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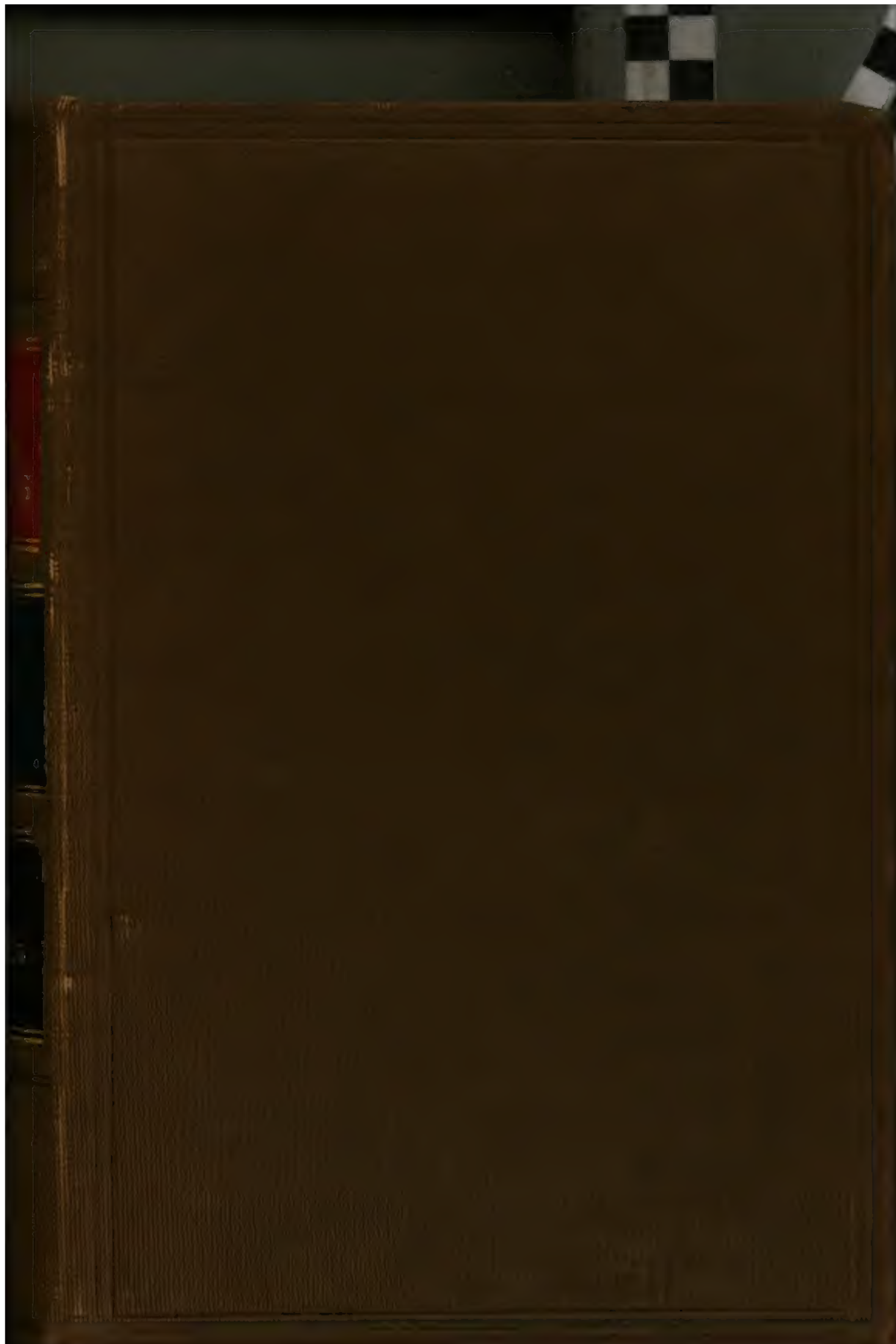
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# The Law of Contracts

By

**WILLIAM HERBERT PAGE**

Professor of Law in the Law School of the University  
of Wisconsin; Author of Page on Wills;  
Page and Jones on Taxation  
by Assessments

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**VOLUME VI**

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## PART IX

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## I

### HISTORY AND GENERAL PRINCIPLES

**§ 3170. Relation of supplementary topics to the law of contracts.** While the remedial right which arises on the breach of a contract is different from the contract itself, a discussion of the nature of the contract at modern law would not be complete without some discussion of the remedial rights which arise as the consequence of the breach. While the essential idea of the contract at modern law is that of a promise which the law will enforce and to the breach of which certain consequences are attached, there is

a wide difference, in actual effect, between a contract for the breach of which the party who is in default may have specific performance or negative performance by injunction on the one hand, and a contract for the breach of which the injured party can recover only nominal damages on the other hand. In both cases the law enforces the contract; but the remedial rights which arise on the breach are so different in these two cases that, for practical purposes, a contract for the breach of which only nominal damages can be recovered is much more like an unenforceable promise than it is like a contract for the breach of which compensatory damages may be recovered, or for which injunction or specific performance may be had.

**§ 3171. History of the law of damages—before trial by jury.** In early English law we find as has already been said,<sup>1</sup> that the English law before the reign of Henry II, was a form of archaic law in which, on the one hand, there were no technical legal experts to administer the law; and, on the other hand, there was no means of ascertaining the facts as a basis for the relief to be granted. The primary object of the law at this period was not justice, but peace. The law did not attempt to render a just decision between the parties to the litigation; but to settle disputes on any basis possible, so as to prevent blood feuds. There was no jury or other means of ascertaining facts in dispute; and evidence as we know it, did not exist. Issues were determined by the ordeal or by compurgation. The amount of damages could not be ascertained by such a system; and accordingly the amount of damages was determined in advance by fixed rules of law, instead of being treated as a fact in accordance with modern views. The schedule of compensation to be paid for various wrongs, which is one of the characteristics of many primitive systems, appears in the early English codes. The wrongs for which such compensation is fixed, would be classed, at modern law, as crimes or torts. No attempt is made to fix compensation for breach of executory contracts. This is possibly due, in part, to the comparative infrequency of such contracts, and in part, in the later law, at least, to the fact that by process of distraint, the promisor was compelled to perform his obligation specifically in the local courts.<sup>2</sup>

<sup>1</sup>See §§ 7 et seq.

<sup>2</sup>4 Selden Society (The Court Baron), 114, 115.

**§ 3172. Early period of trial by jury.** When the inquest first appeared in English law it was a body summoned to answer a specific question of its own knowledge. After the inquest developed into the jury, it became a body to decide upon a specific issue raised by the parties to the litigation; but such issue was still to be decided by the personal knowledge of the jury. At one period in English law, it was even doubted whether it was possible to render a decision unless twelve jurors could be found who were personally acquainted with the facts and who could determine the issue by means of their personal knowledge.<sup>1</sup> As long as this means of ascertaining facts was employed, there could be no law of damages in the sense in which we know it today. The amount of damages, like other facts, was peculiarly within the knowledge of the jury; and the only means of reviewing the action of the jury was by a direct proceeding to attain the verdict.<sup>2</sup>

The law of damages, therefore, can come into existence only after the jury has become a body whose function it is to determine facts from evidence which is offered in open court. Even when this stage of development of trial by jury has been reached, the original theory that damages are within the personal knowledge of the jury and the court can not interfere with the finding of the jury on questions of damages, and still less can direct the jury to bring in a specific verdict persists for a considerable period of time; and the courts repeat the formula that the jury is the judge of the amount of damages.<sup>3</sup> It is true that in some of the cases in which this view was expressed, the cause of action was in tort,<sup>4</sup> and the

<sup>1</sup> Glanville, Book II, c. XXI.

Personal knowledge, however, included not only what the jurors had seen and heard personally, but also what they had learned from the declarations of their fathers or from other sources equally entitled to credit. Glanville, Book II, c. XVII.

<sup>2</sup> The restrictions imposed by the common law on this proceeding and the severity of the punishment of the jurors who were found, in this proceeding, to have rendered a false verdict, were both modified by statute. For practical purposes it seems to have had little efficacy, although it may

have prevented false verdicts that would otherwise have been rendered.

<sup>3</sup> "They (the jury) are chancellors, and they can give damages as great as the case may require in justice (en equitie)." Sir Baptist Hixt v. Goates, 2 Rolles' Abr. 703, pl. 9.

"In civil actions the plaintiff is to recover by way of compensation for the damages he hath sustained, and the jury are the proper judges thereof. \* \* \* By law the jury are judges of the damages." North, C. J., in Lord Townsend v. Hughes, 2 Mod. 150.

<sup>4</sup> Lord Townsend v. Hughes, 2 Mod. 150; Huckle v. Money, 2 Wils. 205; Russell v. Palmer, 2 Wils. 325.

courts felt that in tort, at least, the law had no rules for fixing the amount of damages.<sup>5</sup> The theory that the jury is the judge of the amount of damages was not, however, always used to justify the arbitrary action of the jury in rendering a large verdict. The theory that the jury is the judge of damages, even when expressed in general terms, was sometimes invoked to uphold the verdict for less than the amount claimed.<sup>6</sup>

On the other hand, the theory that the jury is the judge of the amount of damages is not restricted to tort. It is invoked in actions in contract,<sup>7</sup> as in an action to recover for a deficiency in land.<sup>8</sup> In this case, however, the theory of the power of the jury to assess damages is invoked to uphold a verdict for an amount less than the amount for which the plaintiff seeks recovery.<sup>9</sup>

**§ 3173. Later development of trial by jury.** In order to have a law of damages as we know it today, in which the court has power to compel the jury to observe the standards for fixing damages which the law imposes, the court must have power to exclude evidence; the jury must be restricted to the evidence which the court permits them to consider; the court must have power to instruct the jury as to the legal standard for fixing the amount of damages; and the court must have power to enforce this instruction in case the jury disregards it, either by granting a new trial or by modifying the verdict of the jury to conform to the evidence and by rendering a judgment on the verdict as thus modified. The mere power to give an abstract charge to the jury to which the jury may pay no attention, does not help in establishing a rule of law; and accordingly the power of the jury to assess damages at will would have been practically unrestricted if the courts had not asserted their power to modify the verdict or to grant new trials in cases in which the jury had not followed the proper measure of damages. This power, however, was asserted at a comparatively

<sup>5</sup> "The law has not laid down what shall be the measure of damages in actions of tort." *Huckle v. Money*, 2 Wils. 205.

"This action sounds merely in damages, and the jury ought to have been left at liberty to find what damages they thought fit." *Russell v. Palmer*, 2 Wils. 325.

<sup>6</sup> *Sir Baptist Hixt v. Goates*, 2

*Rolles' Abr.* 703, pl. 9. (Action to recover for deficiency in land conveyed.) *Russell v. Palmer*, 2 Wils. 325. (Action for negligence of an attorney.)

<sup>7</sup> *Sir Baptist Hixt v. Goates*, 2 *Rolles' Abr.* 703, pl. 9.

<sup>8</sup> *Sir Baptist Hixt v. Goates*, 2 *Rolles' Abr.* 703 pl. 9.

<sup>9</sup> *Sir Baptist Hixt v. Goates*, 2 *Rolles' Abr.* 703, pl. 9.

early period.<sup>1</sup> In an action of debt for a certain amount of wheat, the court reduced the damages from the amount fixed by the jury to the amount indicated by the evidence.<sup>2</sup> The power to set aside a verdict was exercised at a later time in actions in tort,<sup>3</sup> at least where the amount of actual damage could be estimated by the court with reasonable certainty.<sup>4</sup> The distinction as to the power of the court to grant a new trial on account of damages, seems to be a distinction between the cases in which the court could readily estimate the amount of damages, and those in which the court could not do so,<sup>5</sup> rather than between contract and tort.

When the courts finally asserted their powers to exclude incompetent evidence as to damages, to instruct the jury as to the legal standard for fixing damages and to force obedience as to such instructions, by setting aside verdicts or granting new trials, or by reducing the amount of damages and rendering judgment for such reduced amount, the rules which control the amount of damages became rules of law in the narrower sense, since they were rules which the court would enforce in proper cases.

**§ 3174. Election of remedies.** As is said elsewhere,<sup>1</sup> the constant attempt of the king's courts when established by Henry II, and for a considerable space of time thereafter, was to make relief as specific as possible. A party to a contract was constantly compelled to do what he had agreed to do. This idea, however, was gradually abandoned by the king's common law courts, and by the classic period of the common law it became established that the only relief which could be given by the ordinary forms of action was compensation in money damages, and not specific relief. This general theory controls everywhere as to the form of relief to be given for breach of contract by an action at law. The question, therefore, at law in case of breach, is merely what amount of damages can be recovered. If it is sought to compel the party in default

<sup>1</sup> *Hunt v. de J.*, 12 ed. II. (Hill), 375.

For a statement of the theory that it was not the trial court but the "court above" that had the power to grant a new trial, see *New Trial at the Common Law*, by W. R. Riddell, 26 *Yale Law Journal*, 49.

<sup>2</sup> *Hunt v. de J.*, 12 ed. II. (Hill), 375.

<sup>3</sup> *Seale v. Hunter*, Lofft, 28.

<sup>4</sup> *Seale v. Hunter*, Lofft, 28. (In addition to this reason, the jury had apparently considered the abusive language of the defendant, although the question was as to the value of an animal.)

<sup>5</sup> *Gilbert v. Berkinshaw*, Lofft, 771.

<sup>1</sup> See § 3171 and ch. LXXXIX.

to do the very thing that he agreed to do, relief must be sought in equity. Under what circumstances this form of relief may be had is discussed elsewhere.<sup>2</sup>

After specific relief disappeared from common law, after rules fixing the amount of damages became established, and after quasi-contractual rights became recognized,<sup>3</sup> the party who was not in default could elect, in case of a breach which operated as a discharge of a contract,<sup>4</sup> between two different theories of the case. He could bring an action upon the contract and recover damages for its breach;<sup>5</sup> or, if he had furnished anything of value under the contract, he could ignore the express contract and maintain an action in general assumpsit to recover reasonable compensation therefor.<sup>6</sup>

The right to elect between these two theories of the case, is the right of the party who is not in default, and not the right of the party who is in default. If the party who is not in default wishes to recover damages, the party who is in default can not restrict the plaintiff's right of action to the quasi-contractual right of recovering what he has furnished under the contract.<sup>7</sup> The right of the party who is not in default to demand repayment, given by the terms of the contract, does not exclude his right to recover damages.<sup>8</sup>

Under proper circumstances equity will give the affirmative relief of specific performance or the negative relief of injunction. These forms of relief will be discussed subsequently.<sup>9</sup>

**§ 3175. Theory of damages.** Whether or not a breach of a contract amounts to a discharge of the executory covenants of the party not in default,<sup>1</sup> it gives to such party a right of action at law for damages.<sup>2</sup> The refusal of the common law to give any relief except damages has given rise to a controversy, chiefly academic in character, as to what the true obligation of a contract is.

<sup>2</sup> See ch. LXXXIX and XC.

<sup>3</sup> See §§ 1493 et seq. and ch. LXXXVIII.

<sup>4</sup> See ch. LXXXIV.

<sup>5</sup> The general principles which control this right are discussed in this chapter.

<sup>6</sup> See ch. LXXXVIII.

<sup>7</sup> *Peck-Hammond Co. v. Heifner*, 136 Ala 473, 96 Am. St. Rep. 36, 33 So. 807.

<sup>8</sup> *Knowlson v. Piehl*, 130 Mich.

597, 90 N. W. 415.

<sup>9</sup> See ch. LXXXIX. and ch. XC.

See Specific Performance, Injunctions and Damages in the German Law. Walter Neitzel, 22 Harvard Law Review, 161.

<sup>1</sup> See ch. LXXXIV.

<sup>2</sup> See §§ 3171 and 3174 et seq.

See on this question generally, Damages for Breach of Charterparty, by J. L. Thorndike, 17 Columbia Law Review, 608.

Is the promisor bound in law to do what he agrees to do; or is he merely bound in the alternative either to do that or to pay such damages as may arise from his refusal to do it? The solution of this question depends upon the extent to which primary rights are embodied in the remedial rights which arise on their violation. If there is no primary right apart from the remedial right; or if the invasion of the primary right does away with it so completely that only the remedial right thus created exists, it is probably correct to say that in law the obligation of an executory contract is alternative in law, either to perform or to pay damages. In proper cases, however, a party may be compelled in equity to do the thing which he agrees to do. It is anomalous, to say the least, to treat the obligation of a contract as varying with the jurisdiction before which it may come, especially in view of the fact that it is often not merely the nature of the contract, but also the facts of performance, arising subsequent thereto, that determine whether specific performance can be had or not. Furthermore, it seems that a change of law, giving specific performance where none could be had before, does not impair the obligation of pre-existing contracts.<sup>3</sup> If this is true, the obligation of the contract is to do the very thing which the party has agreed to do; and the so-called alternative right to discharge the contract by paying damages is not a part of the original obligation. It is true that, by reason of the restriction placed by the common law upon the remedy of the party who is not in default, such party can, in an action at law for breach of the contract, recover only compensation in money damages. At the same time it would seem that defects in common law remedies ought not to be regarded as a permanent part of our jurisprudence; and ought not to be regarded as affecting the nature of the substantive right arising out of contract. The extension of the right of specific performance, as by the uniform sales of goods act,<sup>4</sup> does not change the nature of the executory contract of sale, if this theory of the obligation of the contract is correct; while, if at common law, the promisor had the alternative duty of performance or of paying damages, statutes of this sort alter the common-law nature of such contracts.

<sup>3</sup> See ch. XCV. For a discussion of this question, see § 3024.

<sup>4</sup> See § 52 of the Uniform Sale of Goods Act.

One who is not a party to a contract, or a successor in interest of such party, can not recover damages for breach thereof, even if such breach results in damage to the plaintiff.<sup>5</sup>

**§ 3176. Elements and classes of damages—loss without breach.**

The right to recover damages for breach of a contract must necessarily be based upon the fact of a breach. Whatever loss may be suffered by one party as the result of a valid contract into which he has entered, or as a result of the performance thereof by the adversary party, he can not recover damages from such adversary party if the latter has not been guilty of some breach.<sup>1</sup> If the contract contains a provision for the suspension of work, the contractor can not recover for a loss caused by such suspension.<sup>2</sup> In the absence of an expressed or implied warranty, one who has sold machinery in compliance with the terms of contract, is not liable for damages which the purchaser has sustained by reason of the insufficiency of such machinery to do the work for which it was bought.<sup>3</sup> One who has agreed to drill a well to a certain depth and who is not bound by his contract to plug it at a less depth, is not liable for damages which the property owner has sustained by reason of the refusal of the former to plug it at such less depth.<sup>4</sup> One who has undertaken to sell cattle belonging to another, but who has not guaranteed his ability to make such sale is not liable in damages for the loss sustained by a failure to

<sup>5</sup>Hecht v. Boston Wharf Co., 220 Mass. 397, L. R. A. 1915D, 725, 107 N. E. 990.

<sup>1</sup>United States. Wells Bros. Co. v. United States, 254 U. S. 83, 65 L. ed. —.

Colorado. Baldwin v. Patrick, 39 Colo. 347, 91 Pac. 828.

Kentucky. Clarke v. Blue Licks Springs Co., 184 Ky. 827, 5 A. L. R. 234, 213 S. W. 222.

Nebraska. Gallagher v. St. Patrick's Church, 45 Neb. 535, 63 N. W. 864.

North Carolina. Lee v. Upton, 178 N. Car. 198, 100 S. E. 268.

Ohio. Cleveland Punch and Shear

Works Co. v. Consumers' Carbon Co., 75 O. S. 153, 78 N. E. 1009.

Oregon. Chamberlain v. Hibbard, 26 Or. 428, 38 Pac. 437.

Pennsylvania. Robinson v. Baird, 165 Pa. St. 505, 30 Atl. 1010.

Virginia. Casey v. Walker, 122 Va. 465, 95 S. E. 434.

Washington. Brodek v. Farnum, 11 Wash. 565, 40 Pac. 189.

<sup>2</sup>Wells Bros. Co. v. United States, 254 U. S. 83, 65 L. ed. —.

<sup>3</sup>Cleveland Punch and Shear Works Co. v. Consumers' Carbon Co., 75 O. S. 153, 78 N. E. 1009.

<sup>4</sup>Clarke v. Blue Licks Springs Co., 184 Ky. 827, 5 A. L. R. 234, 213 S. W. 222.

make such sale if he has acted in good faith and with due diligence.<sup>5</sup>

**§ 3177. Breach without loss—Nominal damages.** In actions in tort damages are of three general classes: nominal, compensatory and punitive. In contract the general rule is that damages must be compensatory.<sup>1</sup> At the same time there are some recognized exceptions to this general rule. In some cases the injured party is restricted to nominal damages,<sup>2</sup> and in other cases he is allowed to recover punitive damages.<sup>3</sup>

"Nominal damages mean no damages at all. They exist only in name and not in amount. In the quaint language of an old writer they are 'a mere peg to hang costs on.'"<sup>4</sup> Nominal damages only are given in actions upon contracts if a breach of contract is shown but no actual damage is shown to have followed such breach.<sup>5</sup> Since the measure of damages for breach of a con-

<sup>5</sup> *Baldwin v. Patrick*, 39 Colo. 347, 91 Pac. 828.

<sup>1</sup> See §§ 3183 et seq.

<sup>2</sup> See subsequent discussion in this and the following sections.

<sup>3</sup> See §§ 3181 et seq.

<sup>4</sup> *Stanton v. New York & Eastern Ry.*, 59 Conn. 272, 282, 21 Am. St. Rep. 110, 22 Atl. 300.

<sup>5</sup> See also, *Are Small Compensatory Damages Merely Nominal?* by Ralph S. Bauer, 51 American Law Review, 37.

<sup>5</sup> *United States. Troy Laundry Machinery Co. v. Dolph*, 138 U. S. 617, 34 L. ed. 1083.

*Colorado. Ryan v. School Dist. No. 2 Delta County*, 68 Colo. 370, 189 Pac. 782.

*Delaware. Gruell v. Clark*, 4 Penn. (Del.) 321, 54 Atl. 955.

*Illinois. Williamson County v. Farson*, 199 Ill. 71, 64 N. E. 1086 [affirming 101 Ill. App. 328].

*Indiana. Rosenbaum v. McThomas*, 34 Ind. 331.

*Maryland. Saxton v. Stine*, 135 Md. 338, 109 Atl. 12.

*Massachusetts. Tufts v. Bennett*,

163 Mass. 398, 40 N. E. 172; *Hall v. Paine*, 224 Mass. 62, L. R. A. 1917C, 737, 112 N. E. 153.

*Michigan. Detroit Gas Co. v. Storage Co.*, 111 Mich. 401, 69 N. W. 659.

*Missouri. Coleman v. Lucksinger*, 224 Mo. 1, 26 L. R. A. (N.S.), 934, 123 S. W. 441. (One dollar allowed on breach of covenant as deed recited one dollar as consideration and no evidence of value.)

*Nebraska. Lee v. Normal School Co.*, 1 Neb. (Unofficial) 681, 96 N. W. 65; *Jewett v. Wilmot*, 51 Neb. 700, 71 N. W. 775.

*New Jersey. New Jersey School and Church Furniture Co. v. Board of Education*, 58 N. J. L. 646, 35 Atl. 397.

*North Carolina. Cooper v. Clute*, 174 N. Car. 366, 93 S. E. 915; *Morrison v. Marks*, 178 N. Car. 429, 100 S. E. 890.

*Pennsylvania. Streater v. Paxton*, 201 Pa. St. 135, 50 Atl. 926; *Seward v. Pennsylvania Salt Mfg. Co.*, 266 Pa. St., 457, 109 Atl. 617.

*Tennessee. Lancaster Mills v. Cotton-Press Co.* 89 Tenn. 1, 24 Am. St. Rep. 586, 13 L. R. A. 518, 14 S. W.

tract to sell personalty is the difference between the contract price and the market price,<sup>6</sup> only nominal damages can be recovered if the contract price and the market price are the same.<sup>7</sup> If a broker has agreed not to sell his client's stock, nominal damages only can be recovered for his breach of such agreement; if such sale was made at the price for which such stock was generally selling, over a considerable period of time.<sup>8</sup> If a property owner has agreed to convey a right of way, nominal damages only can be recovered for failure to make such conveyance if the railroad company has in fact used and enjoyed such right of way for the time fixed by the terms of the contract.<sup>9</sup> If A agrees to effect insurance on B's property, and does not do so, B can not, after loss, recover the amount of such insurance where B has already insured such property.<sup>10</sup> If a corporation is formed to furnish its members with natural gas at a reduced price, and to secure such reduction it is provided that no member shall sell his stock to any person outside of the corporation until the members have had an opportunity to buy, it is held that no actual damages can be recovered, where such sale of stock is made in breach of the contract if by contract with the vendee of such stock the reduced price of gas is maintained.<sup>11</sup> If no damage is shown to arise from a failure to do certain work at the time stipulated, no actual damages can be recovered.<sup>12</sup> A agreed to deposit money to take up certain bonds. A did not make such deposit but paid all bonds as presented. It was not shown that the holders of outstanding bonds had such notice that the fact of making the deposit would stop interest on their bonds. It was held that A was liable only for nominal damages for such breach.<sup>13</sup> No recovery can be had for breach of a contract to manufacture and lease patented machines

317; *Fisher v. Edgefield & Nashville Mfg. Co.* (Tenn. Ch. App.), 62 S. W. 27.

*West Virginia.* *Douglass v. Ohio River Ry. Co.*, 51 W. Va., 523, 41 S. E. 911.

*Wisconsin.* *New Richmond Roller Mills Co. v. Arnquist*, 170 Wis. 130, 174 N. W. 557.

<sup>6</sup> See §§ 3220 et seq.

<sup>7</sup> *Cooper v. Clute*, 174 N. Car. 366, 93 S. E. 915; *Seward v. Pennsylvania Salt Mfg. Co.*, 266 Pa. St. 457, 109 Atl. 617.

<sup>8</sup> *Hall v. Paine*, 224 Mass. 62, L. R. A. 1917C, 737, 112 N. E. 153.

<sup>9</sup> *Gates v. Detroit & Mackinac Ry. Co.*, 147 Mich. 523, 111 N. W. 101.

<sup>10</sup> *Lancaster Mills v. Cotton-Press Co.*, 89 Tenn. 1, 24 Am. St. Rep. 586, 13 L. R. A. 518, 14 S. W. 317.

<sup>11</sup> *Streator v. Paxton*, 201 Pa. St. 135, 50 Atl. 926.

<sup>12</sup> *Malloy v. Lincoln Cotton Mills*, 132 N. Car. 432, 43 S. E. 951.

<sup>13</sup> *Williamson County v. Farson*, 199 Ill. 71, 64 N. E. 1086 [affirming 101 Ill. App. 328].

if it is not shown that there was some demand therefor.<sup>14</sup> Only nominal damages can be given for breach of a contract not to compete if no actual damages are shown to exist.<sup>15</sup>

If the contract left performance practically optional with the party in default only nominal damages can be recovered. Only nominal damages can be recovered for breach of a contract to furnish news items not to exceed three hundred dollars a week.<sup>16</sup>

**§ 3178. Nominal damages in land contracts.** A special exception to the general rule that damages are to be given as compensation,<sup>1</sup> has been built up by some courts in transactions involving land. The English courts have held that only nominal damages can be recovered if the vendor fails to perform his contract to sell realty because of a failure of title; and, after some vacillation, this rule has been applied to cases in which the vendor knows that the title is defective, as long as he is not guilty of fraud.<sup>2</sup> If the vendor is guilty of fraud, or if he is able to perform and breaks a contract wilfully, he is liable for compensatory damages.<sup>3</sup>

In the United States there is a division of authority on this question, neither line of cases being as favorable to the vendor as the English rule. In some jurisdictions, the vendor is liable only for nominal damages, if he is unable to perform by reason of failure of title, which was not known to him when he entered the contract;<sup>4</sup> although he must, of course, restore the purchase price,

<sup>14</sup> *Doane v. Preston*, 183 Mass. 569, 67 N. E. 867.

<sup>15</sup> *Diers v. Edwards* (Ky.), 63 S. W. 276.

<sup>16</sup> *United Press v. New York Press Co.*, 164 N. Y. 406, 53 L. R. A. 288, 58 N. E. 527.

<sup>1</sup> See §§ 3183 et seq.

<sup>2</sup> *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bain v. Fothergill*, L. R. 7 H. L. 158; *Morgan v. Russell* [1909], 1 K. B. 357.

See *Damages for failure of vendor of realty to give good title*, 9 Columbia Law Review, 438.

<sup>3</sup> *Engell v. Fitch*, L. R. 4 Q. B. 659; *Jones v. Gardiner* [1902], 1 Ch. 191.

<sup>4</sup> *Iowa. White v. Harvey*, 175 Ia. 213, 157 N. W. 152.

*Kentucky. Rankin v. Maxwell*, 9 Ky. (2 A. K. Mar.) 488, 12 Am. Dec. 431..

*Michigan. Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490 [in *Way v. Root*, 174 Mich. 418, 140 N. W. 577, the court avoided either following or overruling *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490, on this point].

*New Jersey. Gerbert v. Trustees of the Congregation of Sons of Abraham*, 59 N. J. L. 160, 59 Am. St. Rep. 578, 35 Atl. 1121.

*New York. Baldwin v. Munn*, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627.

*Pennsylvania. Hertzog v. Hertzog*, 34 Pa. St. 418; *Orr v. Greiner*, 254 Pa. St. 308, 98 Atl. 951.

or so much thereof as has been paid in, on the theory of quasi-contract.<sup>5</sup> Even in these jurisdictions the vendor is liable for substantial damages if he is guilty of a wilful breach, or if his failure to perform is due to a failure of title which was known to him when he entered into the contract.<sup>6</sup> In other jurisdictions no distinction between land contracts and other contracts is recognized. The good faith or the bad faith of the vendor is immaterial; and if he fails to perform the contract for any reason which does not amount to a discharge of the contract in general, he is liable for compensatory damages.<sup>7</sup>

**§ 3179. Right to maintain action for nominal damages.** In theory, nominal damages, at least, should be recovered for a breach of a contract if actual or substantial damages are not shown.<sup>1</sup> If

**Virginia.** *Stuart v. Pennis*, 100 Va. 612, 42 S. E. 667.

**Washington.** *Seymour v. Jaffe*, 78 Wash. 1, 138 Pac. 276.

**Wisconsin.** *Hall v. Delaplaine*, 5 Wis. 208.

<sup>5</sup> See § 3254.

<sup>6</sup> **Iowa.** *Foley v. McKeegan*, 4 Ia. 1, 66 Am. Dec. 107.

**Michigan.** *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490.

**New York.** *Sloan v. Baird*, 162 N. Y. 327, 56 N. E. 752.

**Texas.** *Phillips v. Herndon*, 78 Tex. 378, 22 Am. St. Rep. 59, 14 S. W. 857.

**Wisconsin.** *Arentsen v. Moreland*, 122 Wis. 167, 106 Am. St. Rep. 951, 65 L. R. A. 973, 2 Am. Cas. 628, 99 N. W. 790.

<sup>7</sup> **United States.** *Hopkins v. Lee*, 19 U. S. (6 Wheat) 109, 5 L. ed. 218.

**Illinois.** *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261.

**Massachusetts.** *Boyden v. Hill*, 198 Mass. 477, 85 N. E. 413.

**Nebraska.** *Beck v. Staats*, 80 Neb. 482, 16 L. R. A. (N.S.) 768, 114 N. W. 633.

**North Carolina.** *Le Roy v. Jacobosky*, 136 N. Car. 443, 67 L. R. A. 977, 48 S. E. 796.

<sup>1</sup> **Alabama.** *Vinson v. Southern Bell Telephone & Telegraph Co.*, 188 Ala. 292, L. R. A. 1915C, 450, Ann. Cas. 1916E, 900, 66 So. 100.

**Colorado.** *Ryan v. School Dist. No. 2 Delta County*, 68 Colo. 370, 189 Pac. 782.

**Illinois.** *Radloff v. Haase*, 196 Ill. 365, 63 N. E. 729 [reversing 96 Ill. App. 74].

**Maryland.** *Saxton v. Stine*, 135 Md. 338, 109 Atl. 12.

**Michigan.** *Grinnell v. Bebb*, 126 Mich. 157, 85 N. W. 467.

**North Carolina.** *Morrison v. Marks*, 178 N. Car. 429, 100 S. E. 890.

**Tennessee.** *Turner v. Carter*, 38 Tenn. (1 Head) 520.

**Texas.** *Raymond v. Yarrington*, 96 Tex. 443, 97 Am. St. Rep. 914, 73 S. W. 800 [reversing (Tex. Civ. App.), 69 S. W. 436].

**Vermont.** *Fullam v. Stearns*, 30 Vt. 443.

**Washington.** *Hausken v. Hodson-Feenaughty Co.*, 109 Wash. 606, 614, 187 Pac. 319.

**Wisconsin.** *New Richmond Roller Mills Co. v. Arnquist*, 170 Wis. 130, 174 N. W. 557.

a contract not to re-engage in business is broken, nominal damages, at least, should be allowed.<sup>2</sup> It is said, however, that nominal damages will not sustain a libel in admiralty.<sup>3</sup>

Nominal damages may be recovered even if it is shown affirmatively that the party complaining of the breach was a gainer and not a loser by reason of such breach.<sup>4</sup> Nominal damages may be given where the contractor is forbidden by the adversary party to proceed with the performance of his contract, though it is shown that it would cost more than the contract price to complete the contract.<sup>5</sup> Nominal damages may be recovered for breach of a contract by a vendor of realty, though the contract price was higher than the market price.<sup>6</sup> Nominal damages may be recovered for breach of a contract by a seller of personalty although the contract price was higher than the market price.<sup>7</sup> One who has agreed to erect a structure upon the premises of another is liable in nominal damages for breach of such contract although the performance thereof would have been a financial loss to the owner of such realty.<sup>8</sup>

While the right to recover nominal damages exists technically, it is merely a technical right, and if neither personal rights nor property rights are adjudged in such an action, a court of error, which will reverse a judgment only if an error appears on the record of a substantial character, prejudicial to the party who complains thereof, will not reverse a judgment dismissing plaintiff's action, although to secure technical accuracy, the court should have permitted plaintiff to maintain his action and to re-

<sup>2</sup>Radloff v. Haase, 196 Ill. 365, 63 N. E. 729 [reversing 96 Ill. App. 74]; Raymond v. Yarrington, 96 Tex. 443, 97 Am. St. Rep. 914, 73 S. W. 800 [reversing (Tex. Civ. App.), 69 S. W. 486].

<sup>3</sup>Munson v. Straits of Dover S. S. Co., 99 Fed. 787 [affirmed Munson v. Straits of Dover S. S. Co., 102 Fed. 926, 43 C. C. A. 57].

<sup>4</sup>Kentucky. Koch v. Godshaw, 75 Ky. (12 Bush.) 320.

<sup>5</sup>Nebraska. Carver v. Taylor, 35 Neb. 429, 53 N. W. 386.

<sup>6</sup>New York. Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760.

<sup>7</sup>Oklahoma. Ardizzone v. Archer, — Okla. —, 178 Pac. 263.

<sup>8</sup>South Dakota. Zipp v. Colchester Rubber Co., 12 S. D. 218, 80 N. W. 367.

<sup>9</sup>Jewett v. Wilmot, 51 Neb. 700, 71 N. W. 775.

<sup>10</sup>Carver v. Taylor, 35 Neb. 429, 53 N. W. 386.

<sup>11</sup>Koch v. Godshaw, 75 Ky. (12 Bush.) 320; Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760; Zipp v. Colchester Rubber Co., 12 S. D. 218, 80 N. W. 367.

<sup>12</sup>Ardizzone v. Archer, — Okla. —, 178 Pac. 263.

cover nominal damages therein.<sup>8</sup> In some cases it has been said to be reversible error to dismiss a complaint which shows that only nominal damages could be recovered, or to take a case from the jury and render judgment for defendant for the same reason;<sup>10</sup> but these are cases in which it was quite probable that such order of the trial court precluded the plaintiff from showing substantial damages.

### § 3180. Presumption as to substantial character of damage.

If the breach of the contract is one from which actual damage might result, the question of the existence of actual damage is a question of fact; and the court is not justified in assuming, as a matter of law, that the damages are merely nominal.<sup>1</sup> Where A agreed to make drop-forgings for B for one year as B should order them, A to ship them to B's customers, according to B's directions, it can not be assumed that the orders received by B would be so small as to be without profit.<sup>2</sup> If a contract to remove earth and leave the surface in a smooth condition is broken by leaving it rough, the court can not say as a matter of law that no damage followed.<sup>3</sup> If A grants to B the right to remove gravel from A's land, and as a part of such contract B agrees not to excavate so close to the boundary line as to interfere with the lateral support of adjoining property, A is not limited to the recovery of nominal damages if B has excavated so close to the boundary line as to interfere with the right of lateral support, although the owner of such adjoining land has not attempted to enforce his right of

<sup>8</sup> *Woodhouse v. Powles*, 43 Wash. 617, 117 Am. St. Rep. 1079, 8 L. R. A. (N.S.) 783, 11 Ann. Cas. 54, 86 Pac. 1063; *Casassa v. Seattle*, 75 Wash. 367, 134 Pac. 1080; *Hewson v. Peterman Mfg. Co.*, 76 Wash. 600, 51 L. R. A. (N.S.) 398, 136 Pac. 1158.

<sup>10</sup> *Ryan v. School Dist. No. 2 Delta County*, 68 Colo. 370, 189 Pac. 782; *Saxton v. Stine*, 135 Md. 338, 109 Atl. 12; *Morrison v. Marks*, 178 N. Car. 429, 100 S. E. 890; *New Richmond Roller Mills Co. v. Arnquist*, 170 Wis. 130, 174 N. W. 557.

<sup>1</sup> *Arkansas. McFall v. First National Bank*, 138 Ark. 370, 4 A. L. R. 940, 211 S. W. 919.

*Indiana. Orr v. Dayton & Muncie Traction Co.*, 178 Ind. 40, 48 L. R. A. (N.S.) 474, 96 N. E. 462.

*Iowa. Wachtel v. National Alfalfa Journal Co.*, — Ia. —, 176 N. W. 801.

*Massachusetts. Speirs v. Union Drop Forge Co.*, 180 Mass. 87, 61 N. E. 825.

*Wisconsin. Colburn v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 109 Wis. 377, 85 N. W. 354.

<sup>2</sup> *Speirs v. Union Drop Forge Co.*, 180 Mass. 87, 61 N. E. 825.

<sup>3</sup> *Colburn v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 109 Wis. 377, 85 N. W. 354.

action as against A.<sup>4</sup> If one who is offering a prize at a contest withdraws such offer before the contest is completed, it has been held that the person who was leading in such contest when such offer was revoked, is not restricted to nominal damages.<sup>5</sup> Substantial damages may be recovered for unwarranted refusal to honor a check.<sup>6</sup> If a telephone company has agreed to furnish certain telephone service, a subscriber is not necessarily limited to nominal damages by reason of the failure of the telephone company to furnish such service.<sup>7</sup>

**§ 3181. Punitive damages—General principles.** In actions for breach of contract, the general rule is that the damages are compensatory only and not punitive.<sup>1</sup> Punitive damages can not be recovered from a physician because of his breach of his contract to attend a patient;<sup>2</sup> nor can they be allowed in an action against sureties on an attachment bond for breach of the conditions thereof.<sup>3</sup> It has been said that punitive damages can not be re-

<sup>4</sup>*Orr v. Dayton & Muncie Traction Co.*, 178 Ind. 40, 48 L. R. A. (N.S.) 474, 96 N. E. 462.

<sup>5</sup>*Wachtel v. National Alfalfa Journal Co.*, — Ia. —, 176 N. W. 801.

<sup>6</sup>*McFall v. First National Bank*, 138 Ark. 370, 4 A. L. R. 940, 211 S. W. 919; *American National Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379, 58 L. R. A. 956, 69 S. W. 759; *Wiley v. Bunker Hill National Bank*, 183 Mass. 495, 67 N. E. 655.

<sup>7</sup>*Vinson v. Southern Bell Telephone & Telegraph Co.*, 188 Ala. 292, L. R. A. 1915C, 450, 66 So. 100.

<sup>1</sup>*England. Addis v. Gramophone Co., Ltd.* [1909], A. C. 488.

*Arkansas. Snow v. Grace*, 25 Ark. 570; *Southwestern Telegraph & Telephone Co. v. Memphis Tel. Co.*, 111 Ark. 474, 163 S. W. 1153.

*Illinois. Spaid v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10.

*Kentucky. American National Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379, 58 L. R. A. 956, 69 S. W. 759.

*Mississippi. Hood v. Moffett*, 109 Miss. 757, L. R. A. 1916B, 622, Ann. Cas. 1917E, 410, 69 So. 664.

*Oklahoma. Floyd v. Anderson*, 36 Okla. 308, 43 L. R. A. (N.S.) 788, Ann. Cas. 1915A, 348, 128 Pac. 249.

*Pennsylvania. Hoy v. Gronoble*, 34 Pa. St. 9, 75 Am. Dec. 623.

*South Carolina. Reaves v. Western Union Telegraph Co.*, 110 S. Car. 233, 96 S. E. 295.

*Wisconsin. Gordon v. Brewster*, 7 Wis. 355.

For the general nature of punitive damages, see *Exemplary Damages*, 20 *American Law Register*, (N.S.) 570; *Punitive Damages*, by Lewis Lawrence Smith, 32 *American Law Register*, (N.S.) 517, and *Can Exemplary Damages be Bottomed upon Nominal Damages?* by Seymour D. Thompson, 31 *American Law Review*, 415.

<sup>2</sup>*Hood v. Moffett*, 109 Miss. 757, L. R. A. 1916B, 622, Ann. Cas. 1917E, 410, 69 So. 664.

<sup>3</sup>*Floyd v. Anderson*, 36 Okla. 308, 43 L. R. A. (N.S.) 788, Ann. Cas. 1915A, 348, 128 Pac. 249.

covered in an action for breach of contract.<sup>4</sup> It has also been said that exemplary or punitive damages can be recovered in actions for breach of contract, only in the cases of action for the breach of promise of marriage and actions against a banker for his refusal to honor a depositor's check if the depositor has sufficient funds in the hands of the banker to pay such check.<sup>5</sup> This rule, too, as will be seen from the illustrations, is too narrow to fit the actual adjudication; and furthermore it does not purport to set forth any general principle. The power to award punitive damages has been said, on the one hand, to be a relic of the original power of the jury to assess damages as they chose.<sup>6</sup> It has also been said that such damages are to be regarded as, in one sense, compensatory, since they are given as damages for injury to feelings by wanton and reckless conduct.<sup>7</sup>

There are, however, certain classes of cases in which punitive damages are sometimes given. These are cases of contracts personal or quasi-personal in their nature, a breach of which under circumstances of wantonness may cause disgrace, humiliation or great injury to the feelings of the injured party.<sup>8</sup> An attempt has been made to restrict this class of cases to those in which the

<sup>4</sup> *Horton v. Sherwin*, — Okla. —, 164 Pac. 489.

"To apply in their entirety the principles on which damages are measured in tort to cases of damages for breaches of contract would lead to confusion and uncertainty in commercial affairs, while to apply them only in part and in particular cases would create anomalies, lead occasionally to injustice, and make the law a still more 'lawless science' than it is said to be." *Addis v. Gramophone Company* [1909], A. C. 488, 495.

<sup>5</sup> *Addis v. Gramophone Co. Ltd.* [1909], A. C. 488.

<sup>6</sup> See Opinion of Lord Collins in *Addis v. Gramophone Co.* [1909], A. C. 488. For the extent of such power, see § 3171.

<sup>7</sup> "The award of exemplary damages is also within the discretion of the jury. In a sense, they are to some extent compensatory. Exemplary dam-

ages, according to the ordinary acceptance of the term, are damages imposed by way of punishment, but they are otherwise described as 'addel,' 'punitive,' 'imaginary,' and so on. However, the idea of punishment does not, according to all authorities, enter into the definition of exemplary damages, but the term is employed to mean an increased award in view of supposed aggravation of the injury to the feeling of plaintiff by the wanton or reckless act of defendant." *Brause v. Brause*, — Ia. —, 177 N. W. 65.

<sup>8</sup> *Baumle v. Verde*, 33 Okla. 243, 41 L. R. A. (N.S.) 840, Ann. Cas. 1914B, 317, 124 Pac. 1063; *Davis v. Atlantic Coast Line Ry. Co.*, 104 S. Car. 63, 2 A. L. R. 102, 88 S. E. 273; *G. C. & Santa Fe Ry. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Hooks v. Fitznerieter*, 76 Tex. 277, 13 S. W. 230; *Scheps v. Giles*, — Tex. Civ. App. —, 222 S. W. 343.

cause of action might be treated as a contract or as a tort;<sup>9</sup> but, as the subsequent illustrations will show, the rule, if stated in this form, will exclude a number of cases which can be brought within the rule only by modifying the definition of a tort so as to make it include all cases in which punitive damages can be allowed, no matter what the source of liability may be.<sup>10</sup>

**§ 3182. Punitive damages—Specific illustrations.** A breach of a contract of marriage may be attended with such circumstances of injury to the feeling of the plaintiff as to justify the recovery of punitive damages.<sup>1</sup> A refusal to perform a contract of marriage, without any circumstances of indignity or insult, does not, however, authorize the award of punitive damages therefor.<sup>2</sup> The fact that the defendant has alleged, as an excuse for non-performance that plaintiff was subject to epilepsy, does not render defendant liable for punitive damages unless it has been shown that he acted maliciously and in bad faith in making such defense.<sup>3</sup> If the failure to deliver a telegram announcing the death of a near

<sup>9</sup> *Head v. Georgia Pacific Ry.*, 79 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217; *Hood v. Moffett*, 109 Miss. 757, L. R. A. 1916B, 622, Ann. Cas. 1917E, 410, 69 So. 664; *Welborn v. Dixon*, 70 S. Car. 108, 3 Ann. Cas. 407, 49 S. E. 232; *Hooks v. Fitzenrieter*, 76 Tex. 277, 13 S. W. 230; *Oklahoma Fire Ins. Co. v. Ross*, — Tex. Civ. App. —, 170 S. W. 1062.

<sup>10</sup> See § 3182.

<sup>1</sup> *Illinois. Jacoby v. Stark*, 205 Ill. 34, 68 N. E. 557.

*Massachusetts. Coolidge v. Neat*, 129 Mass. 146.

*Michigan. Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242.

*Minnesota. Hahn v. Bettingen*, 84 Minn. 512, 88 N. W. 10; *Hively v. Golnick*, 123 Minn. 498, 49 L. R. A. (N.S.) 757, Ann. Cas. 1915A, 295, 144 N. W. 213.

*New York. Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561.

*Ohio. White v. Thomas*, 12 O. S. 312, 80 Am. Dec. 347; *Duvall v. Fuhrman*, 2 Ohio C. D. 174.

*Oklahoma. Baumle v. Verde*, 33 Okla. 243, 41 L. R. A. (N.S.) 840, Ann. Cas. 1914B, 317, 124 Pac. 1083.

*Tennessee. Brown v. Odill*, 104 Tenn. 250, 78 Am. St. Rep. 914, 52 L. R. A. 660, 56 S. W. 840.

*Vermont. Stokes v. Mason*, 85 Vt. 164, 36 L. R. A. (N.S.) 388, Ann. Cas. 1914B, 1199, 81 Atl. 162.

*Wisconsin. Luther v. Shaw*, 157 Wis. 234, 52 L. R. A. (N.S.) 85, 147 N. W. 18.

Contra, that while allowance might be made for humiliation as compensatory damages, punitive damages could not be allowed even if defendant's conduct was malicious. *Trammell v. Vaughan*, 158 Mo. 214, 81 Am. St. Rep. 302, 51 L. R. A. 854, 59 S. W. 79.

<sup>2</sup> *Baumle v. Verde*, 33 Okla. 243, 41 L. R. A. (N.S.) 840, Ann. Cas. 1914B, 317, 124 Pac. 1083.

<sup>3</sup> *Hively v. Golnick*, 123 Minn. 498, 49 L. R. A. (N.S.) 757, Ann. Cas. 1915A, 295, 144 N. W. 213.

relative is due to gross negligence,<sup>4</sup> or to deliberate intention,<sup>5</sup> on the part of the telegraph company, punitive damages may be allowed. The act of a telephone company in removing a subscriber's telephone wantonly and wilfully may render it liable for punitive damages;<sup>6</sup> but in the absence of intentional or wanton conduct, failure to answer calls does not render a telephone company liable for punitive damages.<sup>7</sup>

Punitive damages are allowed for breach of contract by a common carrier under special circumstances. If a carrier takes a passenger beyond his destination, either through wilfulness or through gross negligence,<sup>8</sup> or if it refuses to stop at request at a flag station at which such train is scheduled to stop,<sup>9</sup> or if it fails through negligence to let a passenger leave the train at his destination, and such failure is negligent and insolent,<sup>10</sup> or if the conductor refuses to permit a passenger to explain the special contract under which he was to be permitted to leave the train at a station which was not a regular stop,<sup>11</sup> or if the carrier, knowing that a party of excursionists have been detained by a storm, sends the excursion train away empty, leaving only the inadequate regular equipment to transport the excursionists on later trains,<sup>12</sup> punitive damages may be allowed. Failure to notify a passenger of his arrival at destination, or to return to the proper destination, to permit him to leave the train there, does not justify recovery of punitive damages if such conduct is not wilful.<sup>13</sup> Punitive damages may be allowed for the wilful refusal of a carrier to permit

<sup>4</sup>Western Union Telegraph Co. v. Lawson, 66 Kan. 660, 72 Pac. 283.

<sup>5</sup>Butler v. Telegraph Co., 65 S. Car. 510, 44 S. E. 91; G. C. & Santa Fe Ry. Co. v. Levy, 59 Tex. 543, 46 Am. Rep. 269.

<sup>6</sup>Carmichael v. Southern Bell Telephone & Telegraph Co., 157 N. Car. 21, 39 L. R. A. (N.S.) 651, Ann. Cas. 1913B, 1117, 72 S. E. 619.

<sup>7</sup>Southern Telephone Co. v. King, 103 Ark. 160, 39 L. R. A. (N.S.) 402, Ann. Cas. 1914B, 780, 146 S. W. 489.

<sup>8</sup>Birmingham Railway, Light & Power Co. v. Nolan, 134 Ala. 329, 32 So. 715.

<sup>9</sup>Mobile & Ohio Ry. Co. v. Moreland, 104 Miss. 312, 46 L. R. A. (N.S.) 52, 61 So. 424.

<sup>10</sup>Ft. Smith & Western Ry. Co. v. Ford, 34 Okla. 575, 41 L. R. A. (N.S.) 745, 126 Pac. 745.

<sup>11</sup>Illinois Central Ry. Co. v. Reid, 93 Miss. 458, 17 L. R. A. (N.S.) 344, 46 So. 146.

<sup>12</sup>Woodward v. Southern Railway Co., 99 S. Car. 251, L. R. A. 1915C, 477, 83 S. E. 591.

<sup>13</sup>Yazoo & Mississippi Valley Ry. Co. v. Hardie, 100 Miss. 132, 34 L. R. A. (N.S.) 740, Ann. Cas. 1914A, 323, 55 So. 42.

a passenger to bring in proper articles of personal baggage,<sup>14</sup> or his wilful omission to transport baggage with reasonable speed,<sup>15</sup> or for wilful refusal to deliver excess baggage without attempting to verify the passenger's correct statement that he had paid excess rates therefor.<sup>16</sup>

It is evident, however, that these are apparent rather than real exceptions to the general rule. While these rights are founded upon contract, the actions are in effect actions in tort, and are governed by the rules of damages applicable in case of tort and not by those applicable in case of contract. To this extent they justify the rule which restricts punitive damages to actions which are, in effect, actions in tort.

Outside of contracts, the breach of which is, in effect, a tort, the courts are very unwilling to permit the recovery of punitive damages. The act of a bank in refusing, wrongfully, to honor the check of a depositor, is said, in most American jurisdictions, not to render the bank liable for punitive damages in the absence of malice.<sup>17</sup> Exemplary damages can not be had by reason of X's act in causing B to break his contract to furnish supplies to A if X is acting in order to get such contract himself,<sup>18</sup> since malice in the technical sense is lacking.<sup>19</sup> An allegation in general terms that a breach of a contract to furnish goods to be placed in a store was "wilful, fraudulent and malicious," is not sufficient to support a recovery of punitive damages without an allegation of the specific facts.<sup>20</sup>

There is, however, some authority for allowing exemplary damages in other cases.<sup>21</sup> Exemplary damages have been allowed for the unjustifiable discharge of a female employe accompanied by

<sup>14</sup> *McIntosh v. Augusta & Aiken Ry. Co.*, 87 S. Car. 181, 30 L. R. A. (N.S.) 889, 69 S. E. 159.

<sup>15</sup> *Webb v. Atlantic Coast Line Ry. Co.*, 76 S. Car. 193, 9 L. R. A. (N.S.) 1218, 11 Am. Cas. 834, 56 S. E. 954.

<sup>16</sup> *Davis v. Atlantic Coast Line Ry. Co.* 104 S. Car. 63, 2 A. L. R. 102, 88 S. E. 273.

<sup>17</sup> *Hilton v. Jesup Banking Co.*, 128 Ga. 30, 11 L. R. A. (N.S.) 224, 10 Ann. Cas. 987, 57 S. E. 78; *Winkler v. Citizens' State Bank*, 89 Kan. 279, 131 Pac. 597; *American National Bank v. Morey*,

113 Ky. 857, 101 Am. St. Rep. 379, 58 L. R. A. 956, 69 S. W. 759; *Wood v. American National Bank*, 100 Va. 306, 40 S. E. 931.

<sup>18</sup> *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 16 L. R. A. (N. S.) 746, 69 Atl. 405.

<sup>19</sup> *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 16 L. R. A. (N. S.) 746, 69 Atl. 405.

<sup>20</sup> *Hooks v. Fitzenrieter*, 76 Tex. 277, 13 S. W. 230.

<sup>21</sup> *Scheps v. Giles*, — Tex. Civ. App. —, 222 S. W. 248.

rather abusive language.<sup>22</sup> In a case in which A had been appointed to a certain living and had given bond to resign such living under certain circumstances, it was held that the ordinary rules as to right of damages did not apply in an action against A on such bond; and that he might be required to pay more than compensatory damages.<sup>23</sup> In England it is held that if a bank refuses to honor the check of a customer the ordinary rules as to the amount of damages do not apply, and the depositor may recover substantial damages without any proof of actual damages.<sup>24</sup>

**§ 3183. Compensatory damages—Theory—Intent of party in default.** Apart from the few instances referred to in the preceding sections, in which either nominal or punitive damages may be allowed, the general rule of the law of damages, that compensation is to be granted as far as is practicable, applies with especial force to contract law. The law attempts to place the party injured by the default of his adversary in the position which he would have had if such adversary had performed, as nearly as can be done by means of a judgment for money.<sup>1</sup> In estimating

<sup>22</sup> *Scheps v. Giles*, — Tex. Civ. App. —, 222 S. W. 348. (She was called a liar and told to take her coat and hat and go.)

See also *Maw v. Jones*, 25 Q. B. D. 107.

For an opposite result on similar facts, see *Addis v. Gramophone Co., Ltd.* [1909], A. C. 488.

<sup>23</sup> *Lord Sondes v. Fletcher*, 5 B. & Ald. 835.

<sup>24</sup> *Rolin v. Steward*, 14 C. B. 595; *Marzetti v. Williams*, 1 B. & Ad. 415.

<sup>1</sup> *England.* *Di Ferdinando v. Simon Smits & Co.*, 89 L. J. K. B. N. S. 1039, 11 A. L. R. 358.

*United States.* *Camp v. Gress*, 250 U. S. 308, 63 L. ed. 997; *Loewenthal v. Georgia Coast & Piedmont Ry. Co.*, 265 Fed. 961.

*Alabama.* *Worthington v. Gwin*, 119 Ala. 44, 43 L. R. A. 382, 24 So. 739.

*Georgia.* *Upmago Lumber Co. v. Monroe*, 148 Ga. 847, 98 S. E. 498.

*Indiana.* *Hoyle v. Stellwagen*, 28 Ind. App. 681, 63 N. E. 780.

*Iowa.* *International Harvester Co. of America v. Chicago, Milwaukee &*

*St. Paul Ry. Co.*, 186 Ia. 86, 172 N. W. 471.

*Kentucky.* *American National Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379, 58 L. R. A. 956, 69 S. W. 759; *Runyon v. Culver*, 168 Ky. 45, L. R. A. 1916F, 3. 181 S. W. 640.

*Massachusetts.* *Dondis v. Borden*, 230 Mass. 119 N. E. 184.

*New Jersey.* *Drummond v. Hughes*, 91 N. J. L. 563, 104 Atl. 137.

*New York.* *Orester v. Dayton Rubber Mfg. Co.*, 228 N. Y. 134, 126 N. E. 510.

*North Carolina.* *Walls v. Carolina Spruce Co.*, 175 N. Car. 661, 96 S. E. 36; *Newby v. Atlantic Coast Realty Co.*, 180 N. Car. 51, 103 S. E. 909.

*Oregon.* *Coffey v. Northwestern Hospital Association*, 96 Or. 100, 189 Pac. 407.

*Washington.* *Boston Trust Co. v. Evelon Co.*, 96 Wash. 31, 164 Pac. 606.

*West Virginia.* *Hurxthal v. St. Lawrence Boom & Lumber Co.*, 53 W. Va. 87, 44 S. E. 520.

See, *Validity of the Theory of Compensatory Damages*, by Rene Demogue, 27 Yale Law Journal, 585.

compensatory damages, gains which the party who is not in default have been prevented from making are to be included as well as losses which he has sustained,<sup>2</sup> as long as such gains can be shown with sufficient certainty. As compensation to the injured party is the underlying principle, the fact that the party who is in default has sustained other losses in the transaction does not alter the measure of damages.<sup>3</sup>

As far as can be done the courts will give relief on the basis of compensation to the injured party with the minimum burden to the party in default.<sup>4</sup> Except in the case of punitive damages,<sup>5</sup> the party who is injured by the breach will not be given damages in excess of the amount which he has lost by reason of such breach.<sup>6</sup>

If the only loss to the party not in default is due to his inability to perform a wrongful act, he can not recover damages therefor.<sup>7</sup> If A is bound by contract to make a payment to X, and A sends a draft on Y, payable to X, and A then attempts to stop such draft by telegraph, the telegraph company is not liable to A for failure to deliver such telegram in time to stop such draft.<sup>8</sup>

Outside of the cases in which punitive damages may be recovered for a wanton or wilful breach of contract,<sup>9</sup> the intention of the party who is in default is immaterial, since the injury to the party who seeks to recover damages is not increased or diminished thereby. Hence, even if the breach of the contract is unintentional, compensatory damages and not nominal damages must be given.<sup>10</sup> On the other hand, outside of the cases in which punitive damages may be allowed, the amount of compensatory damages is not increased by the evil intent with which the contract is broken by the party who is in default.<sup>11</sup> Only compensatory dam-

<sup>2</sup> *Nance v. Western Union Telegraph Co.*, 177 N. Car. 313, 98 S. E. 838; *Newby v. Atlantic Coast Realty Co.*, 180 N. Car. 51, 103 S. E. 909.

<sup>3</sup> *Runyon v. Culver*, 168 Ky. 45, L. R. A. 1916F, 3, 181 S. W. 640.

<sup>4</sup> *International Harvester Co. of America v. Chicago, Milwaukee & St. Paul Ry. Co.*, 186 Ia. 86, 172 N. W. 471.

<sup>5</sup> See §§ 3181 et seq.

<sup>6</sup> *International Harvester Co. of America v. Chicago, Milwaukee & St.*

*Paul Ry. Co.*, 186 Ia. 86, 172 N. W. 471; *Drummond v. Hughes*, 91 N. J. L. 563, 104 Atl. 187.

<sup>7</sup> *Western Union Telegraph Co. v. Brown*, 253 U. S. 101, 64 L. ed. 803.

<sup>8</sup> *Western Union Telegraph Co. v. Brown*, 253 U. S. 101, 64 L. ed. 803.

<sup>9</sup> See §§ 3180 and 3181.

<sup>10</sup> *Cornell v. Rodabaugh*, 117 Ia. 287, 94 Am. St. Rep. 298, 90 N. W. 599.

<sup>11</sup> *Western Union Telegraph Co. v. Cates*, — Okla. —, 164 Pac. 779.

ages can be recovered because of the act of the payee of a note which has been paid, in sending it to the bank for collection a second time.<sup>12</sup>

**§ 3184. Relation between breach and damage—Damage following in usual course of events.** Like most general rules, however, the rule that damages are compensatory does not furnish the means of solving the questions as they actually arise, but only states a general tendency of the courts. The difficulty found in this connection, is in determining what items of loss can be considered in determining the amount of actual damages. In determining what elements of loss are to be considered in estimating the amount of compensatory damages, the loss to the party in default, caused by the breach, may come under one of several classes.

(1) The damages may be such as would arise according to the usual course of things, from such a breach of the contract as that involved.<sup>1</sup> It is frequently said that the damages must be such

<sup>12</sup> *State Mut. Life & Annuity Association v. Baldwin*, 116 Ga. 855, 43 S. E. 262.

<sup>1</sup> *United States. Loewenthal v. Georgia Coast & Piedmont Ry. Co.*, 265 Fed. 961.

*Iowa. Wragg v. Mead*, 120 Ia. 319, 94 N. W. 856; *International Harvester Co. v. Chicago, Milwaukee & St. Paul Ry.*, 186 Ia. 86, 172 N. W. 471 (obiter).

*Kentucky. Kochenrath v. Christman*, 180 Ky. 799, 203 S. W. 738; *Bugg v. Jones*, 183 Ky. 500, 209 S. W. 514.

*Massachusetts. Hanson v. Wittenberg*, 205 Mass. 319, 91 N. E. 383.

*Minnesota. Independent Grocery Co. v. Sun Insurance Co.*, — Minn. —, 178 N. W. 582.

*New York. Orestor v. Dayton Rubber Mfg. Co.*, 228 N. Y. 134, 126 N. E. 810.

*North Carolina. Newby v. Atlantic Coast Realty Co.*, 180 N. Car. 51, 103 S. E. 909.

*Pennsylvania. Thomas Raby, Inc., v. Ward-Meehan Co.*, 261 Pa. St. 468, 104 Atl. 750.

*Rhode Island. Stone v. Postal Telegraph Cable Co.*, 35 R. I. 498, 46 L. R. A. (N.S.) 180, 87 Atl. 319.

*Wisconsin. Altschuler v. Atchison, Topeka & Santa Fe Ry. Co.*, 155 Wis. 146, 49 L. R. A. (N.S.) 491, 144 N. W. 294.

"When two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of breach of it." *Hadley v. Baxendale*, 9 Exch. 341 (353) [quoted in *Taylor Mfg. Co. v. Hatcher* 39 Fed. 440, 447, 3 L. R. A. 587].

"Actual damages" is said to include both general and special damages. *Winans v. Chapman*, 104 Kan. 664, 180 Pac. 266 (slander).

as were within the contemplation of the parties when they made the contract.<sup>2</sup> While it is sometimes said that the damages must be such as the parties contemplated and such as would arise in the usual course of things,<sup>3</sup> and sometimes that the damages must be such as would follow naturally from the breach or as the parties contemplated,<sup>4</sup> substantially the same meanings seem to be intended by these different forms of statement. If the damages follow in the usual course of things, the party in default is liable therefor, whether he actually contemplated such results or not; and if the terms of the contract or the surrounding circumstances actually show that the parties actually contemplated the consequences, which, in fact, followed, the party in default is liable therefor,<sup>5</sup> even if such consequences would not ordinarily follow. If, on the other hand, the damages would not ordinarily follow from the breach, and were not in the actual contemplation of the parties, recovery therefor can not be had. (2) The damages may not be such as would, in the natural course of things, arise from such a breach of the contract; but the parties may, by their express stipulation, have provided for a special course of things, and the damages may follow from such special course of things thus provided for. (3) The damages may be such as would not follow in the usual course of things, but they may follow from a special

This is said to be "actual damages." *Arizona Copper Co. v. Burciaga*, 20 *Ariz.* 85, 177 *Pac.* 29 (employers' liability).

<sup>2</sup> *England. Mowbray v. Merryweather* [1895], 1 *Q. B. Div.* 857.

*Alabama. Dickson v. Alabama Machinery & Supply Co.*, — *Ala. App.* —, 84 *So.* 416.

*Indiana. Western Union Telegraph Co. v. Biggerstaff*, 177 *Ind.* 168, 97 *N. E.* 531.

*Kentucky. Dice v. Zweigart*, 161 *Ky.* 646, *L. R. A.* 1916F, 1155, 171 *S. W.* 195; *Union Cotton Co. v. Bondurant*, 188 *Ky.* 319, 222 *S. W.* 66.

*Massachusetts. Leavitt v. Fiberloid Co.*, 196 *Mass.* 440, 15 *L. R. A. (N.S.)* 855, 82 *N. E.* 682.

*North Carolina. Nance v. Western Union Telegraph Co.*, 177 *N. Car.* 313, 98 *S. E.* 838.

*Oregon. Levy v. Nevada-California-Oregon Ry.*, 81 *Or.* 673, *L. R. A.* 1917B, 564, 160 *Pac.* 808; *Coffey v. Northwestern Hospital Association*, 96 *Or.* 100, 189 *Pac.* 407.

*South Dakota. Thermoid Rubber Co. v. Bricton Mfg. Co.*, 39 *S. D.* 114, 163 *N. W.* 567.

*Wisconsin. Lloyd Investment Co. v. Illinois Surety Co.*, 164 *Wis.* 282, 160 *N. W.* 58.

<sup>3</sup> *Loewenthal v. Georgia Coast & Piedmont Ry. Co.*, 265 *Fed.* 961; *International Harvester Co. v. Chicago, Milwaukee & St. Paul Ry.*, 186 *Ia.* 86, 172 *N. W.* 471.

<sup>4</sup> *Independent Grocery Co. v. Sun Insurance Co.* — *Minn.* —, 178 *N. W.* 582.

<sup>5</sup> See §§ 3187 et seq.

course of things not provided for in the contract but known to the party in default as contemplated and intended by the adversary party. (4) The damages may be such as do not follow from the ordinary course of things, but they may follow from a special course of things which the party in default knows will probably follow, though he is not positively notified of such fact. (5) The damages may be such as do not follow in the ordinary course of things, but do follow from a course of things contemplated and intended by the injured party, but not known to exist by the party in default.

The first of these classes consists of the damages which arise in the usual course of things as a consequence of the breach. These damages are given by the law, without proof of any special facts and circumstances.<sup>6</sup> Any more exact statement of this rule requires a consideration in detail of the special types of contract. In this connection, we will select characteristic and typical examples, without attempting to make an exhaustive enumeration of all the different forms of contract which may be broken.<sup>7</sup>

**§ 3185. Certainty.** As with other questions of fact, damages must be proved with at least reasonable certainty. They can not

<sup>6</sup> **Arkansas.** *Fenton v. Price*, — Ark. —, 223 S. W. 364.

**Illinois.** *Illinois Central Ry. v. Cobb*, 64 Ill. 128; *Van Arsdale v. Rundel*, 82 Ill. 63.

**Iowa.** *Cobb v. Illinois Central Ry.*, 38 Ia. 601; *Cornell v. Rodabaugh*, 117 Ia. 287, 94 Am. St. Rep. 298, 90 N. W. 599; *International Harvester Co. v. Chicago, Milwaukee & St. Paul Ry.*, 186 Ia. 86, 172 N. W. 471.

**Massachusetts.** *Squire v. Western Union Telegraph Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Connolly v. Sullivan*, 173 Mass. 1, 53 N. E. 143.

**Michigan.** *Wright v. Elk Rapids Iron Co.*, 129 Mich. 543, 89 N. W. 335.

**Minnesota.** *Coxe v. Anoka Waterworks, Electric Light & Power Co.*, 87 Minn. 56, 91 N. W. 265; *Independent Grocery Co. v. Sun Insurance Co.*, — Minn. —, 178 N. W. 582.

**Nebraska.** *Jewett v. Wilmot*, 51 Neb. 700, 71 N. W. 775.

**New York.** *Hexter v. Knox*, 63 N. Y. 561.

**North Carolina.** *Nance v. Western Union Telegraph Co.*, 177 N. Car. 313, 98 S. E. 838.

**North Dakota.** *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026.

**Ohio.** *Smith v. Sloss Marblehead Lime Co.*, 57 O. S. 518, 49 N. E. 695; *Kelly v. Carthage Wheel Co.*, 62 O. S. 598, 57 N. E. 984.

**Pennsylvania.** *Kinports v. Breon*, 193 Pa. St. 309, 44 Atl. 436.

**West Virginia.** *Rhoades v. Chesapeake & Ohio Ry. Co.*, 49 W. Va. 494, 87 Am. St. Rep. 826, 55 L. R. A. 170, 39 S. E. 209.

**Wisconsin.** *Lyle v. McCormick Harvesting Machine Co.*, 108 Wis. 81, 51 L. R. A. 906, 84 N. W. 18.

<sup>7</sup> See §§ 3212 et seq.

be ascertained by mere speculation and conjecture.<sup>1</sup> If damages do not necessarily follow from the breach on which the action is brought, and if no actual damages are shown to exist, no substantial damages can be recovered.<sup>2</sup> It is said that if there are no data for computing the amount of damages no substantial damages can be given even if it is clear from the evidence that some damage has been sustained.<sup>3</sup> Where defective goods were sold by

<sup>1</sup> **United States.** McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N.S.) 1110, 9 Ann. Cas. 628; Chicago Life Ins. Co. v. Tiernan, 263 Fed. 325.

**Arkansas.** Fenton v. Price, — Ark. —, 223 S. W. 364.

**Georgia.** Upmago Lumber Co. v. Monroe, 148 Ga. 847, 98 S. E. 498.

**Indiana.** Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 3 L. R. A. (N.S.) 709, 76 N. E. 294.

**Iowa.** Jemmison v. Gray, 29 Ia. 537.

**Kentucky.** Clarke v. Blue Licks Springs Co., 184 Ky. 827, 213 S. W. 222; Union Cotton Co. v. Bondurant, 188 Ky. 319, 222 S. W. 66.

**Maryland.** Winslow Elevator & Machine Co. v. Hoffman, 107 Md. 621, 17 L. R. A. (N.S.) 1130, 69 Atl. 394.

**Missouri.** Baker v. J. W. McMurray Contracting Co., — Mo. —, 223 S. W. 45.

**Nebraska.** Paxton v. Vadbouker, 1 Neb. (unofficial) 776, 96 N. W. 378.

**New York.** Cramer v. Grand Rapids Show Case Co., 223 N. Y. 63, 1 A. L. R. 154, 119 N. E. 227.

**North Carolina.** Machine Co. v. Tobacco Co., 141 N. Car. 284 [sub nomine, Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co., 8 L. R. A. (N.S.) 255, 53 S. E. 885]; Harper Furniture Co. v. Southern Express Co., 148 N. Car. 87, 30 L. R. A. (N.S.) 483, 62 S. E. 145; Nance v. Western Union Telegraph Co., 177 N. Car. 313, 98 S. E. 838; Morrison v. Marks, 178 N. Car. 429, 100 S. E. 890.

**Ohio.** Rhodes v. Baird, 16 O. S. 573.

**Oregon.** McGinnis v. Studebaker Cor-

poration of America, 75 Or. 519, L. R. A. 1916B, 868, Ann. Cas. 1917B, 1190, 146 Pac. 825.

**Pennsylvania.** Macan v. Scandinavia Belting Co., 264 Pa. St. 384, 107 Atl. 750.

**South Carolina.** Standard Supply Co. v. Carter, 81 S. Car. 181, 19 L. R. A. (N.S.) 155, 62 S. E. 150.

**Washington.** Webster v. Beau, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013; Nelson v. Davenport, 108 Wash. 259, 183 Pac. 132.

**West Virginia.** Douglass v. Ohio River Ry. Co., 51 W. Va. 523, 41 S. E. 911.

**Wisconsin.** American Steam Laundry Co. v. Riverside Printing Co., 171 Wis. 644, 177 N. W. 852.

<sup>2</sup> **Arkansas.** United States Auto Co. v. Arkadelphia Milling Co., 140 Ark. 73, 215 S. W. 641 (obiter).

**California.** Friedman v. McKay Leather Co., 179 Cal. 566, 178 Pac. 139.

**Kentucky.** Gregory v. Harlan Home Coal Co., 182 Ky. 524, 206 S. W. 765; Union Cotton Co. v. Bondurant, 188 Ky. 319, 222 S. W. 66.

**North Carolina.** Machine Co. v. Tobacco Co., 141 N. Car. 284 [sub nomine, Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co., 8 L. R. A. (N.S.) 255, 53 S. E. 885].

**Washington.** Webster v. Beau, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013.

<sup>3</sup> **United States.** Chicago Life Ins. Co. v. Tiernan, 263 Fed. 325.

**Georgia.** Upmago Lumber Co. v. Monroe, 148 Ga. 847, 98 S. E. 498.

**Kentucky.** Bugg v. Jones, 183 Ky.

a wholesaler to a retailer, injury to the retailer's trade may be too uncertain to form a basis of recovering damages.<sup>4</sup>

As between two or more possible rules for the measure of damages the law prefers the most certain. On breach of a contract to give a free pass for life, the measure of damages has been held to be the amount actually spent on railroad fare.<sup>5</sup>

At the same time the amount of damages, except damages for withholding the payment of money,<sup>6</sup> is to be ascertained by the jury from the evidence in the case, including, in many cases, the surrounding facts and circumstances; and accordingly the fact that the amount of damages can not be ascertained with mathematical accuracy does not prevent recovery.<sup>7</sup> It has been said that the rule which forbids the recovery of uncertain or contingent damages applies only to uncertainty or contingency as to the fact of damages and not the uncertainty or contingency as to its amount.<sup>8</sup>

500, 209 S. W. 514; *Clarke v. Blue Licks Spring Co.*, 184 Ky. 827, 213 S. W. 222; *Louisville Bridge Co. v. Louisville & Nashville Ry. Co.*, 25 Ky. L. Rep. 405, 75 S. W. 285.

**Maryland.** *Winslow Elevator & Machine Co. v. Hoffman*, 107 Md. 621, 17 L. R. A. (N.S.) 1130, 69 Atl. 394.

**North Carolina.** *Machine Co. v. Tobacco Co.*, 141 N. Car. 284 [sub nomine, *Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co.*, 8 L. R. A. (N.S.) 255, 53 S. E. 885].

**Ohio.** *Rhodes v. Baird*, 16 O. S. 573.

**Wisconsin.** *American Steam Laundry Co. v. Riverside Printing Co.*, 171 Wis. 644, 177 N. W. 852.

<sup>4</sup>*Jackson Sleigh Co. v. Holmes*, 129 Mich. 370, 88 N. W. 895.

If sufficiently certain, such injury may be an item of damage. *American Pure Food Co. v. Elliott*, 151 N. Car. 393, 31 L. R. A. (N.S.) 910, 66 S. E. 451.

<sup>5</sup>*Curry v. Kansas & Colorado Pacific Ry.*, 61 Kan. 541, 60 Pac. 325.

<sup>6</sup>See § 3229.

<sup>7</sup>*Canada. Laishley v. Goold Bicycle Co.*, 6 Ont. L. Rep. 319 [1903].

**Arkansas.** *Blumenthal v. Bridges*, 91 Ark. 212, 24 L. R. A. (N.S.) 279, 120 S. W. 974; *United States Auto Co. v. Arkadelphia Milling Co.*, 140 Ark. 73, 215 S. W. 641.

**California.** *McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N. S.) 1171, 85 Pac. 929.

**Kentucky.** *Union Cotton Co. v. Bondurant*, 188 Ky. 319, 222 S. W. 66.

**Michigan.** *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N. W. 539.

**Oklahoma.** *Cloe v. Rogers*, 31 Okla. 255, 38 L. R. A. (N.S.) 366, 121 Pac. 201.

**Pennsylvania.** *Macan v. Scandinavia Belting Co.*, 264 Pa. St. 384, 5 A. L. R. 1502, 107 Atl. 750.

**Virginia.** *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

<sup>8</sup>**Arkansas.** *United States Auto Co. v. Arkadelphia Milling Co.*, 140 Ark. 73, 215 S. W. 641.

**Connecticut.** *Edward DeV. Tompkins, Inc., v. Bridgeport*, 94 Conn. 659, 110 Atl. 183.

**Iowa.** *Swift v. Redhead*, 147 Ia. 94, 122 N. W. 140.

If part of the damages are shown with reasonable certainty, and the rest are not thus shown, only that part which can be shown with certainty can be recovered.<sup>9</sup> If a seller refuses to deliver goods, and the buyer buys some and manufactures the rest, he may recover the difference between the contract price and the market price of the goods which he has bought,<sup>10</sup> but he can not recover the difference between the cost of manufacturing such goods and the contract price if he does not show the cost of manufacturing such goods with reasonable certainty,<sup>11</sup> even if he shows that it exceeds the contract price.<sup>12</sup> At any rate, if a certain minimum amount of damages is shown, that, at least, may be recovered, though the evidence may show that the damages were greater than such amount by some uncertain sum.<sup>13</sup>

**§ 3186. Remoteness.** As a necessary deduction from the rule that damages are recoverable only if they flow from the breach in the natural course of events, or are within the contemplation of the parties, it follows that damages which are so remote as to fall without these rules can not be recovered.<sup>1</sup> Damages which are

**Missouri.** Kennett v. Katz Construction Co., 273 Mo. 279, 202 S. W. 558.

**New York.** Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; Loomis v. Hallston, 183 N. Y. Supp. 705.

**Oregon.** McGinnis v. Studebaker Corporation of America, 75 Or. 519, L. R. A. 1916B, 868, Ann. Cas. 1917B, 1190, 146 Pac. 825.

No recovery can be had, however, if data can not be furnished for computing the amount. See Note —, this section.

<sup>9</sup> Hardman Lumber Co. v. Keystone Mfg. Co., 86 W. Va. 404, 103 S. E. 282.

<sup>10</sup> See §§ 3220 et seq.

<sup>11</sup> Hardman Lumber Co. v. Keystone Mfg. Co., 86 W. Va. 404, 103 S. E. 282.

<sup>12</sup> Hardman Lumber Co. v. Keystone Mfg. Co., 86 W. Va. 404, 103 S. E. 282.

<sup>13</sup> Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264.

<sup>1</sup> England. Hobbs v. London & South Western Ry., L. R. 10 Q. B. 111.

**Canada.** Corbin v. Thompson, 39 Can. S. C. 575.

**United States.** St. Louis, Iron Mountain & Southern Ry. v. Commercial Union Ins. Co., 139 U. S. 223, 35 L. ed. 154; McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N.S.) 1110, 9 Ann. Cas. 628; Western Union Telegraph Co. v. Lewis, 203 Fed. 832, 49 L. R. A. (N. S.) 927.

**Arkansas.** Fenton v. Price, — Ark. —, 223 S. W. 364.

**California.** Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51, 7 L. R. A. (N.S.) 913, 87 Pac. 1093.

**Florida.** Bayshore Development Co. v. Bonfoey, 75 Fla. 455, L. R. A. 1918D, 889, 78 So. 507.

**Georgia.** Upmago Lumber Co. v. Monroe, 148 Ga. 847, 98 S. E. 498.

**Indiana.** Krause v. Board of Trustees, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 1 Ann. Cas. 460,

due to natural external causes, and which do not necessarily follow from the breach, can not be recovered, although but for such breach such natural causes would not have operated to the damage of the party not in default.<sup>2</sup> By the weight of authority it is held

70 N. E. 264; *Connersville Wagon Co. v. McFarlan Carriage Co.*, 166 Ind. 123, 3 L. R. A. (N.S.) 709, 76 N. E. 294.

**Iowa.** *Chaney v. Murphy*, 180 Ia. 716, 161 N. W. 658; *International Harvester Co. v. Chicago, Milwaukee & St. Paul Ry.*, 186 Ia. 86, 172 N. W. 471 (obiter).

**Kansas.** *Atchison, Topeka & Santa Fe Ry. v. Henry*, 78 Kan. 490, 18 L. R. A. (N.S.) 177, 97 Pac. 465.

**Maine.** *Continental Paper Bag Co. v. Maine Central Ry. Co.*, 115 Me. 449, 99 Atl. 259.

**Maryland.** *Middendorf v. Alexander Milburn Co.*, 134 Md. 385, 107 Atl. 7.

**Massachusetts.** *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106.

**Michigan.** *Frederick v. Hillebrand*, 199 Mich. 333, 165 N. W. 810.

**Minnesota.** *Northwestern Consolidated Milling Co. v. Chicago, Burlington & Quincy Ry.*, 135 Minn. 363, 160 N. W. 1028.

**Missouri.** *Baker v. J. W. McMurray Contracting Co.*, — Mo. —, 223 S. W. 45.

**Montana.** *Smith v. Billings Sugar Co.*, 37 Mont. 128, 15 L. R. A. (N.S.) 837, 94 Pac. 839.

**Nebraska.** *Roper v. Milbourn*, 93 Neb. 809, Ann. Cas. 1914B, 1225, 142 N. W. 792; *Shurtleff v. Occidental Building & Loan Association*, — Neb. —, 181 N. W. 374.

**New York.** *Cramer v. Grand Rapids Show Case Co.*, 223 N. Y. 63, 1 A. L. R. 164, 119 N. E. 227.

**North Carolina.** *Machine Co. v. Tobacco Co.*, 141 N. Car. 284 [sub nomine, *Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co.*], 8 L. R. A. (N.S.) 255, 53 S. E. 885; *Walls v.*

*Carolina Spruce Co.*, 175 N. Car. 661, 96 S. E. 36; *Morrison v. Marks*, 178 N. Car. 429, 100 S. E. 890.

**North Dakota.** *Russell v. Olson*, 22 N. D. 410, 37 L. R. A. (N.S.) 1217, Ann. Cas. 1914B, 1069, 133 N. W. 1030; *Lynn v. Seby*, 29 N. D. 420, L. R. A. 1916E, 788, 151 N. W. 31; *Hagan v. Knudson*, — N. D. —, 173 N. W. 794.

**Ohio.** *Daniels v. Ballantine*, 23 O. S. 532; *Western Union Telegraph Co. v. Sullivan*, 82 O. S. 14, 91 N. E. 867; *Toledo & Ohio Central Ry. v. S. J. Kibler & Bros. Co.*, 97 O. S. 262, 119 N. E. 733.

**Oklahoma.** *Armstrong v. Illinois Central Ry.*, 26 Okla. 352, 29 L. R. A. (N.S.) 671, 109 Pac. 216; *Wiggins v. Jackson*, 31 Okla. 292, 43 L. R. A. (N.S.) 153, 121 Pac. 662.

**Oregon.** *McGinnis v. Studebaker Corporation of America*, 75 Or. 519, L. R. A. 1916B, 868, Ann. Cas. 1917B, 1190, 146 Pac. 825 147 Pac. 525.

**Texas.** *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280.

**Washington.** *Webster v. Beau*, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013; *Boston Trust Co. v. Evelon Co.*, 96 Wash. 31, 164 Pac. 606.

**West Virginia.** *Hutchinson v. U. S. Express Co.*, 63 W. Va. 128, 14 L. R. A. (N.S.) 393, 59 S. E. 949.

**Wisconsin.** *Altschuler v. Atchison, Topeka & Santa Fe Ry.*, 155 Wis. 146, 49 L. R. A. (N.S.) 491, 144 N. W. 294.

<sup>2</sup>**United States.** *St. Louis, Iron Mountain & Southern Ry. v. Commercial Union Ins. Co.*, 139 U. S. 223, 35 L. ed. 154.

**Kansas.** *Atchison, Topeka & Santa Fe Ry. v. Henry*, 78 Kan. 490, 18 L. R. A. (N.S.) 177, 97 Pac. 465.

that a carrier is not liable for damages to goods due to some external cause for which he would not have been liable if he had performed his contract, although his delay in performing has resulted in exposing the goods to such external causes.<sup>3</sup> A minority of the courts hold, however, that in cases of this sort the default of the carrier and the natural cause must be regarded as co-operating; and it is the fault of the carrier that the goods are exposed to the natural cause.<sup>4</sup> Delay in the construction of a house is held not to render the contractor liable for the destruc-

**Maine.** *Continental Paper Bag Co. v. Maine Central Ry. Co.*, 115 Me. 449, 99 Atl. 259.

**Massachusetts.** *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106.

**Minnesota.** *Northwestern Consolidated Milling Co. v. Chicago, Burlington & Quincy Ry.*, 135 Minn. 363, 160 N. W. 1028.

**North Carolina.** *Walls v. Carolina Spruce Co.*, 175 N. Car. 661, 96 S. E. 36.

**North Dakota.** *Lynn v. Seby*, 29 N. D. 420, L. R. A. 1916E, 788, 151 N. W. 31.

**Ohio.** *Daniels v. Ballantine*, 23 O. S. 532; *Toledo & Ohio Central Ry. v. S. J. Kibler & Bros. Co.*, 97 O. S. 262, 119 N. E. 733.

**Oklahoma.** *Armstrong v. Illinois Central Ry.*, 26 Okla. 352, 29 L. R. A. (N.S.) 671, 109 Pac. 213.

**Texas.** *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280.

**West Virginia.** *Hutchinson v. U. S. Express Co.*, 63 W. Va. 128, 14 L. R. A. (N.S.) 393, 59 S. E. 949.

**United States.** *St. Louis, Iron Mountain & Southern Ry. v. Commercial Union Ins. Co.*, 139 U. S. 223, 35 L. ed. 154.

**Kansas.** *Atchison, Topeka & Santa Fe Ry. v. Henry*, 78 Kan. 490, 18 L. R. A. (N.S.) 177, 97 Pac. 465.

**Maine.** *Continental Paper Bag Co. v. Maine Central Ry. Co.*, 115 Me. 449, 99 Atl. 259.

**Massachusetts.** *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106.

**Minnesota.** *Northwestern Consolidated Milling Co. v. Chicago, Burlington & Quincy Ry.*, 135 Minn. 363, 160 N. W. 1028.

**Ohio.** *Daniels v. Ballantine*, 23 O. S. 532; *Toledo & Ohio Central Ry. v. S. J. Kibler & Bros. Co.*, 97 O. S. 262, 119 N. E. 733.

**Oklahoma.** *Armstrong v. Illinois Central Ry.*, 26 Okla. 352, 29 L. R. A. (N.S.) 671, 109 Pac. 213.

**West Virginia.** *Hutchinson v. U. S. Express Co.*, 63 W. Va. 128, 14 L. R. A. (N.S.) 393, 59 S. E. 949.

**Alabama.** *Alabama Great Southern Ry. v. Quarles*, 145 Ala. 436, 5 L. R. A. (N.S.) 867, 8 Ann. Cas. 308, 40 So. 120; *Alabama Great Southern Ry. v. Elliott*, 150 Ala. 381, 124 Am. St. Rep. 72, 9 L. R. A. (N.S.) 1264, 43 So. 738.

**Illinois.** *Wald v. Pittsburg, Cincinnati, Chicago & St. Louis Ry.*, 162 Ill. 545, 53 Am. St. Rep. 332, 35 L. R. A. 356, 44 N. E. 888.

**Iowa.** *Green-Wheeler Shoe Co. v. Chicago, Rock Island & Pacific Ry.*, 130 Ia. 123, 5 L. R. A. (N.S.) 882, 8 Ann. Cas. 45, 106 N. W. 498.

**Nebraska.** *Sunderland Bros. Co. v. Chicago, Burlington & Quincy Ry.*, 89 Neb. 660, 131 N. W. 1047.

**New York.** *Michaels v. New York Central Ry.*, 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426.

tion of such house,<sup>5</sup> or for the injury thereto by the elements.<sup>6</sup> Delay in returning a barge which has been let does not render the lessee liable for injury thereto by ice.<sup>7</sup> A is liable to B for placing B's goods in a warehouse different from that agreed upon, in which they are when they are destroyed, even if B is not guilty of negligence or other wrongful acts.<sup>8</sup> The partial loss of a crop of sugar beets can not be regarded as due to the default of a sugar company in supervising the cultivation of such beets and in urging the producer not to use any inexperienced men, but to wait until he could get experienced men; since, if the producer did not employ even inexperienced men in time, it is impossible to distinguish the loss caused by delay in supervision from the loss caused by the failure to employ men.<sup>9</sup>

Damages caused by loss of grain by shelling out, owing to a delay in cutting it, are not too remote in an action for breach of such contract by reason of such delay.<sup>10</sup> On a sale of diseased animals, infection of sound animals by being placed with the diseased animals is not too remote.<sup>11</sup>

**§ 3187. Contract with reference to special course of things—General principles.** The law allows all damages which may reasonably be presumed to have been within the contemplation of the parties when they made the contract.<sup>1</sup> Accordingly, if special

See also, as to liability if the goods are shipped over a different route from that specified by the shipper, *O. K. Transfer & Storage Co. v. Neill*, 59 Okla. 291, L. R. A. 1917A, 58, 159 Pac. 272.

<sup>5</sup> *Krause v. Board of Trustees*, 162 Ind. 278, 102 Am. St. Rep. 203, 65 L. R. A. 111, 1 Ann. Cas. 460, 70 N. E. 264.

<sup>6</sup> *Carnegie v. Holt*, 99 Mich. 606, 58 N. W. 623.

<sup>7</sup> *Jones v. Gilmore*, 91 Pa. St. (10 Norr.) 310.

<sup>8</sup> *Lilley v. Doubleday*, 7 Q. B. D. 510.

<sup>9</sup> *Smith v. Billings Sugar Co.*, 37 Mont. 128, 15 L. R. A. (N.S.) 837, 94 Pac. 839.

<sup>10</sup> *Holt Mfg. Co. v. Thornton*, 136 Cal. 232, 68 Pac. 708.

*Contra*, *Lynn v. Seby*, 29 N. D. 420, L. R. A. 1916E, 788, 151 N. W. 31.

<sup>11</sup> *Skinn v. Reutter*, 135 Mich. 57, 63 L. R. A. 743, 97 N. W. 152.

<sup>1</sup> *England. Jackson v. Watson* [1909], 2 K. B. 193.

*Alabama. Vinson v. Southern Bell Telephone & Telegraph Co.*, 188 Ala. 292, L. R. A. 1915C, 450, Ann. Cas. 1916E, 900, 66 So. 100.

*Idaho. Trego v. Arave*, 20 Ida. 38, 35 L. R. A. (N.S.) 1021, 116 Pac. 119.

*Kentucky. Bugg v. Jones*, 183 Ky. 500, 209 S. W. 514.

*Massachusetts. Leavitt v. The Fiberloid Co.*, 196 Mass. 440, 15 L. R. A. (N.S.) 855, 82 N. E. 682; *Dondis v. Borden*, 230 Mass. 73, 119 N. E. 184.

*Nebraska. Shurtleff v. Occidental Building & Loan Association*, — Neb. —, 181 N. W. 374.

*Nevada. Barnes v. Western Union Telegraph Co.*, 27 Nev. 438, 103 Am. St. Rep. 776, 1 Ann. Cas. 346, 76 Pac. 931.

*New York. Orester v. Dayton Rubber Mfg. Co.*, 228 N. Y. 134, 126 N. E. 510.

circumstances, out of the usual course of things, are known to both parties, and they contract with reference thereto, the damages which follow breach and are occasioned by such special course of things must be awarded to the party not in default as compensation.<sup>2</sup> It has been held, however, that mere knowledge of the special circumstances is not sufficient unless it further appears as

**North Carolina.** *Spencer v. Hamilton*, 113 N. Car. 49, 37 Am. St. Rep. 611, 18 S. E. 167.

**North Dakota.** *Murphy v. Hanna*, 37 N. D. 156, L. R. A. 1918B, 135, 164 N. W. 32.

**Ohio.** *Champion Ice Mfg. & Cold Storage Co. v. Pennsylvania Iron Works Co.*, 68 O. S. 229, 67 N. E. 486; *Ackerland v. Louisville & Nashville Ry.*, 83 O. S. 293, 94 N. E. 423.

**Pennsylvania.** *Raby, Inc., v. Ward-Meehan Co.*, 261 Pa. St. 468 [sub nomine, *Thomas Raby, Inc., v. Ward-Meehan Co.*, 104 Atl. 750].

**Texas.** *Western Union Telegraph Co. v. Swearingin*, 97 Tex. 293, 104 Am. St. Rep. 876, 78 S. W. 491.

<sup>2</sup>**England.** *Hadley v. Baxendale*, 9 Exch. 341; *Jackson v. Watson* [1909], 2 K. B. 193.

**United States.** *Iowa Mfg. Co. v. Sturtevant Mfg. Co.*, 162 Fed. 460, 18 L. R. A. (N.S.) 575; *Campfield v. Sauer*, 189 Fed. 576, 38 L. R. A. (N.S.) 837.

**Alabama.** *Vinson v. Southern Bell Teleph. & Teleg. Co.*, 188 Ala. 292. L. R. A. 1915C, 450, Ann. Cas. 1916E, 900, 66 So. 100.

**Iowa.** *Kramer v. Messner*, 101 Ia. 88, 69 N. W. 1142.

**Massachusetts.** *Cutting v. Grand Trunk Ry.*, 95 Mass. (13 All.) 381; *Townsend v. Nickerson Wharf Co.*, 117 Mass. 501; *Manning v. Fitch*, 138 Mass. 273; *Leavitt v. The Fiberloid Co.*, 196 Mass. 440, 15 L. R. A. (N.S.) 855, 82 N. E. 682; *Dondis v. Borden*, 230 Mass. 73, 119 N. E. 184.

**New Hampshire.** *Hurd v. Dunsmore*, 63 N. H. 171.

**New York.** *Griffin v. Colver*, 16 N. Y. 489.

**North Dakota.** *Murphy v. Hanna*, 37 N. D. 156, L. R. A. 1918B, 135, 164 N. W. 32.

**Ohio.** *Devereux v. Buckley*, 34 O. S. 16, 32 Am. Rep. 342.

**Oklahoma.** *Fort Smith & Western Ry. v. Williams*, 30 Okla. 726, 40 L. R. A. (N.S.) 494, 121 Pac. 275.

**Pennsylvania.** *Raby, Inc., v. Ward-Meehan Co.*, 261 Pa. St. 468 [sub nomine, *Thomas Raby, Inc., v. Ward-Meehan Co.*, 104 Atl. 750].

**South Carolina.** *Standard Supply Co. v. Carter*, 81 S. Car. 181, 19 L. R. A. (N.S.) 155, 62 S. E. 150.

**Wisconsin.** *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129; *Vogt v. Schienebeck*, 122 Wis. 491, 103 Am. St. Rep. 989, 67 L. R. A. 756, 2 Ann. Cas. 814, 100 N. W. 820; *Schenning v. Devere & Schloegel Lumber Co.*, — Wis. —, 180 N. W. 136.

"When the special circumstances are known to both parties, it is obvious that each may have contracted with reference to them; and that, if such was in fact the case, the party in fault may be held justly to make good to the other whatever damages he has sustained which were the reasonable and natural consequences of a breach under the circumstances so known and with reference to which the parties acted." *Loneragan v. Waldo*, 179 Mass. 135, 139, 88 Am. St. Rep. 365, 60 N. E. 479.

See, *The Rule in Hadley v. Baxendale*, by F. E. Smith, 16 Law Quarterly Review, 275.

an established fact, that the parties contracted with reference to such circumstances.<sup>3</sup> It is frequently said that the special course of things must be that which is contemplated when the contract is made,<sup>4</sup> at least if the breach is not wilful or in bad faith.<sup>5</sup> It is accordingly held that the party in default is not liable for damages which were not within his contemplation when he made the contract, although at the time of the breach he knows that such breach will inflict such damages upon the adversary party.<sup>6</sup> On the other hand, it has been held that a party is liable for damages if he has notice of the special facts which will cause such damage in time to perform on his part and to avoid such loss to the adversary party.<sup>7</sup> It is said that notice of the facts which will result in special damage is not of itself sufficient to make the party who is in default liable therefor; but that, to result in such liability the circumstances must be such that the party who is in default knows that the adversary party, as a reasonable man, believes that he has been promised a contract with such special condition.<sup>8</sup> If this rule is correct, there is no such thing as a contract in contemplation of a special course of things; but the contract must provide for such special course of things,<sup>9</sup> or such special liability will not attach.

<sup>3</sup> *McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, 11 N. W. 828; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y. 487.

<sup>4</sup> *Illinois Cent. R. Co. v. New Orleans Terminal Co.*, 143 La. 467, 78 So. 738; *Dondis v. Borden*, 230 Mass. 73, 119 N. E. 184; *Clyde Coal Co. v. Pittsburg & Lake Erie Ry.*, 226 Pa. St. 391, 26 L. R. A. (N.S.) 1191, 75 Atl. 596; *Raby, Inc. v. Ward-Meehan Co.*, 261 Pa. St. 468 [sub nomine, *Thomas Raby, Inc. v. Ward-Meehan Co.*, 104 Atl. 750].

<sup>5</sup> *Illinois Cent. R. Co. v. New Orleans Terminal Co.*, 143 La. 467, 78 So. 738.

<sup>6</sup> *Horne v. Midland Ry.*, L. R. 8 C. P. 131; *Clyde Coal Co. v. Pittsburg & Lake Erie Ry.*, 226 Pa. St. 391, 26 L. R. A. (N.S.) 1191, 75 Atl. 596; *Missouri, Kansas & Texas Ry. v. Belcher*, 88 Tex. 549, 35 S. W. 6; *Guetzkow Bros. Co. v. Andrews*, 92 Wis. 214, 52 L. R. A. 209, 66 N. W. 119; *Bradley v. Chicago, Mil-*

*waukee & St. Paul Ry.*, 94 Wis. 44, 68 N. W. 410.

<sup>7</sup> *Asher v. Howard*, 178 Ky. 398, 198 S. W. 1149; *Bourland v. Choctaw, Oklahoma & Gulf Ry.*, 99 Tex. 407, 122 Am. St. Rep. 647, 3 L. R. A. (N.S.) 1111, 90 S. W. 483.

See also, *O'Reilly v. Pennsylvania Ry.*, 263 Pa. St. 28<sup>c</sup>, 106 Atl. 632.

See, *Schenning v. Devere & Schloegel Lumber Co.*, — Wis. —, 180 N. W. 136, in which case, however, the party in default would probably have been held liable even without notice.

<sup>8</sup> *British Columbia & Vancouver's Island Spar Lumber and Saw Mill Co. Ltd. v. Nettleship*, L. R. 3 C. P. 499; *Bixby-Thiersen Lumber Co. v. Evans*, 167 Ala. 431, 29 L. R. A. (N.S.) 194, 52 So. 843; *Callahan v. Chickasha Cotton Oil Co.*, 17 Okla. 544, 87 Pac. 331; *Wiggins v. Jackson*, 31 Okla. 292, 43 L. R. A. (N.S.) 153, 121 Pac. 662.

<sup>9</sup> See § 3189.

The notice to the party whom it is sought to hold must be direct and unequivocal.<sup>10</sup> In a leading case,<sup>11</sup> it was held that knowledge that the factory of a shipper was not in operation and that such shipper had forwarded a piece of broken machinery was not sufficient to notify the carrier that the suspension of such factory was 'due to the carrier's failure to transport such broken machinery; though such suspension was in fact due to such delay, as the broken machinery was to be used as a model in making a duplicate part. If a lessor does not know that lessee is unable to obtain another house, and that in consequence thereof he will be obliged to give up his employment, he is not liable, on breach of a contract to lease a dwelling house, for damages arising out of such loss of employment.<sup>12</sup> A notice to "rush" motion picture films is said not to be sufficient notice that they are intended for exhibition and that special damage will be sustained if they are not delivered so that they can be exhibited on a holiday at a special admission fee.<sup>13</sup>

Such notice, however, may be implied from the entire transaction and need not be given by express words. If a carrier knows that goods are intended for market, and that their arrival on time is important to the vendor, he may be held liable for the difference between the market price of such goods if delivered at the time agreed upon and their market price when delivered.<sup>14</sup> The fact that a telegram shows on its face that it deals with a business matter, is notice to the telegraph company that the failure to transmit such message correctly will probably inflict serious injury.<sup>15</sup>

<sup>10</sup> *Hadley v. Baxendale*, 9 Exch. 341; *Chapman v. Fargo*, 223 N. Y. 32, L. R. A. 1918F, 1049, Ann. Cas. 1918E, 1054, 119 N. E. 76; *Wiggins v. Jackson*, 31 Okla. 292, 43 L. R. A. (N.S.) 153, 121 Pac. 662.

<sup>11</sup> *Hadley v. Baxendale*, 9 Exch. 341. For a similar case, involving delay in shipping hog cholera serum, see *Adams Express Co. v. Allen*, 125 Va. 530, 100 S. E. 473.

<sup>12</sup> *Serfing v. Andrews*, 106 Wis. 78, 81 N. W. 991.

<sup>13</sup> *Chapman v. Fargo*, 223 N. Y. 32, L. R. A. 1918F, 1049, Ann. Cas. 1918E, 1054, 119 N. E. 76.

<sup>14</sup> *Illinois*. *Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Patton*, 203 Ill. 376, 67 N. E. 804 [affirming, 104 Ill. App. 550].

*Massachusetts*. *Cutting v. Grand Trunk Ry.*, 95 Mass. (13 All.) 381.

*Missouri*. *Sloop v. Wabash Ry.*, 93 Mo. App. 605, 67 S. W. 956.

*New York*. *Ward v. New York Central Ry.*, 47 N. Y. 29.

*Ohio*. *Devereux v. Buckley*, 34 O. S. 16, 32 Am. Rep. 342.

<sup>15</sup> *Western Union Telegraph Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Shawnee Milling Co. v. Postal Telegraph-Cable Co.*, 101 Kan. 307, L. R. A.

**§ 3188. Contract with reference to special course of things—**  
**Specific illustrations.** On breach of a contract to make a cellar waterproof, loss of goods stored therein may be recovered.<sup>1</sup> Under a contract to sell a given article, breach by the delivery of a different article which will ignite or explode in the ordinary process of manufacture renders the seller liable for loss thus caused. On breach of a contract to furnish an article fit for food by furnishing an article unfit therefor, which results in the death of the wife of the purchaser, the purchaser may recover damages which he has sustained by reason of such death.<sup>2</sup> If a contract to deliver pipe is broken and the vendor knows that the vendee has, in reliance upon such contract, dug a trench to lay such pipe, it can not be said as a matter of law that the vendor is not liable for the cost of redigging, which has become necessary because, while the vendee was delayed by the vendor's breach, the rain washed the dirt back into the trench.<sup>3</sup> If A breaks a contract to deliver goods to B, knowing that B will be delayed in performing his contract with C,<sup>4</sup> or that B has arranged to resell such goods to C,<sup>5</sup> A is liable for the loss thus caused. A agreed to deliver a monument in the spring to B, and B had resold it to X. A repudiated his contract in December. It was held that the difficulty of getting stock for a monument during the winter should be considered in estimating damages.<sup>6</sup> Delay in repairing an engine, with knowledge that the owner's employes will be kept idle while on pay,<sup>7</sup> or delay of a carrier in delivering goods, knowing that they are to be resold,<sup>8</sup> imposes liability for the loss thus caused. Delay of buyer in unloading goods from cars for which the seller is obliged to pay rent renders the buyer liable for the value of the use of

1917F, 844, 166 Pac. 493; *Western Union Telegraph Co. v. Collins*, 45 Kan. 88, 10 L. R. A. 515, 25 Pac. 187; *Cain v. Western Union Telegraph Co.*, 89 Kan. 797, 133 Pac. 874.

<sup>1</sup> *Dondis v. Borden*, 230 Mass. 73, 119 N. E. 184.

<sup>2</sup> *Jackson v. Watson* [1909], 2 K. B. 193.

<sup>3</sup> *Loneragan v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479; *Leavitt v. The Fiberloid Co.*, 196 Mass. 440, 15 L. R. A. (N.S.) 855, 82 N. E. 682.

<sup>4</sup> *Iowa Mfg. Co. v. Sturtevant Mfg. Co.*, 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. (N.S.) 575; *Campfield v. Sauer*, 189 Fed. 576, 111 C. C. A. 14, 38 L. R. A. (N.S.) 837.

<sup>5</sup> *Trego v. Arave*, 20 Ida. 38, 35 L. R. A. (N.S.) 1021, 116 Pac. 119.

<sup>6</sup> *Forsyth v. Mann*, 68 Vt. 116, 32 L. R. A. 788, 34 Atl. 481.

<sup>7</sup> *Corbin v. Thompson*, 39 Can. 575.

<sup>8</sup> *Ackerland v. Louisville & Nashville Ry.*, 83 O. S. 293, 94 N. E. 423.

such cars for such delay.<sup>9</sup> Failure to deliver a telegram asking for money renders the telegraph company liable for injury sustained by the sender by reason of being without the funds which he had requested.<sup>10</sup> If a telephone company knows of actual or probable illness, it is liable for injuries sustained by one who is obliged to go to summon a doctor on failure of the telephone company to furnish proper service.<sup>11</sup> If A has agreed to lend money to B, and A knows of the fact from which B will sustain special damages, A is liable for such damages on breach of such contract.<sup>12</sup> On breach of contract to permit A's land to be used by B as a dumping ground, the extra cost of longer hauls to the most available dumping ground is an item of damages.<sup>13</sup>

**§ 3189. Effect of provision in contract for special course of things.** If by the terms of their contract the parties provide for a special course of things, damages which follow a breach and arise out of such special course of things are as much the natural result of such breach of that particular contract, as the damages which follow in the ordinary course of things are the natural result of breach of a contract which contains no special terms. Damages arising out of such special course of things are therefore to be allowed to the party who is not in default to compensate him for the loss occasioned by breach.<sup>1</sup> A agreed to furnish to B such

<sup>9</sup> Penn Oil Co. v. Triangle Petroleum & Gasoline Co., 136 Md. 559, 111 Atl. 482.

Delay in giving shipping orders is held to make the buyer liable for loss by fire, of the danger of which he has had notice, although title has not passed. Schenning v. Devere & Schloegel Lumber Co., — Wis. —, 180 N. W. 136.

<sup>10</sup> Barnes v. Western Union Telegraph Co., 27 Nev. 438, 103 Am. St. Rep. 776, 65 L. R. A. 666, 1 Ann. Cas. 346, 76 Pac. 931.

<sup>11</sup> Vinson v. Southern Bell Telephone & Telegraph Co., 188 Ala. 292, L. R. A. 1915C, 450, Ann. Cas. 1916E, 900, 66 So. 100.

<sup>12</sup> Shurtleff v. Occidental Building & Loan Association, — Neb. —, 181 N. W. 374 (increased cost of building for

the construction of which the money was to be loaned, but not loss of rents); Murphy v. Hanna, 37 N. D. 156, L. R. A. 1918B, 135, 164 N. W. 32.

<sup>13</sup> O'Reilly v. Pennsylvania Ry. Co., 263 Pa. St. 289, 106 Atl. 632 (including loss on all contracts made up to A's breach).

<sup>1</sup> Michigan. Heilman v. Pruyn, 122 Mich. 301, 80 Am. St. Rep. 570, 81 N. W. 97.

Nebraska. Dunn v. Bushnell, 63 Neb. 568, 93 Am. St. Rep. 474, 88 N. W. 693.

New York. Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Sutherland v. Albany Cold Storage & Warehouse Co., 171 N. Y. 269, 89 Am. St. Rep. 815, 63 N. E. 1100.

North Carolina. Reiger v. Worth, 127 N. Car. 230, 80 Am. St. Rep. 798, 52 L. R. A. 362, 37 S. E. 217.

ice as B needed for his ice box in which he kept meat for sale. A did not furnish such ice during a part of the summer, and by reason of such breach and of the fact that B was unable to obtain other ice a quantity of meat spoiled. It was held that A was liable to B for the value of such meat.<sup>2</sup> A agreed to store perishable goods for B in cold storage, the temperature of the storeroom to be kept below a certain degree. A did not keep the temperature below the degree contracted for and by reason thereof such goods decayed. It was held that A was liable to B for such loss.<sup>3</sup> If A agreed to furnish a heater for B's greenhouse to maintain a given temperature, A is liable for damages caused by defective working of such heater, causing damages to B's plants by cold.<sup>4</sup> The cases in which a special course of things is specifically contracted for, shade off imperceptibly into the class of cases in which the special course of things is known to the party in default but is not specifically contracted for.<sup>5</sup>

### § 3190. Party in default ignorant of special circumstances.

If the party in default is not advised of the special course of circumstances, he is not liable for the damages which follow breach by reason of such special course.<sup>1</sup> If greater damages than would be indicated by the rules for estimating ordinary damages are in

**Virginia.** *Trigg v. Clay*, 88 Va. 330, 29 Am. St. Rep. 723, 13 S. E. 434.

**Wisconsin.** *Richardson v. Chynoweth*, 26 Wis. 656.

<sup>2</sup> *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129.

<sup>3</sup> *Hyde v. Mechanical Refrigerating Co.*, 144 Mass. 432, 11 N. E. 673; *Sutherland v. Albany Cold Storage & Warehouse Co.*, 171 N. Y. 269, 89 Am. St. Rep. 815, 63 N. E. 1100; *Leidy v. Quaker City Cold Storage & Warehouse Co.*, 180 Pa. St. 323, 36 Atl. 851.

<sup>4</sup> *Kramer v. Messner*, 101 Ia. 88, 69 N. W. 1142.

<sup>5</sup> See §§ 3187 et seq.

<sup>1</sup> **Florida.** *Williams v. Atlantic Coast Line Ry.*, 56 Fla. 735, 24 L. R. A. (N. S.) 134, 48 So. 209.

**Georgia.** *Fresman v. Macon Gas,*

*Light & Water Co.*, 126 Ga. 843, 7 L. R. A. (N.S.) 917, 56 S. E. 61.

**Maryland.** *Middendorf v. Alexander Milburn Co.*, 134 Md. 385, 107 Atl. 7.

**Massachusetts.** *Batchelder v. Sturgis*, 57 Mass. (3 Cush.) 201; *Scott v. Boston & New Orleans Steamship Co.*, 106 Mass. 468; *Harvey v. Connecticut & Passumpsic Ry.*, 124 Mass. 421, 26 Am. Rep. 673; *Swift River Co. v. Fitchburg Ry.*, 169 Mass. 326, 61 Am. St. Rep. 288, 47 N. E. 1015.

**North Carolina.** *Lee v. Upton*, 178 N. Car. 198, 100 S. E. 268.

**Oklahoma.** *Wiggins v. Jackson*, 31 Okla. 292, 43 L. R. A. (N.S.) 153, 121 Pac. 662.

**Pennsylvania.** *Raby, Inc., v. Ward-Meehan Co.*, 261 Pa. St. 468 [sub nomine, *Thomas Raby, Inc., v. Ward-Meehan Co.*, 104 Atl. 750].

fact sustained, such additional damages can not be recovered "unless the special circumstances which made it reasonable to expect that the greater damages would naturally ensue were, at the time when the contract was made within the knowledge of both parties."<sup>2</sup> If there is a delay in furnishing machinery and the vendor does not know the vendee's business, or the interruption of such business caused by such delay, he is not liable for damages by reason of such interruption.<sup>3</sup> One who has broken his contract to buy corporate stock is not liable for special damages caused by the lapse of certain patent rights through failure of the buyer to pay the agreed price, if it is not shown that the buyer knew of the special circumstances which would result in such loss.<sup>4</sup> No recovery can be had on breach of a contract of sale for loss of profits on a resale if the original vendor did not know of vendee's intention to resell.<sup>5</sup>

A carrier is not liable for special damages, such as interference with the operation of a factory, or of a business, and the like, if he does not know the special circumstances which will result in such damage.<sup>6</sup> A carrier is not liable for the loss of a perishable crop because of his failure to deliver receptacles therefor if he

<sup>2</sup> *Loneragan v. Waldo*, 179 Mass. 135, 139, 88 Am. St. Rep. 365, 60 N. E. 479.

<sup>3</sup> *Creamery Package Mfg. Co. v. Benton County Creamery Co.*, 120 Ia. 584, 95 N. W. 188; *Puget Sound Iron & Steel Works v. Clemmons*, 32 Wash. 36, 72 Pac. 465.

<sup>4</sup> *Middendorf v. Alexander Milburn Co.*, 134 Md. 385, 107 Atl. 7.

<sup>5</sup> *United States. Lynch v. Wright*, 94 Fed. 703.

*Connecticut. Crug v. Gorham*, 74 Conn. 541, 51 Atl. 519.

*Kentucky. Denhard v. Hirst*, 111 Ky. 546, 64 S. W. 393.

*North Carolina. Tillinghast v. Cotton Mills*, 143 N. Car. 268 [sub nomine, *Tillinghast-Styles Co. v. Providence Cotton Mills*, 55 S. E. 621].

*Pennsylvania. Pennypacker v. Jones*, 106 Pa. St. 237.

*Wisconsin. Buffalo Barb Wire Co. v. Phillips*, 64 Wis. 338, 25 N. W. 208.

<sup>6</sup> *England. Gee v. Lancashire & Y. R. Co.*, 6 Hurlst. & N. 210; *Hadley v. Baxendale*, 9 Exch. 341; *Horne v. Midland Ry.*, L. R. 7 C. P. 583.

*Florida. Williams v. Atlantic Coast Line Ry.*, 56 Fla. 735, 131 Am. St. Rep. 169, 24 L. R. A. (N.S.) 134, 48 So. 209.

*Kentucky. Illinois Central Ry. Co. v. Nelson*, 139 Ky. 449, 17 L. R. A. (N. S.) 284, 97 S. W. 757.

*Massachusetts. Mather v. American Exp. Co.*, 138 Mass. 55, 52 Am. Rep. 258; *Swift River Co. v. Fitchburg Ry.*, 169 Mass. 326, 61 Am. St. Rep. 288, 47 N. E. 1015.

*Mississippi. American Express Co. v. Jennings*, 86 Miss. 329, 109 Am. St. Rep. 708, 38 So. 374.

*New Jersey. Higgins v. United States Express Co.*, 83 N. J. L. 398, 85 Atl. 450.

*Pennsylvania. Clyde Coal Co. v. Pittsburg & Lake Erie Ry.*, 226 Pa. St. 391, 26 L. R. A. (N.S.) 1191, 75 Atl. 596.

does not know that such crop can not be delivered until such receptacles are furnished.<sup>7</sup> A water company which wrongfully cuts off the supply of water is not liable for special damages due to the fact that there was illness in such house if they have no notice of such fact.<sup>8</sup>

**§ 3191. Special course of things merely probable.** If the party in default knows that a certain course of circumstances is probable, but does not know that such course of circumstances will follow, he is not liable, if such course of circumstances comes to pass, for the loss which arises by reason thereof.<sup>1</sup> A telegraph company is said not to be liable for damages for failure to transmit a message which is merely an offer or a stage in negotiations, since acceptance of such offer would not necessarily follow even if it might be probable.<sup>2</sup> A agreed to sell oil to B to be delivered at a

**Wisconsin.** *Thomas, Badgley & Wentworth Mfg. Co. v. Wabash, St. Louis & Pac. Ry.*, 62 Wis. 642, 51 Am. Rep. 725, 22 N. W. 827; *Bradley v. Chicago, Milwaukee & St. Paul Ry.*, 94 Wis. 44, 68 N. W. 410.

<sup>7</sup>*Williams v. Atlantic Coast Line Ry.*, 56 Fla. 735, 24 L. R. A. (N.S.) 134, 48 So. 209.

<sup>8</sup>*Freeman v. Macon Gas, Light & Water Co.*, 126 Ga. 843, 7 L. R. A. (N. S.) 917, 56 S. E. 61.

<sup>1</sup>*United States. Globe Refining Co. v. Lauda Cotton Oil Co.*, 190 U. S. 540, 47 L. ed. 1171.

**Arkansas.** *Western Union Telegraph Co. v. Caldwell*, 133 Ark. 184, L. R. A. 1918D, 121, 202 S. W. 232.

**Georgia.** *Richmond Hosiery Mills v. Western Union Telegraph Co.*, 123 Ga. 216, 51 S. E. 290.

**Iowa.** *Bennett v. Western Union Telegraph Co.*, 129 Ia. 607, 106 N. W. 13.

**Kentucky.** *Western Union Telegraph Co. v. Caumissar*, 160 Ky. 569, 169 S. W. 1026.

**Louisiana.** *Oil City Iron Works v. S. Bender Supply Co.*, 147 La. 450, 85 So. 201.

**Mississippi.** *Western Union Telegraph Co. v. Adams Machine Co.*, 92 Miss. 849, 47 So. 412; *Western Union Telegraph Co. v. Webb* (Miss.), 48 So. 408.

**North Carolina.** *Tanning Co. v. Telegraph Co.*, 143 N. Car. 376 [sub nomine, *Cherokee Tanning Extract Co. v. Western Union Telegraph Co.*, 118 Am. St. Rep. 806, 55 S. E. 777].

**West Virginia.** *Beatty Lumber Co. v. Western Union Telegraph Co.*, 52 W. Va. 410, 44 S. E. 309.

<sup>2</sup>**Arkansas.** *Western Union Telegraph Co. v. Caldwell*, 133 Ark. 184, L. R. A. 1918D, 121, 202 S. W. 232.

**Georgia.** *Richmond Hosiery Mills v. Western Union Telegraph Co.*, 123 Ga. 216, 51 S. E. 290.

**Iowa.** *Bennett v. Western Union Telegraph Co.*, 129 Ia. 607, 106 N. W. 13.

**Kentucky.** *Western Union Telegraph Co. v. Caumissar*, 160 Ky. 569, 169 S. W. 1026.

**Mississippi.** *Western Union Telegraph Co. v. Adams Machine Co.*, 92 Miss. 849, 47 So. 412; *Western Union Telegraph Co. v. Webb* (Miss.), 48 So. 408.

certain place. A knew that it was probable that B would use some means of transportation for such oil, but he was not positively advised of such fact. On breach, A was held liable to B for the difference between the market price and the contract price; but not for expenses incurred by B in hiring oil-cars, nor for B's loss of trade.<sup>3</sup> An employer who renounces in advance a contract of employment, by the terms of which the employe, in addition to his salary, has the right to buy goods from his employer at wholesale prices, is not liable in damages for the difference between the wholesale and retail price of the goods which such employe would probably have bought.<sup>4</sup>

**§ 3192. Increase of damages by party not in default.** The party who is not in default is required, from motives of expediency which are largely economic in their character, to exercise some degree of care and diligence for the purpose of rendering the damages as small as possible. His duty on the negative side seems fairly clear. If he knows that the contract is renounced, abandoned, or otherwise discharged, he will not be permitted to continue performance on his part and thus to increase the amount of damages; and if he does so he can not recover the amount which he has added to the original damage by his conduct in continuing performance.<sup>1</sup> By the weight of authority an employe who has

**North Carolina.** *Tanning Co. v. Telegraph Co.*, 143 N. Car. 376 [sub nomine, *Cherokee Tanning Extract Co. v. Western Union Telegraph Co.*, 118 Am. St. Rep. 806, 55 S. E. 777].

**West Virginia.** *Beatty Lumber Co. v. Western Union Telegraph Co.*, 52 W. Va. 410, 44 S. E. 309.

<sup>3</sup> *Globe Refining Co. v. Lauda Cotton Oil Co.*, 190 U. S. 540, 47 L. ed. 1171.

<sup>4</sup> *Harris v. Moss*, 112 Ga. 95, 37 S. E. 123.

<sup>1</sup> **California.** *Benenato v. McDougall*, 166 Cal. 405, 49 L. R. A. (N.S.) 1202, Ann. Cas. 1915C, 871, 137 Pac. 8.

**Colorado.** *Kilpatrick v. Inman*, 46 Colo. 514, 26 L. R. A. (N.S.) 188, 105 Pac. 1080.

**Maine.** *Listman Mill Co. v. Dufresne*, 111 Me. 104, 47 L. R. A. (N.S.) 654, 88 Atl. 354.

**Massachusetts.** *Haynes v. Nye*, 185 Mass. 507, 70 N. E. 932; *Ingraham v. Pullman Co.*, 190 Mass. 33, 2 L. R. A. (N.S.) 1087, 76 N. E. 237.

**Michigan.** *International Text-book Co. v. Jones*, 166 Mich. 86, 131 N. W. 98.

**Minnesota.** *Gibbons v. Bente*, 51 Minn. 499, 22 L. R. A. 80, 53 N. W. 756.

**Nebraska.** *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623, 136 Am. St. Rep. 710, 126 N. W. 293 (obiter).

**New York.** *Clark v. Marsiglia*, 1 Denio (N. Y.) 317; *Ware Bros. Co. v. Cortland Cart & Carriage Co.*, 210 N. Y. 122, 103 N. E. 890.

**North Dakota.** *Davis v. Bronson*, 2 N. D. 300, 33 Am. St. Rep. 783, 16 L. R. A. 655, 50 N. W. 836.

been discharged wrongfully must use reasonable diligence in obtaining similar employment in that neighborhood; and if he does not use such diligence the amount which he could have earned if he had used such diligence is to be deducted from the compensation which he would have received under the contract. He can not remain idle voluntarily and recover the entire contract price.<sup>2</sup> If A and B make a contract by which A is to publish advertising for B for a certain period of time, and B orders such advertising discontinued before the end of such period, A can not continue to publish such advertising and recover the contract rate for the entire period.<sup>3</sup> If A, an architect, agrees to prepare plans for B for a building which was not to exceed a certain cost, and B learns, before he begins the construction thereof, that such building can not be built for such maximum price, B can not continue performance, construct such building, and recover from B the difference between the actual cost of the building and the agreed maximum cost.<sup>4</sup> On failure of A to furnish appliances to B with which B is to perform, B can not continue performance without them at A's expense, if this is much more expensive than purchasing them.<sup>5</sup> In case of a breach of a contract to buy cattle the vendor can not keep them for six months at the vendee's expense.<sup>6</sup>

In some jurisdictions, however, the party who is not in default is permitted to continue performance of certain classes of contracts and to recover the purchase price therefor.<sup>7</sup> This is really a means of permitting the party who is not in default to enforce the contract specifically, without any of the checks which the

**Pennsylvania.** *Miller v. Phillips*, 31 Pa. St. 218.

**Wisconsin.** *Badger State Lumber Co. v. G. W. Jones Lumber Co.*, 140 Wis. 73, 121 N. W. 933; *Richards v. Manitowoc & Northern Traction Co.*, 140 Wis. 85, 133 Am. St. Rep. 1063, 121 N. W. 937.

See, *Damages Upon Repudiation of Contract*, by Joseph H. Beale, Jr., 17 *Yale Law Journal*, 443.

<sup>2</sup> See § 3212.

<sup>3</sup> *Ward v. American Health Food Co.*, 119 Wis. 12, 96 N. W. 388.

See, *Ware Bros. Co. v. Cortland Cart & Carriage Co.*, 210 N. Y. 122, 103 N.

E. 890, where no evidence reducing amount of damage was shown.

<sup>4</sup> *Benenato v. McDougall*, 166 Cal. 405, 49 L. R. A. (N.S.) 1202, Ann. Cas. 1915C, 871, 137 Pac. 8.

<sup>5</sup> *Stonega Coke & Coal Co. v. Addington*, 112 Va. 807, 37 L. R. A. (N. S.) 969, 73 S. E. 257.

<sup>6</sup> *First National Bank v. Ragsdale*, 171 Mo. 168, 71 S. W. 178.

<sup>7</sup> *Feick v. Stephens*, 250 Fed. 185, 162 C. C. A. 321; *John A. Roebling's Sons Co. v. Lock-Stitch Fence Co.*, 130 Ill. 660, 22 N. E. 518; *Marsh v. Blackman*, 50 Barb. (N. Y.) 329.

See § 2899.

court of equity recognizes in determining whether or not it will grant a decree of specific performance.<sup>8</sup>

If the party in default is attempting to perfect performance and the adversary party wrongfully prevents him from so doing, such adversary party can not recover damages because of such defective performance.<sup>9</sup>

**§ 3193. Duty to diminish damages by affirmative action.** As far as the affirmative action of the party who is not in default is concerned, it is generally said that it is his duty, on discharge of the contract by breach of the adversary party, to make use of such means as a reasonable and prudent man would employ in his own affairs to mitigate damages.<sup>1</sup>

This principle, however, does not require the party who is not in default to make every possible precaution to mitigate damages. He is not bound to do more than a reasonable and prudent man

<sup>8</sup> See Chapter LXXXIX.

<sup>9</sup> *Lehmann v. Webster*, 209 Ill. 264, 70 N. E. 600.

<sup>1</sup> *England. Jamal v. Moola Dawood Sons & Co.* [1916], A. C. 175.

*United States. Wicker v. Hoppock*, 73 U. S. (6 Wall.) 94, 18 L. ed. 752; *Warren v. Stoddart*, 105 U. S. 224, 26 L. ed. 1117; *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406; *Roehm v. Horst*, 178 U. S. 1, 44 L. ed. 953.

*Colorado. Kilpatrick v. Inman*, 46 Colo. 514, 26 L. R. A. (N.S.) 188, 105 Pac. 1080.

*Connecticut. Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521.

*Florida. Hodges v. Fries*, 34 Fla. 63, 15 So. 682; *Moses v. Autuono*, 56 Fla. 499, 20 L. R. A. (N.S.) 350, 47 So. 925.

*Kansas. Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Am. St. Rep. 101, 26 Pac. 717; *Hamilton v. McKenna*, 95 Kan. 207, L. R. A. 1915E, 455, 147 Pac. 1126.

*Kentucky. Cincinnati, New Orleans & Texas Pacific Ry. v. Rose*, — Ky. —, 21 L. R. A. (N.S.) 681, 115 S. W. 830.

*Maine. Miller v. Mariners' Church*, 7 Me. 51.

*Massachusetts. Ingraham v. Pullman Co.*, 190 Mass. 33, 2 L. R. A. (N.S.) 1087, 76 N. E. 237; *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 85 N. E. 877; *Hall v. Paine*, 224 Mass. 62, L. R. A. 1917C, 737, 112 N. E. 153.

*Michigan. Talley v. Courter*, 93 Mich. 473, 53 N. W. 621.

*Nebraska. Uhlig v. Barnum*, 43 Neb. 584, 61 N. W. 749; *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623, 13 Am. St. Rep. 710, 126 N. W. 293.

*New York. Taylor v. Read*, 4 Paige (N. Y.) 561; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Thomas W. Finucane Co. v. Board of Education*, 190 N. Y. 76, 14 L. R. A. (N.S.) 1101, 13 Ann. Cas. 441, 82 N. E. 737.

*South Carolina. Colvin v. McCormick Cotton Oil Co.*, 66 S. Car. 61, 44 S. E. 380.

*Vermont. Derosia v. Ferland*, 83 Vt. 372, 28 L. R. A. (N.S.) 577, 76 Atl. 153.

*West Virginia. Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 9 L. R. A. (N.S.) 1130, 57 S. E. 253.

would do if he wished to mitigate his own loss.<sup>2</sup> If the party in default promises to perform in the future, the injured party is not bound to anticipate that he will continue in default;<sup>3</sup> and he is not bound to take steps to reduce damages on the theory that such default will continue.<sup>4</sup> In attempting to diminish damages the party not in default is bound merely to use reasonable care. He is not an insurer of results.<sup>5</sup> If a telegraph company breaks its contract to pay over funds which have been transmitted by telegraph, the determination of the payee to proceed on his journey homeward without funds sufficient to buy food, instead of staying over and taking chances on receiving the money on the following day, can not be said to be an aggravation of damages.<sup>6</sup> On the breach of a sleeping-car company to reserve a drawing room, the determination of a passenger to travel on that train and sit up all night instead of accepting other sleeping accommodations, on the same train, or taking a drawing room on a later train, is said to be an aggravation of damages.<sup>7</sup> On the other hand, this rule is explained as not being a matter of duty to reduce damages, but on the theory that the injured party has not sustained damage by reason of loss which he could have prevented if he had acted as a reasonable and prudent man would act.<sup>8</sup> If the party who is not

<sup>2</sup>United States. *United States v. United States Fidelity & Guaranty Co.*, 236 U. S. 512, 59 L. ed. 696; *Gulf, Colorado & Santa Fe Ry. v. Texas Packing Co.*, 244 U. S. 31, 61 L. ed. 970; *Campfield v. Sauer*, 189 Fed. 576, 111 C. C. A. 14, 38 L. R. A. (N.S.) 837.

**Alabama.** *Bixby-Theirson Lumber Co. v. Evans*, 167 Ala. 431, 140 Am. St. Rep. 47, 29 L. R. A. (N.S.) 194, 52 So. 843.

**Florida.** *Western Union Telegraph Co. v. Wells*, 50 Fla. 474, 2 L. R. A. (N.S.) 1072, 7 Ann. Cas. 531, 39 So. 838.

**Massachusetts.** *Neal v. Jefferson*, 212 Mass. 517, 41 L. R. A. (N.S.) 387, Ann. Cas. 1913D, 205, 99 N. E. 334.

**New York.** *Ehrenworth v. George F. Stuhmer & Co., Inc.*, 229 N. Y. 210, 128 N. E. 108.

**Oregon.** *Krebs Hop Co. v. Livesley*, 59 Or. 574, Ann. Cas. 1913C, 758, 114 Pac. 944, 118 Pac. 165.

**Tennessee.** *Plesofaky v. Kaufman*, 140 Tenn. 208, 1 A. L. R. 433, 204 S. W. 204.

**Washington.** *Florence Fish Co. v. Everett Packing Co.*, 111 Wash. 1, 188 Pac. 792.

<sup>3</sup>*Florence Fish Co. v. Everett Packing Co.*, 111 Wash. 1, 188 Pac. 792.

<sup>4</sup>*Florence Fish Co. v. Everett Packing Co.*, 111 Wash. 1, 188 Pac. 792.

<sup>5</sup>*The Thomas P. Sheldon*, 113 Fed. 779; *Western Union Telegraph Co. v. Wells*, 50 Fla. 474, 2 L. R. A. (N.S.) 1072, 7 Ann. Cas. 531, 39 So. 838.

<sup>6</sup>*Western Union Telegraph Co. v. Wells*, 50 Fla. 474, 2 L. R. A. (N.S.) 1072, 7 Ann. Cas. 531, 39 So. 838.

<sup>7</sup>*Ingraham v. Pullman Co.*, 190 Mass. 33, 2 L. R. A. (N.S.) 1087, 76 N. E. 237.

<sup>8</sup>See, *Replacement in the Market*, by A. G. Sedgwick, 12 Columbia Law Review, 519.

in default fails to take proper steps to mitigate damages, he is not denied all damages by reason of such breach;<sup>9</sup> but he can not recover for damages which might have been prevented by such means.<sup>10</sup> The rule which requires the party not in default to mitigate damages is said to be founded on equitable considerations.<sup>11</sup>

If the party who is not in default acts in a reasonable and prudent manner in an attempt to mitigate damages, and if he incurs necessary and reasonable expenses in so doing, he may recover the cost of such attempt to mitigate damages, even though such attempt proves unsuccessful.<sup>12</sup> An employe who is discharged wrongfully may recover reasonable expenses incurred in trying to secure other employment.<sup>13</sup> If the seller has delivered a defective machine, the buyer may recover reasonable expenses incurred in attempting to put such machine into proper condition, although without success.<sup>14</sup> On breach of a warranty of plastering, the injured party attempted in good faith and in a reasonable manner to remedy defects by patching. This attempt failed. It was held that

<sup>9</sup> *Gulf, Colorado & Santa Fe Ry. v. Texas Packing Co.*, 244 U. S. 31, 61 L. ed. 970; *Crosby v. Plummer*, 111 Me. 355, 89 Atl. 145; *Stonega Coke & Coal Co. v. Addington*, 112 Va. 807, 37 L. R. A. (N.S.) 989, 73 S. E. 257; *Hurxthal v. St. Lawrence Boom & Lumber Co.*, 53 W. Va. 87, 97 Am. St. Rep. 954, 44 S. E. 520.

<sup>10</sup> *England. Jamal v. Moola Dawood Sons & Co.* [1916], A. C. 175.

*United States. Wicker v. Hoppock*, 73 U. S. (6 Wall.) 94, 18 L. ed. 752; *Warren v. Stoddart*, 105 U. S. 224, 26 L. ed. 1117.

*Florida. Moses v. Autuono*, 56 Fla. 499, 20 L. R. A. (N.S.) 350, 47 So. 925.

*Kansas. Hamilton v. McKenna*, 95 Kan. 207, L. R. A. 1915E, 455, 147 Pac. 1126.

*Kentucky. Cincinnati, New Orleans & Texas Pacific Ry. v. Rose*, — Ky. —, 21 L. R. A. (N.S.) 681 115 S. W. 830.

*Maine. Miller v. Mariners' Church*, 7 Me. 51.

*Massachusetts. Ingraham v. Pullman Co.*, 190 Mass. 33, 2 L. R. A. (N.S.) 1087, 76 N. E. 237; *Maynard v. Royal*

*Worcester Corset Co.*, 200 Mass. 1, 85 N. E. 877; *Hall v. Paine*, 224 Mass. 62, L. R. A. 1917C, 737, 112 N. E. 153.

*New York. Taylor v. Read*, 4 Paige (N. Y.) 561; *Thomas W. Finucane Co. v. Board of Education*, 190 N. Y. 76, 14 L. R. A. (N.S.) 1101, 13 Ann. Cas. 441, 82 N. E. 737.

*South Carolina. Colvin v. McCormick Cotton Oil Co.*, 66 S. Car. 61, 44 S. E. 380.

*Vermont. Derosia v. Ferland*, 83 Vt. 372, 28 L. R. A. (N.S.) 577, 76 Atl. 153.

*West Virginia. Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 9 L. R. A. (N.S.) 1130, 57 S. E. 253.

<sup>11</sup> *Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 9 L. R. A. (N. S.) 1130, 57 S. E. 523.

<sup>12</sup> *Dickinson v. Talmage*, 138 Mass. 249; *Whitehead & Atherton Machine Co. v. Ryder*, 139 Mass. 366, 31 N. E. 736; *Nye & Schneider Co. v. Snyder*, 56 Neb. 754, 77 N. W. 118.

<sup>13</sup> *Dickinson v. Talmage*, 138 Mass. 249.

<sup>14</sup> *Whitehead & Atherton Machine Co. v. Ryder*, 139 Mass. 366, 31 N. E. 736.

he could recover as part of his damages the cost of such unsuccessful attempt.<sup>15</sup> Expenses incurred in mitigating loss to the plaintiff, but not in mitigating damages to the defendant, can not be recovered.<sup>16</sup>

If the damages are actually mitigated, the party who is not in default may recover reasonable expenses incurred for such purpose;<sup>17</sup> although he can not recover unreasonable expenditures even if they operate to some extent, to mitigate damages.<sup>18</sup>

The question whether under all the circumstances the party not in default did what he should to mitigate damages is a question of fact.<sup>19</sup>

If the party in default is so successful in his attempt to mitigate damages that he receives more than he would have received in case of performance, the party in default can not recover such profit.<sup>20</sup>

**§ 3194. Specific illustrations.** The practical difficulty in determining to what extent damages should be mitigated is largely due to the difficulty of determining what should be expected of the party who is not in default under the circumstances of the particular case. The owner of a building is not bound to take charge of the construction of the building,<sup>1</sup> or to rebuild it,<sup>2</sup> in order to mitigate damages, if the contractor has not abandoned the contract. The party who is not in default is not bound to abandon the business in which he is engaged and to carry on which he has made the contract in question, in order to mitigate damages.<sup>3</sup>

The party who is not in default is not bound to do a wrongful act in order to mitigate damages.<sup>4</sup> He is not bound to break a

<sup>15</sup> *Nye & Schneider Co. v. Snyder*, 56 Neb. 754, 77 N. W. 118.

<sup>16</sup> *Kennedy v. Atchison, Topeka & Santa Fe Ry.*, 104 Kan. 708, 5 A. L. R. 149, 181 Pac. 117 (amount of liability limited by contract).

<sup>17</sup> *Jackson Architectural Iron Works v. Hurlbut*, 158 N. Y. 34, 52 N. E. 665; *Northern Supply Co. v. Wangard*, 123 Wis. 1, 100 N. W. 1066.

<sup>18</sup> *Northern Supply Co. v. Wangard*, 123 Wis. 1, 100 N. W. 1066.

<sup>19</sup> *Loneragan v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479.

<sup>20</sup> *Whitcomb v. Brant*, 90 N. J. L. 245,

L. R. A. 1917D, 609, 100 Atl. 175 (lessor, on default of lessee, leases for increased rent).

<sup>1</sup> *Leghorn v. Nydell*, 39 Wash. 17, 80 Pac. 833.

<sup>2</sup> *United States v. United States Fidelity & Guaranty Co.*, 236 U. S. 512, 59 L. ed. 696.

<sup>3</sup> *Brazell v. Cohn*, 32 Mont. 556, 81 Pac. 339.

<sup>4</sup> *Des Arc Oil Mill v. Western Union Telegraph Co.*, 132 Ark. 335, 6 A. L. R. 1081, 201 S. W. 273; *Wabash Ry. v. Campbell*, 219 Ill. 312, 3 L. R. A. (N.S.) 1092, 76 N. E. 346.

contract with a third party in order to mitigate damages, although his breach of such contract may result in diminishing the amount of damages.<sup>5</sup> He is not bound to remove notices although wrongfully posted by the adversary party, if a private individual is forbidden by law to remove such notice.<sup>6</sup>

If a lessee renounces a lease, there is a division of authority as to the duty of the lessor to mitigate damages by reletting. In a number of jurisdictions it is held that the lessor is not bound to mitigate damages by taking possession of the premises and reletting,<sup>7</sup> even if he would not be held to have accepted a surrender of the lease by such conduct. This is possibly due to the fact that a lease is not an ordinary contract, but that the lessee has acquired a property right for the entire term which the lessor is not bound to accept in order to mitigate the lessee's damages, the lessee being just as capable of assigning or sub-letting as the lessor is of reletting. In other jurisdictions a lease seems to be treated like an ordinary contract and it is held that the lessor must mitigate damages by reletting.<sup>8</sup> If a lessor breaks a covenant by which he had agreed to renew a lease by renunciation thereof in advance, the lessee is not bound to mitigate damages by accepting a lease from the lessor for the same premises at a higher rate beginning before the new term is to begin.<sup>9</sup> If a lessor has broken the covenants of a lease by failure to deliver possession at the time agreed upon, it is held that the lessee should accept possession if tendered to him soon after such time, if his acceptance will mitigate his damage.<sup>10</sup>

It is the duty of a discharged employe to seek other employment;<sup>11</sup> of the owner of a vessel whose charterer refuses to use and pay for it to seek another charterer;<sup>12</sup> of a lessee whose lessor has refused to put him in possession of the leased premises to

<sup>5</sup> *Des Arc Oil Mill v. Western Union Telegraph Co.*, 132 Ark. 335, 6 A. L. R. 1081, 201 S. W. 273.

<sup>6</sup> *Wabash Ry. v. Campbell*, 219 Ill. 312, 3 L. R. A. (N.S.) 1092, 76 N. E. 346.

<sup>7</sup> *Merrill v. Willis*, 51 Neb. 162, 70 N. W. 914; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576; *Conner v. Warner*, 52 Okla. 630, 152 Pac. 1116; *Brown v. Hayes*, 92 Wash. 300, 159 Pac. 89.

<sup>8</sup> *In re Mullings Clothing Co.*, 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539.

<sup>9</sup> *Neal v. Jefferson*, 212 Mass. 517, 41 L. R. A. (N.S.) 387, Ann. Cas. 1913D, 205, 99 N. E. 334.

<sup>10</sup> *Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 9 L. R. A. (N. S.) 1130, 57 S. E. 523.

<sup>11</sup> See § 3212.

<sup>12</sup> *Watts v. Camors*, 115 U. S. 353, 29 L. ed. 406.

lease others;<sup>13</sup> and in such cases the amount which the injured party thus received from others, or the amount which he might have received by the use of reasonable care and diligence, must be deducted from the amount of damages. If the vendor fails to deliver goods agreed upon, and the vendee can purchase similar goods in the market, he can not increase his damages by refusing to make such purchase.<sup>14</sup> A sold to B pork in leaky barrels. The defects were discovered by B before any harm had been done to the pork. B could recover as damages only the cost of repacking the pork in tight barrels.<sup>15</sup>

**§ 3195. Duty to diminish damages by new contract with party in default.** It is said, in a number of cases, that the party who is not in default is not bound to accept a new contract from the party who is in default, containing terms which are substantially different from that in the original contract.<sup>1</sup> If a seller refuses to perform, the buyer is not bound to mitigate damages by purchasing from such seller at a higher rate,<sup>2</sup> especially if the offer to sell at such higher rate is such, that the buyer will be in danger of waiving his right under the original contract if he accepts such offer.<sup>3</sup>

If the seller has agreed to extend credit to the buyer and subsequently he renounces such contract, there is a division of authority as to the duty of the buyer to purchase such goods from the seller for cash in order to mitigate damages. It has been held that the buyer must accept the seller's offer to sell for cash,<sup>4</sup> provided it is shown that the buyer is financially able to pay cash.<sup>5</sup>

<sup>13</sup> *Hodges v. Fries*, 34 Fla. 63, 15 So. 682.

<sup>14</sup> *Parsons v. Sutton*, 66 N. Y. 92.

<sup>15</sup> *Hitchcock v. Hunt*, 28 Conn. 343.

<sup>1</sup> *Coulter v. B. F. Thompson Lumber Co.*, 142 Fed. 706, 74 C. C. A. 38; *Neal v. Jefferson*, 212 Mass. 517, 41 L. R. A. (N.S.) 387, Ann. Cas. 1913D, 205, 99 N. E. 334; *Minneapolis Threshing Machine Co. v. McDonald*, 10 N. D. 408, 87 N. W. 993; *Plesofsky v. Kaufman*, 140 Tenn. 208, 1 A. L. R. 433, 204 S. W. 204.

<sup>2</sup> *Campfield v. Sauer*, 189 Fed. 576, 111 C. C. A. 14, 38 L. R. A. (N.S.) 837;

*Havemeyer v. Cunningham*, 35 Barb. (N. Y.) 515; *Krebs Hop Co. v. Livesley*, 59 Or. 574, Ann. Cas. 1913C, 758, 114 Pac. 944, 118 Pac. 165.

<sup>3</sup> *Campfield v. Sauer*, 189 Fed. 576, 111 C. C. A. 14, 38 L. R. A. (N.S.) 837; *Krebs Hop Co. v. Livesley*, 59 Or. 574, Ann. Cas. 1913C, 758, 114 Pac. 944, 118 Pac. 165.

See §§ 2494 et seq.

<sup>4</sup> *Lawrence v. Porter*, 63 Fed. 62, 26 L. R. A. 167.

<sup>5</sup> *Lawrence v. Porter*, 63 Fed. 62, 26 L. R. A. 167.

In other jurisdictions it is held that the seller is not bound to accept the offer of the buyer, since a different contract will thus be forced upon the seller from that into which he entered originally.<sup>6</sup> At any rate the buyer is not bound to accept seller's offer if it contains any change in the conditions of the sale other than the demand for cash instead of credit.<sup>7</sup> He is not bound to accept an offer which demands payment of part of the purchase price in advance.<sup>8</sup>

Since the stipulation for credit is likely to be vital, it is difficult to see any justification for permitting the seller to insist that the buyer must accept the seller's offer in which this term is modified in order to mitigate damages, unless the seller is to be permitted to modify all the terms at his pleasure and to require the buyer to enter into an entirely new contract, under penalty of not being able to recover the loss which would have been thus prevented. The analogy of contracts of employment, in which the employe is not bound to engage in business of a substantially different character, would seem to indicate that the purchaser should not be required to enter into a contract substantially different in kind. Even if the purchaser is able to pay cash for this particular item his ability to make use of such cash for other purposes and to secure credit upon the purchases in question, may well have been the very thing which induced the purchaser to enter into such a contract. At any event, the purchaser is not bound to accept the seller's offer to sell for cash if the purchaser is not able to pay cash;<sup>9</sup> and the burden of showing the buyer's ability is upon the seller,<sup>10</sup> even in jurisdictions in which the interests of the seller who is in default are safeguarded most carefully.

It is said that an employe should accept similar employment from the same employer as a means of diminishing damages,<sup>11</sup> unless his acceptance would discharge his right of action under

<sup>6</sup> *Coppola v. Marden, Orth & Hastings Co.*, 282 Ill. 281, 118 N. E. 499; *Louis Cook Manufacturing Co. v. Randall*, 62 Ia. 244, 17 N. W. 507; *Coxe v. Anoka Waterworks, Electric Light & Power Co.*, 87 Minn. 56, 91 N. W. 265.

<sup>7</sup> *Coulter v. B. F. Thompson Lumber Co.*, 142 Fed. 706; *Minneapolis Threshing Machine Co. v. McDonald*, 10 N. D. 408, 87 N. W. 993; *Plesofsky v. Kaufman*, 140 Tenn. 208, 1 A. L. R. 433, 204 S. W. 204.

<sup>8</sup> *Plesofsky v. Kaufman*, 140 Tenn. 208, 1 A. L. R. 433, 204 S. W. 204.

<sup>9</sup> *Plesofsky v. Kaufman*, 140 Tenn. 208, 1 A. L. R. 433, 204 S. W. 204.

<sup>10</sup> *Plesofsky v. Kaufman*, 140 Tenn. 208, 1 A. L. R. 433, 204 S. W. 204.

<sup>11</sup> *Morris Shoe Co. v. Coleman*, 187 Ky. 837, 221 S. W. 242; *Birdsong v. Ellis*, 62 Miss. 418.

*Contra*, *Youngberg v. Lamberton*, 91 Minn. 100, 97 N. W. 571.

the original contract.<sup>12</sup> A passenger who has paid for his transportation is not bound to pay his fare a second time if he is threatened with wrongful expulsion in order to mitigate damages by preventing such expulsion.<sup>13</sup> Even where he is required to pay a second fare if he has the money, he need not borrow for that purpose.<sup>14</sup>

**§ 3196. Escape from ultimate loss as reducing damages.** The rule as to the duty to mitigate damages and the effect of such mitigation applies only to the immediate consequences of performance. After the loss is fixed, the skill or good luck of the party not in default may result in his avoiding ultimate financial loss in the transaction. This is, however, of no consequence in estimating damages. He is entitled to the benefit of the contract which has been broken and to the result of his own skill in avoiding ultimate loss; and such results can not enure to the party in default.<sup>1</sup> A agreed to cure certain fruit for B, but performed his contract in a negligent manner. A is liable to B in damages, even though B finally succeeded in selling such fruit at prices usually obtained for good fruit.<sup>2</sup> On breach of a contract to transport grain the liability of the carrier is not affected by the fact that the shipper made a very favorable settlement with persons to whom he had agreed to sell such grain.<sup>3</sup> Where a telegraph company delays a message and thereby prevents a sale of corn at a price

<sup>12</sup> *Morris Shoe Co. v. Coleman*, 187 Ky. 837, 221 S. W. 242.

<sup>13</sup> *Arkansas. St. Louis Southwestern Ry. v. Branch*, 106 Ark. 269, 153 S. W. 118.

*Kansas. Arnold v. Atchison, Topeka & Santa Fe Ry.*, 81 Kan. 400, 105 Pac. 541.

*Missouri. Cherry v. Chicago & Alton Ry.*, 191 Mo. 489, 109 Am. St. Rep. 830, 2 L. R. A. (N.S.) 695, 90 S. W. 381.

*Texas. Texas & Pacific Ry. v. Payne*, 99 Tex. 46, 122 Am. St. Rep. 603, 70 L. R. A. 946, 87 S. W. 330; *Atchison, Topeka & Santa Fe Ry. v. Lucas*, 105 Tex. 82, 39 L. R. A. (N.S.) 512, 144 S. W. 1126.

*Washington. Loy v. Northern Pacific Ry.*, 68 Wash. 33, 39 L. R. A. (N.S.) 180, 122 Pac. 372.

*Contra, Mahoney v. Detroit Street Ry.*, 93 Mich. 612, 32 Am. St. Rep. 528, 18 L. R. A. 335, 53 N. W. 793.

<sup>14</sup> *Light v. Detroit & Mackinac Ry.*, 165 Mich. 433, 34 L. R. A. (N.S.) 282, 130 N. W. 1124.

<sup>1</sup> *E. E. Thomas Fruit Co. v. Start*, 107 Cal. 206, 40 Pac. 336; *Cobb v. Illinois Central Ry.*, 38 Ia. 601; *Western Union Telegraph Co. v. Nye & Schneider Co.*, 70 Neb. 251, 63 L. R. A. 803, 97 N. W. 305.

See on this question generally, *Accident Insurance as Affecting the Measure of Damages*, by J. Campbell Lorimer, 19 *Juridical Review*, 58.

<sup>2</sup> *E. E. Thomas Fruit Co. v. Start*, 107 Cal. 206, 40 Pac. 336.

<sup>3</sup> *Cobb v. Illinois Central Ry.*, 38 Ia. 601.

above the market price, the company is liable for the difference between the price at which the corn would have sold and the market price, even if the vendor subsequently sold such corn at a higher price.<sup>4</sup>

**§ 3197. To what date damages may be recovered.** The question of the date to which damages are to be computed is often material. If the breach for which the action is brought is such as to discharge the entire contract, all damages caused by such breach, including those which will arise with reasonable certainty after the trial, must be recovered in that action.<sup>1</sup>

The right of the party who is not in default to recover the entire damages for the breach of the contract in one action and the merger of a cause of action in judgment, if he brings an action for less than the entire amount of damages, both are governed by the same principles. The question in each case is whether the breach discharges the entire contract, leaving only a cause of action for damages, or whether the breach does not discharge the contract, and the contract remains in full force and effect. In the former case the party who is in default must bring one action in which he must recover all the damages which he seeks to recover. In the second case he must bring a separate action for each successive breach in case there is more than one breach of such contract. If the breach discharges the contract and the party in default voluntarily sues for less than the amount to which

<sup>4</sup>Western Union Telegraph Co. v. Nye & Schneider Co., 70 Neb. 251, 63 L. R. A. 803, 97 N. W. 305.

<sup>1</sup>United States. Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953.

California. Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62.

Delaware. Ogden-Howard Company v. Brand, — Del. —, 8 A. L. R. 334, 108 Atl. 277.

Iowa. Stoner-McCray System v. Manhattan Oil Co., 176 Ia. 630, 156 N. W. 683.

Kentucky. Standard Oil Co. v. Denton (Ky.), 70 S. W. 282.

Massachusetts. Drummond v. Crane, 159 Mass. 577, 38 Am. St. Rep. 460, 23 L. R. A. 707, 65 N. E. 90.

Michigan. Conlon v. McGraw, 66 Mich. 194, 33 N. W. 388; Webb v. Depew, 152 Mich. 698, 16 L. R. A. (N.S.) 813, 116 N. W. 560.

Minnesota. Rathborne, Hair & Ridgeway Co. v. Wheelihan, 82 Minn. 30, 84 N. W. 638.

Ohio. James v. Allen County, 44 O. S. 226, 58 Am. Rep. 821, 6 N. E. 246.

Vermont. Remelee v. Hall, 31 Vt. 582, 76 Am. Dec. 140; Derosia v. Ferland, 83 Vt. 372, 28 L. R. A. (N.S.) 577, 76 Atl. 153.

West Virginia. Rhoades v. Chesapeake & Ohio Ry., 49 W. Va. 494, 87 Am. St. Rep. 826, 55 L. R. A. 170, 39 S. E. 209.

he is entitled, a judgment for such less amount will bar further recovery.<sup>2</sup>

If the breach for which the action is brought is not such as to discharge the contract, it gives rise to a cause of action for damages, while it leaves the contract itself valid and subsisting.<sup>3</sup> In cases of this sort the plaintiff can not recover, in that action, all damages caused by such breach. According to the weight of authority, damages can be recovered in such cases down to the date of the writ or the time at which the action is commenced, according to local procedure.<sup>4</sup> If the lessor has failed to restore the premises to their former condition after an injury, the obligation of such covenant continues and is not discharged by such breach; and, accordingly, damages can be assessed only to the date of the writ.<sup>5</sup> In some cases, however, recovery can be had down to the date of the trial if the condition of affairs and the damages caused thereby persists from the breach down to such date.<sup>6</sup> In an action to recover damages for breach of a covenant not to compete in business, damages may be recovered down to the date of the trial.<sup>7</sup> If an action has been brought to recover damages for breach of a contract for employment before the expiration of the time fixed for such employment and it is not tried until after the expiration of such period, damages for the entire period may be recovered.<sup>8</sup>

**§ 3198. Time at which right of damages is fixed.** It is generally said that rights of the parties under a contract which has been discharged by breach are fixed at the time of such breach.<sup>1</sup>

<sup>2</sup> See §§ 2555 et seq.

<sup>3</sup> See §§ 2971 et seq., 2981 et seq., and 2994 et seq.

<sup>4</sup> *Bradley v. Washington, Alexandria & Georgetown Steam Packet Co.*, 34 U. S. (9 Pet.) 107, 9 L. ed. 68; *Parker v. Russell*, 133 Mass. 74; *Nathan v. Leland*, 193 Mass. 576, 79 N. E. 793; *Vorenberg v. William Filene's Sons Co.*, 232 Mass. 153, 122 N. E. 287; *Wittenberg v. Mollyneaux*, 59 Neb. 203, 80 N. W. 824; *Barnes v. Coal Co.*, 101 Tenn. 354 [sub nomine, *Barnes v. Black Diamond Coal Co.*, 47 S. W. 498]; *Jackson v. Byrnes*, 103 Tenn. 698, 54 S. W. 984.

<sup>5</sup> *Vorenberg v. William Filene's Sons Co.*, 232 Mass. 153, 122 N. E. 287.

<sup>6</sup> *Bryson v. McCone*, 121 Cal. 153, 53 Pac. 637; *Kochenrath v. Christman*, 180 Ky. 799, 203 S. W. 738; *Allen v. Enneroeth*, 111 Minn. 395, 127 N. W. 426; *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319.

<sup>7</sup> *Kochenrath v. Christman*, 180 Ky. 799, 203 S. W. 738.

<sup>8</sup> *Howay v. Going-Northrup Co.*, 24 Wash. 88, 85 Am. St. Rep. 942, 64 Pac. 135.

<sup>1</sup> *England. Di Ferdinando v. Simon Smits & Co.*, 89 L. J. K. B. N. S. 1039, 11 A. L. R. 358.

*United States. Roberts v. Benjamin*, 124 U. S. 64, 31 L. ed. 334.

If the breach in question consists in a total failure of consideration or in a renunciation of the contract at the time that performance is due, the rights of the parties are fixed at the time of such non-performance or renunciation.<sup>2</sup> If the contract is one which is to be performed in installments the rights of the parties are fixed as of the dates on which each installment is due.<sup>3</sup> The time of the first discovery of defects in articles is said to be the time for fixing damages, although there is an intervening delay before it is discovered that such defects can not be remedied.<sup>4</sup>

A delay of one day in buying property on refusal of the seller to accept it and to indemnify his broker is not unreasonable, and it is said that damages may be fixed as of the date of such purchase.<sup>5</sup>

If a contract is discharged by renunciation before performance is due, more difficult questions are presented. If there has been defective tender followed by renunciation it is said that the date

**California.** *Moss v. Smith*, 181 Cal. 519, 185 Pac. 385.

**Connecticut.** *Rabinowitz v. Apter*, 90 Conn. 1, 96 Atl. 157.

**Illinois.** *Summers v. Hibbard, Spencer, Bartlett & Co.*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

**Iowa.** *Brown v. Sharkey*, 93 Ia. 157, 61 N. W. 364.

**Maryland.** *United Railways & Electric Co. v. Wehr*, 103 Md. 323, 63 Atl. 475.

**Massachusetts.** *Jewett v. Brooks*, 134 Mass. 505.

**New Hampshire.** *Trask v. Hamburger*, 70 N. H. 453, 48 Atl. 1087.

**Tennessee.** *Goodloe v. Goodloe*, 116 Tenn. 252, 6 L. R. A. (N.S.) 703, 8 Ann. Cas. 112, 92 S. W. 767.

**Wisconsin.** *Malueg v. Hatten Lumber Co.*, 140 Wis. 381, 122 N. W. 1057.

If allowance for exchange is to be made in computing unliquidated damages, it is said that the rate of exchange prevailing at the time of the breach must control; and not that prevailing at the time of the judgment.

Foreign currency depreciated. *Di Ferdinando v. Simon Smits & Co.*, 89

L. J. K. B. N. S. 1C30, 11 A. L. R. 358.

Domestic currency depreciated. *Lebaupin v. Crispin* [1920], 2 K. B. 714.

Under a contract to pay a debt, exchange has been allowed as of the time of the trial; *Marburg v. Marburg*, 26 Md. 8, 90 Am. Dec. 84; *Hawes v. Woolcock*, 26 Wis. 629.

<sup>2</sup> **United States.** *Roberts v. Benjamin*, 124 U. S. 64, 31 L. ed. 334.

**Illinois.** *Summers v. Hibbard, Spencer, Bartlett & Co.*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

**Iowa.** *Brown v. Sharkey*, 93 Ia. 157, 61 N. W. 364.

**Maryland.** *United Railways & Electric Co. v. Wehr*, 103 Md. 323, 63 Atl. 475.

**New Hampshire.** *Trask v. Hamburger*, 70 N. H. 453, 48 Atl. 1087.

**Washington.** *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621.

<sup>3</sup> *Roller v. Leonard*, 229 Fed. 607, 143 C. C. A. 629.

<sup>4</sup> *Moss v. Smith*, 181 Cal. 519, 185 Pac. 385.

<sup>5</sup> *Alger-Fowler Co. v. Tracy*, 98 Minn. 432, 107 N. W. 1124.

of the renunciation and not the date of the defective tender fixes the damages.<sup>6</sup> At the same time, it is generally recognized that the party in default can not alter the date at which damages are to be fixed by his renunciation before performance is due.<sup>7</sup> If a contract calls for delivery during a certain period at the election of the buyer, the buyer may make his election at the point within such period at which he wishes, in spite of the fact that the seller has renounced the contract.<sup>8</sup> If the proper measure of damages is the difference between the contract price and the market price at time of delivery, renunciation on the part of the seller can not change such date from the time of performance to the time of renunciation.<sup>9</sup>

On renunciation, however, the party who is not in default may elect to treat the contract as discharged and may regard the rights of the parties as fixed at that time,<sup>10</sup> especially if such renunciation occurs after the earliest point of time at which the party who is not in default could have demanded performance.<sup>11</sup> If the party who is not in default postpones his acceptance of the renunciation, he postpones it for the benefit of both parties as far as the measure of damages is concerned;<sup>12</sup> and if the damages are less at the date at which he accepts such renunciation than they are at the date of the renunciation, the party who is in default may have the benefit thereof.<sup>13</sup> It has been said, however, that the party who is not in default can not increase the damages by electing to treat renunciation as a breach.<sup>14</sup>

## II

### ITEMS OF DAMAGE

**§ 3199. Profits—Remoteness.** The courts frequently deny to the party who is not in default, profits which he had expected to

<sup>6</sup> *Ashmore v. Cox* [1890], 1 Q. B. 436.

<sup>7</sup> *Long v. Conklin*, 75 Ill. 32; *Kadish v. Young*, 108 Ill. 170; *Mount Vernon Brewing Co. v. Teachner*, 108 Md. 158, 16 L. R. A. (N.S.) 758, 69 Atl. 702.

<sup>8</sup> *Long v. Conklin*, 75 Ill. 32.

<sup>9</sup> *Kadish v. Young*, 108 Ill. 170.

<sup>10</sup> *Kansas Flour Mills Co. v. Brandt*, 98 Kan. 587, L. R. A. 1917A, 1000, 158 Pac. 1120; *Davidor v. Bradford*, 129 Wis. 524, 8 L. R. A. (N.S.) 124, 109 N. W. 576.

<sup>11</sup> *Kansas Flour Mills Co. v. Brandt*, 98 Kan. 587, L. R. A. 1917A, 1000, 158 Pac. 1120.

<sup>12</sup> *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575.

<sup>13</sup> *Louisville Packing Co. v. Crain*, 141 Ky. 379, 132 S. W. 575.

<sup>14</sup> *Greenwall Theatrical Circuit Co. v. Markowitz*, 97 Tex. 479, 65 L. R. A. 302, 79 S. W. 1069.

realize out of the transaction, because the loss of such profits does not flow from the breach in the natural course of events, or is not within the contemplation of the parties.<sup>1</sup> Recovery of profits is also denied occasionally on the ground that only such special circumstances as are fairly within the contemplation of the parties can be considered in measuring damages,<sup>2</sup> and profits in the particular case were not fairly within the contemplation of the parties.<sup>3</sup> Unless the party to the contract knows of these special circumstances or unless he has expressly assumed such obligation, he is not liable for profits which the party who was not in default had expected to realize from other independent transactions into which he has entered in reliance on the contract in question.<sup>4</sup> Loss of rental through delay in obtaining possession of a building is too remote to be recovered as damages against an architect whose negligence in preparing the plans and specifications caused such

<sup>1</sup> **Canada.** *Corbin v. Thompson*, 39 Can. S. C. 575.

**United States.** *Western Union Telegraph Co. v. Lewis*, 203 Fed. 832, 122 C. C. A. 150, 49 L. R. A. (N.S.) 927; *Chicago Life Insurance Co. v. Tiernan*, 263 Fed. 325.

**Florida.** *Bayshore Development Co. v. Bonfoey*, 75 Fla. 455, L. R. A. 1918D, 889, 78 So. 507.

**Georgia.** *Goodin v. Southern Ry.*, 125 Ga. 630, 6 L. R. A. (N.S.) 1054, 5 Ann. Cas. 573, 54 S. E. 720; *Upmago Lumber Co. v. Monroe*, 148 Ga. 847, 98 S. E. 498.

**Indiana.** *Connersville Wagon Co. v. McFarlan Carriage Co.*, 166 Ind. 123, 3 L. R. A. (N.S.) 709, 76 N. E. 294.

**New York.** *Cramer v. Grand Rapids Show Case Co.*, 223 N. Y. 63, 1 A. L. R. 154, 119 N. E. 227.

**North Carolina.** *Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co.*, 141 N. Car. 284, 8 L. R. A. (N.S.) 255, 53 S. E. 885; *Harper Furniture Co. v. Southern Express Co.*, 148 N. Car. 87, 30 L. R. A. (N.S.) 483, 62 S. E. 145.

**Oklahoma.** *Wiggins v. Jackson*, 31 Okla. 292, 43 L. R. A. (N.S.) 153, 121 Pac. 662.

**Oregon.** *McGinnis v. Studebaker Corporation of America*, 75 Or. 519, L. R. A. 1916B, 868, Ann. Cas. 1917B, 1190, 146 Pac. 825.

**Washington.** *Webster v. Beau*, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013; *Boston Trust Co. v. Evelon Co.*, 96 Wash. 31, 164 Pac. 606.

In many cases recovery of profits is denied because the loss of profits does not follow naturally from the breach and because the amount of profits is uncertain.

See § 3200.

<sup>2</sup> See §§ 3186 et seq.

<sup>3</sup> *Stoddard v. Treadwell*, 26 Cal. 294; *Somers v. Wright*, 115 Mass. 292; *Mason v. Howes*, 122 Mich. 329; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13.

<sup>4</sup> **England.** *Williams v. Aguis, Limited* [1914], A. C. 510.

**Canada.** *Corbin v. Thompson*, 39 Can. S. C. 575.

**Georgia.** *Goodin v. Southern R. Co.*, 125 Ga. 630, 6 L. R. A. (N.S.) 1054, 5 Ann. Cas. 573, 54 S. E. 720.

**Illinois.** *Olmstead v. Burke*, 25 Ill. 74.

**Wisconsin.** *Serfling v. Andrews*, 106 Wis. 78, 81 N. W. 991.

delay.<sup>5</sup> On breach of contract by a landlord to repair a dwelling house, no recovery can be had by the tenant for loss of profits caused by the interruption to business.<sup>6</sup> On breach of a contract to exchange land, damage arising from loss of an opportunity to sell wood or failure to build a barn resulting in the loss of hay are too remote to be recovered.<sup>7</sup> On breach of a covenant to renew a lease, future profits that would be made thereby can not be recovered.<sup>8</sup> On breach of a contract to complete a railroad, loss of profits that would have been made on shipments is too remote.<sup>9</sup> If a vessel contracted for is not delivered in time, loss of profits is too remote. The measure of damages is interest on the amount paid in advance for the time of delay.<sup>10</sup> It has been held that on breach of a contract to sell a patent-right, profits of a contemplated resale can not be recovered.<sup>11</sup> Under a contract to sell horses, knowing that they are to be used to cultivate a certain tract of land, damages arising from inability to cultivate such tract because such horses were not sound is too remote.<sup>12</sup> If defective goods are sold, it is said that the expense of transportation, using and removing the defective articles may be recovered, but not damage for delay, loss of time, extra work in superintending and trouble.<sup>13</sup> The profit which would have been made on a resale of land can not be recovered as damages for failure to deliver a telegram making an offer therefor.<sup>14</sup> Damage for loss of freight can not be recovered for failure to deliver a telegram from the owner of a vessel to the captain thereof, instructing him in effect to await further orders as to cargo before leaving.<sup>15</sup> Damages sustained by the loss of patent rights because of inability to raise

<sup>5</sup> Bayshore Development Co. v. Bonfoey, 75 Fla. 455, L. R. A. 1918D, 889, 78 So. 507.

<sup>6</sup> Mason v. Howes, 122 Mich. 329, 81 N. W. 111.

<sup>7</sup> Frederick v. Hillebrand, 199 Mich. 333, 165 N. W. 810.

<sup>8</sup> Grubb v. Burford, 98 Va. 553, 37 S. E. 4.

<sup>9</sup> Contra, Neal v. Jefferson, 212 Mass. 517, 41 L. R. A. (N.S.) 387, Ann. Cas. 1913D, 205, 99 N. E. 334.

<sup>10</sup> Atlantic & Danville Ry. v. Delaware Construction Co., 98 Va. 503, 37 S. E. 13.

<sup>11</sup> De Ford v. Maryland Steel Co., 113 Fed. 72.

<sup>12</sup> Skirm v. Hilliker, 66 N. J. L. 410, 49 Atl. 679.

<sup>13</sup> Wiggins v. Jackson, 31 Okla. 292, 43 L. R. A. (N.S.) 153, 121 Pac. 662.

<sup>14</sup> McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360, 8 L. R. A. (N. S.) 1110.

<sup>15</sup> Western Union Telegraph Co. v. Lewis, 203 Fed. 832, 122 C. C. A. 150, 49 L. R. A. (N.S.) 927.

<sup>16</sup> Western Union Telegraph Co. v. Sullivan, 82 O. S. 14, 91 N. E. 867. (The telegram did not, perhaps, disclose such intent to the telegraph company.)

funds to preserve them can not be recovered on breach of contract to sell corporation stock, the funds from which would have been thus applied.<sup>16</sup> The courts which refused to recognize seduction as an element of damage in a breach of contract to marry do so on the theory that such damage does not follow naturally from such breach.<sup>17</sup> Damage arising from breach of a contract to locate a business in a specified city and to maintain it for a certain period, which damage consists in injury to the value of the promisee's property, is too remote.<sup>18</sup> On breach of a contract to furnish medical attention and care in a hospital in case of sickness, injury sustained by being obliged to resort to charity is within the contemplation of the parties.<sup>19</sup> The loss of a prize is not too remote to be considered as a damage due to the discontinuance of a contest in which such prize was offered.<sup>20</sup> Under the sale of goods act, it is held that, on delay in delivery, due to the failure of the buyer to furnish shipping orders, the risk is on the buyer, although the title remains in the seller and the goods are destroyed by external causes for which the buyer is not directly responsible.<sup>21</sup>

**§ 3200. Profits—Uncertainty.** The rule that damages must be shown with reasonable certainty, often prevents recovery of profits contemplated by the injured party.<sup>1</sup> On breach of a con-

<sup>16</sup> *Middendorf, Williams & Co. v. Alexander Milburn Co.*, 134 Md. 385, 107 Atl. 7.

<sup>17</sup> *Wrynn v. Downey*, 27 R. I. 454, 114 Am. St. Rep. 63, 4 L. R. A. (N.S.) 615, 8 Ann. Cas. 912, 63 Atl. 401.

<sup>18</sup> *Fitzsimmons v. Chapman*, 37 Mich. 139, 26 Am. Rep. 508; *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541.

See also, *Webster v. Beau*, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013.

<sup>19</sup> *Coffey v. Northwestern Hospital Association*, 96 Or. 100, 189 Pac. 407.

<sup>20</sup> *Wachtel v. National Alfalfa Journal Co.*, — Ia. —, 176 N. W. 801.

<sup>21</sup> *Schenning v. Devere & Schloegel Lumber Co.*, — Wis. —, 180 N. W. 136.

<sup>1</sup> *California. Friedman v. McKay Leather Co.*, 179 Cal. 566, 178 Pac. 139.

*Georgia. Upmago Lumber Co. v. Monroe*, 148 Ga. 847, 98 S. E. 498.

*Indiana. Connersville Wagon Co. v.*

*McFarlan Carriage Co.*, 166 Ind. 123, 3 L. R. A. (N.S.) 709, 76 N. E. 294.

*Kentucky. Clarke v. Blue Licks Springs Co.*, 184 Ky. 827, 213 S. W. 222.

*Maryland. Winslow Elevator & Machine Co. v. Hoffman*, 107 Md. 621, 17 L. R. A. (N.S.) 1130, 69 Atl. 394.

*Michigan. Sandusky Grain Co. v. Borden's Condensed Milk Co.*, — Mich. —, 183 N. W. 218.

*North Carolina. Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co.*, 141 N. Car. 284, 8 L. R. A. (N. S.) 255, 53 S. E. 885.

*Ohio. Rhodes v. Baird*, 16 O. S. 573.

*Oregon. McGinnis v. Studebaker Corporation of America*, 75 Or. 519, L. R. A. 1916B, 868, Ann. Cas. 1917B, 1190, 146 Pac. 825.

*Washington. Webster v. Beau*, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013.

tract to make a lease of certain realty to be used as a peach orchard, which breach consisted in evicting plaintiff within two years after he had taken possession; and after he had planted the peach trees, it was held that future profits could not be recovered, but that the measure of damages was the value of the plaintiff's interest in the orchard at the time of eviction.<sup>2</sup> The damages which follow the breach of a contract to establish a business are too uncertain to be recovered,<sup>3</sup> especially if such business is to be established at a distance and in a country which is thinly settled,<sup>4</sup> so that the success of the business is entirely speculative. A sales agent can not recover damages based on the fact that he has discovered a number of persons to whom he might be able to make sales, since it is uncertain whether he will be able to make such sales and to earn commissions thereon.<sup>5</sup> On breach of a contract to exhibit a machine at an exposition, the profits which might have been made from sales which might have been made at such exhibit, are too uncertain to be recovered.<sup>6</sup> Under a contract for the lease of a tram road and the equipment thereof, the profits which might have been earned if the road had been in proper condition are too uncertain to be recovered.<sup>7</sup> On breach of a contract to drill a well for oil or gas, the loss of profits arising from inability to use the well can not be recovered as damages.<sup>8</sup> If an elevator is defective, loss of rents by reason thereof can not be recovered.<sup>9</sup>

**§ 3201. Profits—Recovery allowed.** The result of the combination of the doctrines of uncertainty and remoteness as applied by many of the courts is to deny to the party who is not in de-

<sup>2</sup> Rhodes v. Baird, 16 O. S. 573.

<sup>3</sup> Sandusky Grain Co. v. Borden's Condensed Milk Co., — Mich. —, 183 N. W. 218; Webster v. Beau, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013.

Damages due to loss of profits arising from delay in completing a milk-condensery can not be recovered if such profits depend on the amount of milk that producers would sell to such condensery. Sandusky Grain Co. v. Borden's Condensed Milk Co., — Mich. —, 183 N. W. 218.

<sup>4</sup> Webster v. Beau, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013.

<sup>5</sup> McGinnis v. Studebaker Corporation of America, 75 Or. 519, L. R. A. 1916B, 868, Ann. Cas. 1917B, 1100, 146 Pac. 825.

<sup>6</sup> Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co., 141 N. Car. 284, 8 L. R. A. (N.S.) 255, 53 S. E. 885.

<sup>7</sup> Upmago Lumber Co. v. Monroe, 148 Ga. 847, 98 S. E. 498.

<sup>8</sup> Clarke v. Blue Licks Springs Co., 184 Ky. 827, 213 S. W. 222.

<sup>9</sup> Winslow Elevator & Machine Co. v. Hoffman, 107 Md. 621, 17 L. R. A. (N. S.) 1130, 69 Atl. 394.

fault the right to recover profits in many cases where the amount of prospective profits is the only measure of substantial damages, which can be applied so as to do justice. By the application of the doctrine of remoteness, the party who is not in default is frequently denied the recovery of losses which he has sustained in reliance upon the contract in question. By the application of the doctrine of uncertainty the party who is in default is frequently able to escape, practically without any liability in many cases. Where the only compensation consists of prospective profits only nominal damages can be recovered if the amount of such prospective profits can not be shown. By the application of this principle the party who is in default, and who by his own default has prevented the adversary party from making the amount of these profits certain, is able to take advantage of his own default and to escape without paying any substantial damages because he has, himself, made it impracticable to ascertain the amount. In many of these cases it would apparently lead to a result far more just, to permit the jury to hear all the evidence as to the probable scope of the business and the probable expenses including amounts earned and expenses in similar lines of business, and to find, from this evidence, the amount of damage actually sustained. While the answer thus reached could never be shown to be the exact amount that would have been earned under the contract, it is far better than permitting the party in default to escape with nominal damages.

While some of the earlier cases indicate an unwillingness on the part of the courts to recognize prospective profits as an element of damage under any circumstances,<sup>1</sup> there is, at modern law, no arbitrary rule forbidding the recovery of profits as such. If they follow naturally from the breach, are not too remote and can be proved with sufficient certainty, there is no reason why they may not be considered as an element of damage.<sup>2</sup>

<sup>1</sup> See discussion in *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250.

<sup>2</sup> England. *Hadley v. Baxendale*, 9 Exch. 341.

Alabama. *Watson v. Kirby*, 112 Ala. 436, 20 So. 624; *Baxley v. Tallassee & Montgomery Ry.*, 123 Ala. 183, 29 So. 451.

Arkansas. *Blumenthal v. Bridges*, 91 Ark. 212, 120 S. W. 974 [sub nomine,

*Bluthenthal v. Bridges*, 24 L. R. A. (N. S.) 279]; *Marion Hotel Co. v. Dickinson*, 141 Ark. 188, 216 S. W. 1049.

Connecticut. *Warner v. McLay*, 92 Conn. 427, 103 Atl. 113; *Edward DeV. Tompkins, Inc., v. Bridgeport*, 94 Conn. 687, 110 Atl. 183.

Florida. *Silver Springs, Ocala & Gulf Ry. v. Van Ness*, 45 Fla. 559, 34 So. 884.

On breach of a contract, even the courts which seem the most hostile to the recovery of profits as such, permit the recovery of profits obtained by deducting from the contract price the cost of performance to the party who is not in default.<sup>3</sup> On breach of a contract for which A agreed to supply B with coal at a certain

**Idaho.** *Trego v. Arave*, 20 Ida. 38, 35 L. R. A. (N.S.) 1021, 116 Pac. 119.

**Iowa.** *Rule v. McGregor*, 117 Ia. 419, 90 N. W. 811.

**Kentucky.** *Union Cotton Co. v. Bondurant*, 188 Ky. 319, 222 S. W. 66.

**Louisiana.** *Usrey Lumber Co. v. Huie-Hodge Lumber Co.*, 146 La. 296, 83 So. 578.

**Massachusetts.** *Dondis v. Borden*, 230 Mass. 73, 119 N. E. 184.

**Michigan.** *Martindale v. Lobdell-Emery Manufacturing Co.*, 189 Mich. 477, L. R. A. 1918F, 1, 155 N. W. 559.

**Minnesota.** *Emerson v. Pacific Coast & Norway Packing Co.*, 96 Minn. 1, 1 L. R. A. (N.S.) 445, 104 N. W. 573; *Newhall v. Journal Printing Co.*, 105 Minn. 44, 20 L. R. A. (N.S.) 899, 117 N. W. 228; *Stronge Warner Co. v. Choate*, — Minn. —, 182 N. W. 712.

**Nebraska.** *Schrand v. Young*, 62 Neb. 254, 86 N. W. 1085.

**North Carolina.** *Hamilton v. Western North Carolina Ry.*, 96 N. Car. 398, 3 S. E. 164; *Herring v. Armwood*, 130 N. Car. 177, 57 L. R. A. 958, 41 S. E. 96; *Gardner v. Postal Telegraph-Cable Co.*, 171 N. Car. 405, L. R. A. 1916E, 484, 88 S. E. 630; *Walls v. Carolina Spruce Co.*, 175 N. Car. 661, 96 S. E. 36; *Nance v. Western Union Telegraph Co.*, 177 N. Car. 313, 98 S. E. 838; *Storey v. Stokes*, 178 N. Car. 400, 100 S. E. 689.

**Oklahoma.** *Fort Smith & Western Ry. v. Williams*, 30 Okla. 726, 40 L. R. A. (N.S.) 494, 121 Pac. 275; *Cloe v. Rogers*, 31 Okla. 255, 38 L. R. A. (N.S.) 366, 121 Pac. 201.

**Pennsylvania.** *Macan v. Scandinavia Belting Co.*, 264 Pa. St. 384, 5 A. L. R. 1502, 107 Atl. 750.

**South Dakota.** *Karsten v. Root*, 40 S. D. 236, 167 N. W. 147.

**Tennessee.** *Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 7 Ann. Cas. 1172, 92 S. W. 518.

**Virginia.** *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

**Washington.** *Bromley v. Heffernan Engine Works*, 108 Wash. 31, 182 Pac. 929; *Nelson v. Davenport*, 108 Wash. 259, 183 Pac. 132.

**Wisconsin.** *Lincoln v. Charles Alshuler Mfg. Co.*, 142 Wis. 475, 28 L. R. A. (N.S.) 780, 125 N. W. 908.

"It is sometimes said that loss of profits to arise from a good bargain may not be considered in estimating the damages from breach of an executory contract; but, on examination, the position will be found to obtain only where, in a given instance, from the uncertainties of trade, the fluctuation of prices, or the like, these anticipated proofs present too many elements of uncertainty to be made the basis of a satisfactory business adjustment. This, however, is not because they are profits, but by reason of their uncertainty; and where it appears that such profits were in reasonable contemplation of the parties, and the contract and evidence relevant to the inquiry afford data from which the amount may be ascertained with a reasonable degree of certainty, the profits to arise from a good bargain may be recovered." *Gardner v. Postal Telegraph-Cable Co.*, 171 N. Car. 405, L. R. A. 1916E, 484, 88 S. E. 630.

<sup>3</sup> *Warner v. McLay*, 92 Conn. 427, 103 Atl. 113; *Gregory v. Harlan Home Coal Co.*, 182 Ky. 524, 206 S. W. 765; *Magnolia Metal Co. v. Gale*, 189 Mass. 124, 75 N. E. 219.

rate and to give to B the exclusive privilege of selling it at a certain place, the measure of damages is said to be the amount which B would have received less his expenses, including the cost of the coal.<sup>4</sup>

**§ 3202. Contract for earning and dividing profits.** If the contract which is broken is one which contemplates the earning and division of profits as the essential part of its performance, the amount of the prospective profits which would have been earned under such contract is the only measure of damages which can be used, if the party who is not in default is to be placed in the position in which he would have been if the contract had been performed.<sup>1</sup> On wrongful breach of a partnership contract, the measure of damages is the profits which the party not in default would have received if the contract had been performed.<sup>2</sup> Profits furnish the measure of damages under a contract to divide profits earned by feeding steers,<sup>3</sup> or to divide the increase of a flock of sheep and the wool clip.<sup>4</sup> On breach of a contract for services to be paid for by a share of the profits, the amount of such profits is to be considered in determining the amount of damages.<sup>5</sup> On breach of

<sup>4</sup> *Gregory v. Harlan Home Coal Co.*, 182 Ky. 524, 206 S. W. 765.

<sup>1</sup> *Arkansas. United States Auto Co. v. Arkadelphia Milling Co.*, 140 Ark. 73, 215 S. W. 641.

*California. Friedman v. McKay Leather Co.*, 179 Cal. 566, 178 Pac. 139.

*Iowa. Rule v. McGregor*, 117 Ia. 419, 90 N. W. 811.

*Kansas. Vaught v. Pettyjohn*, 104 Kan. 174, 178 Pac. 623.

*Kentucky. Gregory v. Harlan Home Coal Co.*, 182 Ky. 524, 206 S. W. 765.

*Minnesota. Emerson v. Pacific Coast & Norway Packing Co.*, 96 Minn. 1, 1 L. R. A. (N.S.) 445, 6 Ann. Cas. 973, 104 N. W. 573; *Stronge Warner Co. v. Choate*, — Minn. —, 182 N. W. 712.

*Nebraska. Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085.

*North Carolina. Storey v. Stokes*, 178 N. Car. 409, 100 S. E. 689.

*Oklahoma. Farwell v. Wilcox*, — Okla. —, 175 Pac. 936.

*South Dakota. Karsten v. Root*, 40 S. D. 236, 167 N. W. 147.

*Virginia. Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

<sup>2</sup> *Farwell v. Wilcox*, — Okla. —, 175 Pac. 936.

<sup>3</sup> *Rule v. McGregor*, 117 Ia. 419, 90 N. W. 811. (A case arising out of a refusal to furnish steers to be fed. Probable expenses for extra help, and the amount actually received by the injured party for his own labor during the term of the contract, should be deducted.)

<sup>4</sup> *Schrandt v. Young*, 2 Neb. (unofficial) 546, 89 N. W. 607; 62 Neb. 254, 86 N. W. 1085.

<sup>5</sup> *Friedman v. McKay Leather Co.*, 179 Cal. 566, 178 Pac. 139; *Emerson v. Pacific Coast & Norway Packing Co.*, 96 Minn. 1, 1 L. R. A. (N.S.) 445, 6 Ann. Cas. 973, 104 N. W. 573; *Karsten v. Root*, 40 S. D. 236, 167 N. W. 147.

a contract by which a broker is to sell land for the owner thereof and is to receive a certain share of the profits, after a certain amount is paid to the owner, the profits which the broker would have earned can be recovered as damages,<sup>6</sup> at least if the owner sold the property at a reasonable profit over the amount which he would have received if he had performed the contract.<sup>7</sup> If A wrongfully prevents B from performing an oral contract for the sale of land, the measure of damages is the amount of profit which B would have made by reason of such sale.<sup>8</sup>

**§ 3203. Profits on breach of contract for sale of goods.** Ordinarily, the loss of profits which the buyer would have made on a contemplated resale can not be recovered.<sup>1</sup> This is the rule where the seller does not know of such intended resale.<sup>2</sup> If the seller is aware at the time at which he enters into the contract, that the buyer intends to resell such goods, and the buyer is unable to lessen the amount of his damages by purchasing such goods elsewhere at a reasonable price, the measure of the buyer's damages is the difference between the price at which he had agreed to resell them or could have resold them, and the contract price, less the expenses, if any, of the resale which was saved to the buyer by such default,<sup>3</sup> at least if no more accurate measure of damages

Loss of profits may be recovered for breach of a contract to manage a department of a department store and to pay the profits to the manager after deducting expenses which include rent. *Stronge Warner Co. v. Choate*, — Minn. —, 182 N. W. 712.

<sup>6</sup> *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

<sup>7</sup> *Atlantic Coast Realty Co. v. Townsend*, 124 Va. 490, 98 S. E. 684.

<sup>8</sup> *Vaught v. Pettyjohn*, 104 Kan. 174, 178 Pac. 623.

<sup>1</sup> *Holloway v. White-Dunham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N.S.) 704, 10 Ann. Cas. 509; *Crug v. Gorham*, 74 Conn. 541, 51 Atl. 519; *W. K. Henderson Lumber Co. v. Stilwell*, 130 Mich. 124, 89 N. W. 718.

<sup>2</sup> *Holloway v. White-Dunham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10

L. R. A. (N.S.) 704, 10 Ann. Cas. 509; *South Gardiner Lumber Co. v. Bradstreet*, 97 Me. 165, 53 Atl. 1110.

<sup>3</sup> *Idaho. Trego v. Arave*, 20 Ida. 38, 35 L. R. A. (N.S.) 1021, 116 Pac. 119.

*Kentucky. Denhard v. Hurst*, 111 Ky. 546, 64 S. W. 393; *Tradewater Coal Co. v. Lee* (Ky.), 68 S. W. 400, 24 Ky. L. Rep. 215.

*Louisiana. Usrey Lumber Co. v. Huie-Hodge Lumber Co.*, 146 La. 296, 83 So. 578.

*Michigan. Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147, 30 Am. St. Rep. 421, 51 N. W. 197; *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. Rep. 378, 92 N. W. 788.

*Minnesota. Newhall v. Journal Printing Co.*, 105 Minn. 44, 20 L. R. A. (N.S.) 899, 117 N. W. 228.

in the particular case can be discovered. On a breach of a contract to grant the exclusive right to sell a newspaper in a certain territory the prospective profits may be recovered.<sup>4</sup>

If the goods can be purchased readily in the open market the measure of damages is the difference between the contract price and the market price;<sup>5</sup> but if they can not thus be purchased, the measure of damages is the profit lost by such breach.<sup>6</sup>

If one who has agreed to sell and deliver machinery which he knows is necessary to the operation of a certain business, fails to perform his contract, some liability attaches; but the courts have been unable to agree as to the proper measure of damages. Considerations of supposed uncertainty and remoteness have induced some courts to hold that the profit which the purchaser has lost by reason of such breach, can not be the measure of damages.<sup>7</sup> If failure to receive this machinery has not prevented the operation of the rest of the mill or factory the measure of damages for delay is the value of the use of the machinery.<sup>8</sup> If failure to receive the machinery prevents the use of part or all of the property which is devoted to such business, and if the seller has no notice of other prospective damages which will be caused by his breach, he is liable for the fair rental value of that part of such property, the use of which the buyer is necessarily deprived by reason of the

New York. *Ellis v. Miller*, 164 N. Y. 434, 58 N. E. 516.

North Carolina. *Storey v. Stokes*, 178 N. Car. 409, 100 S. E. 689.

Oregon. *Hockersmith v. Hanley*, 29 Or. 27, 44 Pac. 497.

Pennsylvania. *Macan v. Scandinavia Belting Co.*, 264 Pa. St. 384, 5 A. L. R. 1502, 107 Atl. 750.

Virginia. *Perry Tie & Lumber Co. v. Reynolds*, 100 Va. 264, 40 S. E. 919.

Wisconsin. *Jones v. Foster*, 67 Wis. 296, 30 N. W. 697.

See for the opposite result, *Holloway v. White-Dunham Shoe Co.*, 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N.S.) 704, 10 Ann. Cas. 509; *Connersville Wagon Co. v. McFarlan Carriage Co.*, 166 Ind. 123, 3 L. R. A. (N.S.) 709, 76 N. E. 294.

<sup>4</sup> *Newhall v. Journal Printing Co.*, 105 Minn. 44, 20 L. R. A. (N.S.) 899, 117 N. W. 228.

<sup>5</sup> See §§ 3220 et seq.

<sup>6</sup> *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. Rep. 378, 92 N. W. 788.

<sup>7</sup> *Canada. Corbin v. Thompson*, 39 Can. S. C. 575.

*United States. Howard v. Stillwell & Bierce Mfg. Co.*, 139 U. S. 199, 35 L. ed. 147.

*Illinois. Frazer v. Smith*, 60 Ill. 145.

*Indiana. Acme Cycle Co. v. Clarke*, 157 Ind. 271, 61 N. E. 561.

*Michigan. McKinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458, 11 N. W. 828.

*Pennsylvania. Pennypacker v. Jones*, 106 Pa. St. 237.

*South Carolina. Standard Supply Co. v. Carter*, 81 S. Car. 181, 19 L. R. A. (N.S.) 155, 62 S. E. 150.

<sup>8</sup> *Champion Ice Mfg. & Cold Storage Co. v. Pennsylvania Iron Works Co.*, 68 O. S. 229, 67 N. E. 486.

seller's breach,<sup>9</sup> in case a rental value can be shown. If no rental value is shown, the value of the use of the property of which the purchaser is deprived by failure to deliver the machine is the measure of damages.<sup>10</sup> On breach of a contract to furnish fertilizer, the loss caused thereby, consisting of a diminution in the crop, is not too remote and may be recovered.<sup>11</sup>

If the vendor knows that the vendee is expecting to perform outstanding contracts by means of such machinery he is liable for loss of profits due to such delay,<sup>12</sup> if other machinery can not be obtained.<sup>13</sup> On breach of a contract to deliver machinery to a mill, damages to cotton seed caused by delay in delivering such machinery may be recovered.<sup>14</sup> If the vendor knows that the vendee needs such machinery to use in harvesting a certain crop, his failure to deliver makes him liable for injury to such crop.<sup>15</sup> Even in cases of this sort some courts have denied the right to recover profits.<sup>16</sup> A agreed to deliver a machine for making bicycle hubs, but did not deliver such machine. It was held that though there was a great demand for bicycle hubs, no recovery could be had for loss of profits which would have been earned had such machine been delivered.<sup>17</sup> If A refuses to deliver machinery necessary for a cotton gin so that the buyer is unable to operate such gin during such season, the buyer can not recover his anticipated proceeds.<sup>18</sup> Profits have been allowed on breach of a contract by which defendant agreed to furnish garbage to B to feed B's hogs.<sup>19</sup>

The rule that profits must be shown with reasonable certainty,<sup>20</sup> is said to prevent recovery of loss of profits caused by delay in

<sup>9</sup> Hooks Smelting Co. v. Planters Compress Co., 72 Ark. 275, 79 S. W. 1052; D. A. Tompkins Co. v. Dallas Cotton Mills, 130 N. Car. 347, 41 S. E. 938.

<sup>10</sup> Standard Supply Co. v. Carter, 81 S. Car. 181, 19 L. R. A. (N.S.) 155, 62 S. E. 150.

<sup>11</sup> Herring v. Armwood, 130 N. Car. 177, 57 L. R. A. 958, 41 S. E. 96.

<sup>12</sup> St. Marys Machine Co. v. Cook, 187 Ky. 112, 218 S. W. 733; Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244; Dillie v. Ratcliff, 29 Tex. Civ. App. 545, 69 S. W. 237.

<sup>13</sup> Bates Machine Co. v. Norton Iron Works, 113 Ky. 372, 68 S. W. 423.

<sup>14</sup> Colvin v. McCormick Cotton Oil Co., 66 S. Car. 61, 44 S. E. 380.

<sup>15</sup> Neal v. Pender-Hyman Hardware Co., 122 N. Car. 104, 65 Am. St. Rep. 697, 29 S. E. 96.

<sup>16</sup> Corbin v. Thompson, 39 Can. S. G. 575; Acme Cycle Co. v. Clarke, 157 Ind. 271, 61 N. E. 561; Standard Supply Co. v. Carter, 81 S. Car. 181, 19 L. R. A. (N.S.) 155, 62 S. E. 150.

<sup>17</sup> Acme Cycle Co. v. Clarke, 157 Ind. 271, 61 N. E. 561.

<sup>18</sup> Standard Supply Co. v. Carter, 81 S. Car. 181, 19 L. R. A. (N.S.) 155, 62 S. E. 150.

<sup>19</sup> Marion Hotel Co. v. Dickinson, 141 Ark. 188, 216 S. W. 1049.

<sup>20</sup> See § 3200.

delivering goods sold, if such loss is sustained in a business which is not yet established.<sup>21</sup>

**§ 3204. Profits on breach of contract for transportation.** If a carrier fails to perform his contract either by omitting entirely to transport the goods or persons in question, or by delaying such transportation, he is chargeable with loss of profits due to such delay,<sup>1</sup> if he had knowledge of the special facts which cause such delay to result in such loss of profits,<sup>2</sup> or if the contract of transportation made express provisions therefor.<sup>3</sup> If a carrier knows that machinery is to be used for a specific purpose and that his delay in transporting it will cause a loss of profits, he is liable therefor.<sup>4</sup> Under a contract by A to supply cars to B to haul timber which B had agreed to sell to X, B may recover the profits of such resale if A does not furnish cars.<sup>5</sup> If no market value for rental can be shown, the interest on the capital kept idle, and such losses as insurance, idle labor, deterioration in value, and the like, may be considered, but in some jurisdictions not the loss of profits.<sup>6</sup> If defective machinery is delivered and breaks down, delaying the operation of the plant for use in connection with which it was sold, the rental value of such plant may be recovered.<sup>7</sup> Delay in delivering a gas-holder until just at the end of that part of the year at which its use is needed, makes the vendor liable for the interest on the money paid in and on the cost of the realty bought for such purpose.<sup>8</sup>

<sup>21</sup> *Cramer v. Grand Rapids Show Case Co.*, 223 N. Y. 63, 1 A. L. R. 154, 119 N. E. 227.

<sup>1</sup> *England. Hadley v. Baxendale*, 9 Exch. 341.

*Arkansas. Wells Fargo & Co. v. W. B. Baker Lumber Co.*, 115 Ark. 142, 171 S. W. 132.

*Massachusetts. Weston v. Boston & Maine Ry.*, 190 Mass. 298, 112 Am. St. Rep. 330, 4 L. R. A. (N.S.) 569, 5 Ann. Cas. 825, 76 N. E. 1050.

*Oklahoma. Fort Smith & Western Ry. v. Williams*, 30 Okla. 726, 40 L. R. A. (N.S.) 494, 121 Pac. 275.

*South Carolina. Piero v. Southern Express Co.*, 103 S. Car. 467, 88 S. E. 269.

*Wisconsin. Altschuler v. Atchison,*

*Topeka & Santa Fe Ry.*, 155 Wis. 146, 49 L. R. A. (N.S.) 491, 144 N. W. 294.

<sup>2</sup> See §§ 3187 et seq.

<sup>3</sup> See § 3189.

<sup>4</sup> *Hadley v. Baxendale*, 9 Exch. 341; *American Express Co. v. Jennings*, 86 Miss. 329, 109 Am. St. Rep. 708, 38 So. 374; *Fort Smith & Western Ry. v. Williams*, 30 Okla. 726, 40 L. R. A. (N.S.) 494, 121 Pac. 275.

<sup>5</sup> *Baxley v. Tallassee & Montgomery Ry.*, 128 Ala. 183, 29 So. 451.

<sup>6</sup> *Sharpe v. Southern Ry.*, 130 N. Car. 613, 41 S. E. 799.

<sup>7</sup> *Machine Co. v. Compress Co.*, 105 Tenn. 187 [sub nomine, *Livermore Foundry & Machine Co. v. Compress Co.*, 53 L. R. A. 482, 58 S. W. 270].

<sup>8</sup> *Wood v. Joliet Gaslight Co.*, 111 Fed. 463, 49 C. C. A. 427.

**§ 3205. Profits—Other specific contracts.** Profits have been allowed for breach of a contract by which A agreed that his employes would board and room with B for certain consideration;<sup>1</sup> or by which A had agreed to cut timber;<sup>2</sup> or by which A agreed to manufacture and sell goods stamped with B's trade mark for a royalty to be paid to B.<sup>3</sup> Loss of profits on existing contracts has been given for breach of a contract for repairing machinery.<sup>4</sup> A telegram company has been held liable in case of failure to deliver a telegram ordering goods, for the profits which would have been made on the resale thereof.<sup>5</sup> On breach of a contract to furnish a telephone the measure of damages is the value of the telephone to the user.<sup>6</sup> On breach of a contract not to compete, the measure of damages is the profits which the purchaser of such business has lost by reason of such breach, and not the profits which the seller has made thereby.<sup>7</sup>

**§ 3206. Mental suffering—Not item of damage.** Wherever the breach is not such as would naturally cause mental anguish, and the special facts by reason of which mental anguish is caused are not known, the courts refuse to allow such damages in accordance with the general principles applicable to damages, and not by reason of any principles peculiar to this form of damage.<sup>1</sup> If a telegram does not show on its face that its non-delivery will cause mental anguish and such facts are not known, no damages for mental anguish can be recovered.<sup>2</sup> If the mental suffering follows naturally from the breach or if the facts are known to the promisor, so that, as a reasonable man, he can anticipate that such suffering will follow, there is a conflict of authority on the question

<sup>1</sup> *Nance v. Western Union Telegraph Co.*, 177 N. Car. 313, 98 S. E. 838.

<sup>2</sup> *Martindale v. Lobdell-Emery Manufacturing Co.*, 189 Mich. 477, L. R. A. 1918F, 1, 155 N. W. 559.

<sup>3</sup> *Wright v. Maynard Corset Co.*, 229 Mass. 343, 118 N. E. 654.

<sup>4</sup> *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. Car. 584, 41 S. E. 797.

<sup>5</sup> *Gardner v. Postal Telegraph-Cable Co.*, 171 N. Car. 405, L. R. A. 1916E, 484, 88 S. E. 630.

<sup>6</sup> *Zabel v. New State Telephone Co.*, 127 Mich. 402, 86 N. W. 949.

But such measure of damages was denied in the absence of proof of special damages. *Cumberland Telephone & Telegraph Co. v. Hendon*, 114 Ky. 501, 60 L. R. A. 849, 71 S. W. 435.

<sup>7</sup> *Kochenrath v. Christman*, 180 Ky. 799, 203 S. W. 738.

<sup>1</sup> *Wachtel v. National Alfalfa Journal Co.*, — Ia. —, 176 N. W. 801; *Sparkman v. Western Union Telegraph Co.*, 130 N. Car. 447, 41 S. E. 881.

<sup>2</sup> *Sparkman v. Western Union Telegraph Co.*, 130 N. Car. 447, 41 S. E. 881.

as to whether mental suffering can be considered as an item of damage. The general rule applicable to contracts is that no recovery can be had for mental suffering caused by breach.<sup>3</sup> According to the weight of authority, mental suffering and injury to feelings can not be considered as an item of damages in an action for breach of a contract to transmit and deliver a telegram,<sup>4</sup> even if the telegram shows on its face that mental suffering will follow a delay or a failure to deliver it. Even in states in which recovery for mental suffering can be allowed, the federal courts refuse to allow recovery therefor as an item of damage;<sup>5</sup> and even such state courts follow the federal rule in interstate transactions.<sup>6</sup> No recovery can be had for injury to feelings caused by the use of insulting language in discharging an employe wrongfully.<sup>7</sup> No recovery for injury to feelings can be had by a soldier or sailor

<sup>3</sup> **England.** *Addis v. Gramophone Co., Ltd.* [1909], A. C. 488.

**United States.** *Southern Express Co. v. Byers*, 240 U. S. 612, L. R. A. 1917A, 197, 60 L. ed. 825; *Wilcox v. Richmond & Danville Ry.*, 52 Fed. 264, 17 L. R. A. 804.

**Indiana.** *Western Union Telegraph Co. v. Adams*, 28 Ind. App. 420, 63 N. E. 125.

**Iowa.** *Smith v. Sanborn State Bank*, 147 Ia. 640, 140 Am. St. Rep. 336, 30 L. R. A. (N.S.) 517, 128 N. W. 779; *Wachtel v. National Alfalfa Journal Co.*, — Ia. —, 176 N. W. 801.

**Kentucky.** *American National Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379, 58 L. R. A. 956, 69 S. W. 759.

**North Carolina.** *Thomason v. Hackney & Moale Co.*, 159 N. Car. 299, 47 L. R. A. (N.S.) 1120, 74 S. E. 1022; *Bateman v. Western Union Telegraph Co.*, 174 N. Car. 97, L. R. A. 1918A, 803, 93 S. E. 467.

**Wisconsin.** *Gatzow v. Buening*, 106 Wis. 1, 80 Am. St. Rep. 17, 49 L. R. A. 475, 81 N. W. 1003.

<sup>4</sup> **Alabama.** *Jordan v. Western Union Telegraph Co.*, 197 Ala. 28, 72 So. 339.

**Dakota.** *Russell v. Western Union*

*Telegraph Co.*, 3 Dak. 315, 19 N. W. 408.

**Georgia.** *Chapman v. Western Union Telegraph Co.*, 88 Ga. 763, 30 Am. St. Rep. 183, 17 L. R. 430, 15 S. E. 901.

**Indiana.** *Western Union Telegraph Co. v. Ferguson*, 157 Ind. 64, 54 L. R. A. 846, 60 N. E. 674, 1080.

**Kansas.** *West v. Western Union Telegraph Co.*, 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807.

**Mississippi.** *Western Union Telegraph Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300, 13 L. R. A. 859, 9 So. 823; *Western Union Telegraph Co. v. Teague*, 117 Miss. 401, 78 So. 610.

**Ohio.** *Morton v. Western Union Telegraph Co.*, 53 O. S. 431, 53 Am. St. Rep. 648, 32 L. R. A. 735, 41 N. E. 689.

**Wisconsin.** *Summerfield v. Western Union Telegraph Co.*, 87 Wis. 1, 41 Am. St. Rep. 17, 57 N. W. 973.

<sup>5</sup> *Southern Express Co. v. Byers*, 240 U. S. 612, L. R. A. 1917A, 197, 60 L. ed. 825.

<sup>6</sup> *Bateman v. Western Union Telegraph Co.*, 174 N. Car. 97, L. R. A. 1918A, 803, 93 S. E. 467.

<sup>7</sup> *Addis v. Gramophone Co., Ltd.* [1909], A. C. 488.

who is excluded from a dance hall because he is in uniform.<sup>8</sup> If A has employed B, who is a physician, to furnish professional services to A's wife, and B does not furnish such services, A can not recover for his mental suffering caused by such conduct on the part of B.<sup>9</sup> It is held that in breach of a contract to furnish a hearse, no recovery can be had for injury to the feelings of near relatives, even though it is known that no other hearse can be obtained.<sup>10</sup> No recovery can be had for mental anguish because of the failure of one to whom films have been delivered to develop, to return such films, although such films contained the only picture of a child since deceased, and such facts were known.<sup>11</sup> One who has entered a contest can not recover for mental suffering due to the failure of the magazine to deliver premiums to subscribers in accordance with its promise, although such subscribers had made such complaint to such contestant.<sup>12</sup> No recovery can be had for mental suffering and humiliation arising out of a breach of a contract by a bank to honor a check,<sup>13</sup> or by a telegraph company to send money.<sup>14</sup> No damages for wounded feelings can be recovered in case of the wrongful and insulting discharge of an employee.<sup>15</sup>

**§ 3207. Mental suffering item of damage.** In an action for breach of a contract to marry, damages may be allowed for mental suffering.<sup>1</sup> While causes of action of this sort are based upon a promise, they are treated, for many purposes, as if they were

<sup>8</sup> *Buenzle v. Newport Amusement Association*, 29 R. I. 23, 14 L. R. A. (N.S.) 1242, 68 Atl. 721.

<sup>9</sup> *Adams v. Brosius*, 69 Or. 513, 51 L. R. A. (N.S.) 36, 139 Pac. 729.

<sup>10</sup> *Gatzow v. Buening*, 106 Wis. 1, 80 Am. St. Rep. 17, 49 L. R. A. 475, 81 N. W. 1003.

<sup>11</sup> *Thomason v. Hackney & Moale Co.*, 159 N. Car. 209, 47 L. R. A. (N.S.) 1120, 74 S. E. 1022.

<sup>12</sup> *Wachtel v. National Alfalfa Journal Co.*, — Ia. —, 176 N. W. 801.

<sup>13</sup> *American National Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379, 58 L. R. A. 956, 69 S. W. 759.

<sup>14</sup> *Robinson v. Western Union Telegraph Co. (Ky.)*, 57 L. R. A. 611, 68 S. W. 656.

<sup>15</sup> *Addis v. Gramophone Co., Ltd.* [1909], A. C. 488.

<sup>1</sup> *England. Berry v. Da Costa*, L. R. 1 C. P. 331.

*California. Reed v. Clark*, 47 Cal. 194.

*Iowa. Robinson v. Craver*, 88 Ia. 381, 55 N. W. 492.

*Kentucky. Grubbs v. Pence (Ky.)*, 73 S. W. 785 [rehearing denied, 74 S. W. 709, 25 Ky. L. Rep. 170].

*Michigan. Rutter v. Collins*, 103 Mich. 143, 61 N. W. 267; *Houser v. Carmody*, 173 Mich. 121, 139 N. W. 9.

*Minnesota. Hahn v. Bettingen*, 81 Minn. 91, 50 L. R. A. 669, 83 N. W. 467.

*New York. Chellis v. Chapman*, 125 N. Y. 214, 11 L. R. A. 784, 26 N. E. 308.

actions which arose out of a tort; and the willingness of the court to allow recovery for mental suffering may be explained on the theory that these contract actions are analogous to tort actions.

In addition to cases of this sort, recovery for mental suffering is allowed in cases of pure contract in some jurisdictions. It may be regarded as an item of damage if it follows naturally from the breach or if the party who is in default knows of the fact which will cause such suffering to follow from such breach.<sup>2</sup> Recovery has also been allowed in breach of a contract to furnish a trousseau, for mortification and humiliation;<sup>3</sup> or for breach of a contract to let a park for a picnic;<sup>4</sup> or for wrongfully expelling a woman from a bath-house after agreeing to permit her to make use thereof.<sup>5</sup> It has been held that mental suffering can be recovered in an action for breach of a contract by a doctor to attend a patient, at least if the patient has suffered pain by reason of such breach;<sup>6</sup> or a breach of contract for furnishing medical attention and hospital services in case of illness;<sup>7</sup> or for breach of a contract to furnish burial, resulting in distress to the parents and relatives of the deceased;<sup>8</sup> or for breach of a contract by husband to renew cohabitation with his wife.<sup>9</sup> Damages for mental suffering may be allowed in cases where a common carrier breaks its

**Utah.** *Arbon v. Blyth*, 54 Utah 153, 179 Pac. 979.

**West Virginia.** *Kendall v. Dunn*, 71 W. Va. 262, 43 L. R. A. (N.S.) 556, 76 S. E. 454.

**2 Alabama.** *Southern Ry. v. Rowe*, 198 Ala. 353, 73 So. 634.

**Indiana.** *Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 850, 9 L. R. A. 514, 25 N. E. 822.

**Minnesota.** *Lindh v. Great Northern Ry.*, 99 Minn. 408, 7 L. R. A. (N.S.) 1018, 100 N. W. 823.

**Mississippi.** *Hood v. Moffett*, 100 Miss. 757, L. R. A. 1916B, 622, Ann. Cas. 1917E, 410, 69 So. 664.

**Nevada.** *Burrus v. Nevada-California-Oregon Ry.*, 38 Nev. 156, L. R. A. 1917D, 750, 145 Pac. 926.

**Oregon.** *Coffey v. Northwestern Hospital Association*, 96 Or. 100, 189 Pac. 407.

**West Virginia.** *Bolyard v. Bolyard*, 79 W. Va. 554, L. R. A. 1917D, 440, 91 S. E. 520.

<sup>3</sup>*Lewis v. Holmes*, 109 La. 1030, 61 L. R. A. 274, 34 So. 66.

<sup>4</sup>*O'Meallie v. Moreau*, 116 La. 1020, 41 So. 243.

<sup>5</sup>*Aaron v. Ward*, 203 N. Y. 351, 38 L. R. A. (N.S.) 204, 96 N. E. 736.

<sup>6</sup>*Hood v. Moffett*, 100 Miss. 757, L. R. A. 1916B, 622, Ann. Cas. 1917E, 410, 69 So. 664.

*Contra*, *Adams v. Brosius*, 69 Or. 513, 51 L. R. A. (N.S.) 36, 139 Pac. 729.

<sup>7</sup>*Coffey v. Northwestern Hospital Association*, 96 Or. 100, 189 Pac. 407.

<sup>8</sup>*Renihan v. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249, 9 L. R. A. 514, 25 N. E. 822; *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172.

<sup>9</sup>*Bolyard v. Bolyard*, 79 W. Va. 554, L. R. A. 1917D, 440, 91 S. E. 520.

contract, resulting in mental suffering,<sup>10</sup> as for breach of a contract to send a special train to take the son of the plaintiff to a place where he could receive necessary medical attention after injury,<sup>11</sup> or for breach of a contract to transport a corpse.<sup>12</sup> In some jurisdictions mental suffering may be considered as an item of damage for failure to deliver a telegram which shows its nature upon its face.<sup>13</sup>

**§ 3208. Expenses as item of damage—Expenses in preparation for performance.** On the question of allowance of expenses as an item of damage, there has been considerable confusion, but rather in outward form of expression than in actual difference in principle. In the use of this term there are a number of ambiguities. In some cases in which it is said that expenses are allowed as damages, the party who is not in default is not attempting to recover damages; but he has treated the contract as discharged

<sup>10</sup> *Lindh v. Great Northern Ry.*, 99 Minn. 408, 7 L. R. A. (N.S.) 1018, 109 N. W. 823; *Burrus v. Nevada-California-Oregon Ry.*, 38 Nev. 156, L. R. A. 1917D, 750, 145 Pac. 926; *Hale v. Bonner*, 82 Tex. 33, 27 Am. St. Rep. 850, 14 L. R. A. 336, 17 S. W. 605.

<sup>11</sup> *Burrus v. Nevada-California-Oregon Ry. Co.*, 38 Nev. 156, L. R. A. 1917D, 750, 145 Pac. 926.

<sup>12</sup> *Lindh v. Great Northern Ry.*, 99 Minn. 408, 7 L. R. A. (N.S.) 1018, 109 N. W. 823; *Hale v. Bonner*, 82 Tex. 33, 27 Am. St. Rep. 850, 14 L. R. A. 336, 17 S. W. 605.

<sup>13</sup> *Alabama*. *Western Union Telegraph Co. v. Crocker*, 135 Ala. 492, 59 L. R. A. 398, 33 So. 45.

*Iowa*. *Cowan v. Western Union Telegraph Co.*, 122 Ia. 379, 101 Am. St. Rep. 268, 64 L. R. A. 545, 98 N. W. 281.

*Kentucky*. *Chapman v. Western Union Telegraph Co.*, 90 Ky. 265, 13 S. W. 880.

*Louisiana*. *Graham v. Western Union Telegraph Co.*, 109 La. 1069, 34 So. 91.

*Nebraska*. *Western Union Telegraph Co. v. Church (Neb.)*, 57 L. R. A. 905, 90 N. W. 878.

*North Carolina*. *Cashion v. Western Union Telegraph Co.*, 123 N. Car. 267, 31 S. E. 493; *Meadows v. Western Union Telegraph Co.*, 132 N. Car. 40, 43 S. E. 512; *Bright v. Western Union Telegraph Co.*, 132 N. Car. 317, 43 S. E. 841; *Lawrence v. Western Union Telegraph Co.*, 171 N. Car. 240, 88 S. E. 226.

*South Carolina*. *Marsh v. Western Union Telegraph Co.*, 65 S. Car. 430, 43 S. E. 953; *Willis v. Western Union Telegraph Co.*, 69 S. Car. 531, 104 Am. St. Rep. 828, 2 Ann. Cas. 52, 48 S. E. 538.

*Tennessee*. *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574; *Gray v. Western Union Telegraph Co.*, 108 Tenn. 39, 91 Am. St. Rep. 706, 56 L. R. A. 301, 64 S. W. 1063.

*Texas*. *S. O. Relle v. Western Union Telegraph Co.*, 55 Tex. 308, 40 Am. Rep. 805 [overruled in *Gulf Ry. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278; but followed in *Western Union Telegraph Co. v. Linn*, 87 Tex. 7, 47 Am. St. Rep. 58, 26 S. W. 490]; *Western Union Telegraph Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482.

and is seeking to recover the reasonable value of performance on his part.<sup>1</sup> Even when the action is really one to recover damages, the term "expenses" is used in two different senses. It is used of expenses which the party who is not in default has incurred in performing or preparing to perform; and it is also used of expenses which the party who is not in default has sustained by reason of the breach, including expenses which he has incurred in placing himself, as near as he can, in the position in which he would have been had the contract been performed, or in mitigating damages to such breach.

If the party who is not in default has not commenced performance, no expenses have been incurred by him, and, accordingly, the question of his right to recover expenses incurred in preparing to perform does not arise.<sup>2</sup> On the other hand, if the party who is not in default has performed in full, the measure of his recovery is ordinarily the contract price;<sup>3</sup> and the question of the amount of his expenses is immaterial.

If the party who is not in default has commenced performance and has incurred expenses in so doing, but the contract has been discharged before performance is completed, he can not ordinarily recover the full contract price; and the question of his right to recover expenses thus incurred as damages is frequently presented for adjudication. Wherever the ordinary rules of damages can be applied and the party not in default can be given the contract price less the amount which he is saved by not being obliged to perform, or the difference between the contract price or the market price if he can readily buy or sell the thing contracted for, as the case may be, the question of expenses which he has incurred in performing the contract is ordinarily immaterial; since the amount of damages as thus fixed bears no necessary relation to such expenses. The fact that they may have been very high should not entitle him to recover a greater amount of damages, and the fact that they may have been very low does not justify the law in depriving him of the profits of an advantageous bargain. For these reasons it is generally said that expenses of this sort can not be recovered as damages.<sup>4</sup> If an employe is suing for wrong-

<sup>1</sup> See §§ 3236 et seq.

<sup>2</sup> See § 3177.

<sup>3</sup> See § 3226.

<sup>4</sup> *Maryland. Middendorff, Williams & Co. v. Alexander Milburn Co.*, — Md. —, 113 Atl. 348.

*Massachusetts. Noble v. Ames Mfg. Co.*, 112 Mass. 492; *Mount Pleasant Stable Co. v. Steinberg*, — Mass. —, 131 N. E. 295.

*Oregon. Mackey v. Olssen*, 12 Or. 429, 8 Pac. 357.

ful discharge the measure of damages is the contract price less what he can earn in such employment by the use of due diligence;<sup>5</sup> and he can not recover the expense of going to the place at which he is to be employed.<sup>6</sup> In case of a breach of a contract for the sale of timber, the expense which has been incurred in constructing a road is not an item of damage.<sup>7</sup> In some cases recovery of expenses is refused on the theory that such items of damage do not follow naturally from the breach.<sup>8</sup> In case of failure of title, the expense of making improvements on adjoining land is not allowed.<sup>9</sup> In case of a breach of a contract for drawing a casing, the measure of damages is the value of the casing and not the additional expense of watering cattle.<sup>10</sup> If expenses are incurred as a convenient method of performing, and are not necessarily required by such contract, they can not be recovered.<sup>11</sup> Expenses incurred before the contract was made in reliance on securing it, can not be regarded as an item of damage.<sup>12</sup> In any event, even if the party might choose between recovering expenses on the theory of quasi-contract and recovering the total amount of profits, he can not recover both,<sup>13</sup> since this will frequently put him in a better position than he would have been if the contract had been performed.

If the contract is of such a nature that the actual damages can not be computed readily, the actual expenses incurred by the party who is not in default, in preparation for performance, have been allowed as the best available measure of his recovery.<sup>14</sup> If the amount of profit which the party not in default would have

<sup>5</sup> *Texas. Elmendorf v. Classen*, 92 Tex. 472, 49 S. W. 1043.

<sup>6</sup> *Utah. Hawley v. Corey*, 9 Utah 175, 33 Pac. 695.

<sup>7</sup> See § 3212.

<sup>8</sup> *Noble v. Ames Mfg. Co.*, 112 Mass. 492; *Hawley v. Corey*, 9 Utah 175, 33 Pac. 695.

<sup>9</sup> *Mackey v. Olssen*, 12 Or. 429, 8 Pac. 357.

<sup>10</sup> See §§ 3186 et seq.

<sup>11</sup> *Beaupland v. McKeen*, 28 Pa. St. 124, 70 Am. Dec. 115.

<sup>12</sup> *Elmendorf v. Classen*, 92 Tex. 472, 49 S. W. 1043.

<sup>13</sup> *Middendorf, Williams & Co. v. Alexander Milburn Co.*, — Md. —, 113

Atl. 348; *Kenerson v. Colgan*, 164 Mass. 166, 41 N. E. 122.

<sup>14</sup> *Kapczynski v. Bolcom-Vanderhoof Logging Co.*, 71 Wash. 93, 127 Pac. 601.

<sup>15</sup> *Smith v. Davis*, 150 Ala. 106, 43 So. 729; *Hardaway-Wright Co. v. Bradley*, 163 Ala. 596, 51 So. 21; *Periodical Press Co. v. Sherman-Elliott Co.*, 143 Minn. 489, 174 N. W. 516; *Hawley v. Corey*, 9 Utah 175, 33 Pac. 695.

<sup>16</sup> *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168; *Webster v. Beau*, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013; *Woodbury v. Jones*, 44 N. H. 206.

See also, *Lynch v. Culhane*, — Mass. —, 129 N. E. 717.

earned under the contract can not be shown with sufficient certainty, by reason of its being remote or speculative, the amount of expenses which he has incurred has been allowed as a proper measure of damages.<sup>15</sup> On breach of a contract of employment, under which the employe is to be paid by commissions, he may, in case of wrongful discharge, recover compensation for his time and expenses,<sup>16</sup> or his reasonable expenses in advertising and commissions on orders actually secured by him before his discharge.<sup>17</sup> If an auctioneer is discharged before he has had an opportunity to earn his commissions, he can not recover the commissions which he might have earned, but he can recover his expenses in preparing to perform the contract.<sup>18</sup> Under a contract whereby A is to make certain tests of his patent and B is to manufacture and sell such invention, A may recover for the expenses of the tests and the value of his time where B sells out his business before performing the contract.<sup>19</sup> If complete performance has been prevented after performance has been begun, it has been said that the amount expended under the contract can be recovered as damages as long as such amount is included in the total cost of performance so that it is not counted twice, once as expenses and once as profits.<sup>20</sup> In such cases anything of value which the party who is not in default is able to save out of the expenditures which he has incurred must be deducted from the amount of such expenses.<sup>21</sup> If compensation

<sup>15</sup> *United States. United States v. Behan*, 110 U. S. 338, 28 L. ed. 168; *Taylor Mfg. Co. v. Hatcher Mfg. Co.*, 39 Fed. 440, 3 L. R. A. 587.

*Alabama. Worthington v. Gwin*, 119 Ala. 44, 43 L. R. A. 382, 24 So. 739.

*California. Cederberg v. Robison*, 100 Cal. 93, 34 Pac. 625.

*Minnesota. Swanson v. Andrus*, 83 Minn. 505, 86 N. W. 465.

*Washington. Webster v. Beau*, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013.

*West Virginia. Griffith v. Blackwater Boom & Lumber Co.*, 55 W. Va. 604, 69 L. R. A. 124, 48 S. E. 442.

The same result has been reached where plaintiff renounced his claim for profits. *Lynch v. Culhane*, — Mass. —, 129 N. E. 717 (building contract).

<sup>16</sup> *Cadman v. Markle*, 76 Mich. 448,

5 L. R. A. 707, 43 N. W. 315.

<sup>17</sup> *Taylor Mfg. Co. v. Hatcher*, 39 Fed. 440, 3 L. R. A. 587.

Contra, that he can not recover expenses. *Middendorf, Williams & Co. v. Alexander Milburn Co.*, — Md. —, 113 Atl. 348.

Contra, that he can recover the commissions that he would have earned less expenses, but not expense of advertising. *Holton v. Monarch Motor Car Co.*, 202 Mich. 271, 168 N. W. 539.

<sup>18</sup> *Girardey v. Stone*, 24 La. Ann. 280.

<sup>19</sup> *Griffen v. Sprague Electric Co.*, 115 Fed. 749.

<sup>20</sup> *Periodical Press Co. v. Sherman-Elliott Co.*, 143 Minn. 489, 174 N. W. 516; *Bradley v. Nevada-California-Oregon Ry.*, 42 Nev. 411, 178 Pac. 906.

<sup>21</sup> *Bradley v. Nevada-California-Oregon Ry.*, 42 Nev. 411, 178 Pac. 906.

is to be made on the basis of the cost, plus a specified percentage of profits, extra expenses in buying material to perform such contract may be recovered.<sup>22</sup> In some cases in which recovery of expenses is allowed, it is rather on the theory of quasi-contract,<sup>23</sup> than on the theory of a measure of damages.<sup>24</sup>

**§ 3209. Expenses resulting from breach.** If the expenses are incurred after breach as a result thereof, or as a means of placing the party not in default in the position in which he would have been if the contract had been performed, such expenses are ordinarily allowed, if reasonable, as a part of the damage caused by such breach.<sup>1</sup> In case of breach of a contract not to disturb lateral support, the cost of restoring such support may be recovered.<sup>2</sup> In case of a wrongful discharge of an employe, expenses incurred in

<sup>22</sup> *Pittsburgh Steel Foundry v. Pittsburgh Steel Co.*, 223 Pa. St. 430, 72 Atl. 813.

<sup>23</sup> See §§ 3236 et seq.

<sup>24</sup> *Brady v. Oliver*, 125 Tenn. 595, 41 L. R. A. (N.S.) 60, Ann. Cas. 1913C, 376, 147 S. W. 1135.

<sup>1</sup> *England*. *Hamlin v. Great Northern Railway*, 1 H. & N. 408; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Featherston v. Wilkinson*, L. R. 8 Ex. 122. *Di Ferdinando v. Simon Smits & Co.*, 89 L. J. K. B. N. S. 1039, 11 A. L. R. 358.

*Alabama*. *Pullman Co. v. Meyer*, 195 Ala. 397, 70 So. 763.

*Indiana*. *Orr v. Dayton & Muncie Traction Co.*, 178 Ind. 40, 48 L. R. A. (N.S.) 474, Ann. Cas. 1915B, 1277, 96 N. E. 462.

*Iowa*. *Novelty Iron Works v. Capital City Oatmeal Co.*, 88 Ia. 524, 55 N. W. 518.

*Kentucky*. *Bugg v. Jones*, 183 Ky. 500, 209 S. W. 514.

*Maine*. *Seretto v. Rockland, South Thomaston & Owl's Head Ry.*, 101 Me. 140, 63 Atl. 651.

*Massachusetts*. *Johnson v. Arnold*, 56 Mass. (2 Cush.) 46; *Waite v. Gil-*

*bert*, 64 Mass. (10 Cush.) 177; *Brown v. Smith*, 66 Mass. (12 Cush.) 366; *Mather v. American Express Co.*, 138 Mass. 55; *Dickinson v. Talmage*, 138 Mass. 249; *Whitehead & Atherton Machine Co. v. Ryder*, 139 Mass. 366, 31 N. E. 736; *Peak v. Frost*, 162 Mass. 298, 38 N. E. 518; *Swift River Co. v. Fitchburg Railroad*, 169 Mass. 326, 47 N. E. 1015; *Weston v. Boston & Maine Railroad*, 190 Mass. 298, 4 L. R. A. (N. S.) 569, 5 Ann. Cas. 825, 76 N. E. 1050; *Metropolitan Coal Co. v. Boutell Transportation & Towing Co.*, 196 Mass. 72, 13 L. R. A. (N.S.) 481, 12 Ann. Cas. 886, 81 N. E. 645; *C. W. Hunt Co. v. Boston Elevated Ry.*, 199 Mass. 220, 85 N. E. 446.

*Oklahoma*. *Chickasha v. Hollingsworth*, 56 Okla. 341, 155 Pac. 859.

*Texas*. *Hunt v. Reilly*, 50 Tex. 99.

*Washington*. *Peterman v. Goss*, 93 Wash. 184, 160 Pac. 432.

*Wisconsin*. *Modern Steel Structural Co. v. English Construction Co.*, 129 Wis. 31, 108 N. W. 70.

<sup>2</sup> *Orr v. Dayton & Muncie Traction Co.*, 178 Ind. 40, 48 L. R. A. (N.S.) 474, Ann. Cas. 1915B, 1277, 96 N. E. 462.

securing other employment may be recovered.<sup>3</sup> If a breach of a contract to furnish machinery deprives the adversary party of the use of a part of his plant, the rental of similar facilities, if not unreasonable, may be recovered.<sup>4</sup> In case of breach by delay in furnishing material, the costs incurred by such delay,<sup>5</sup> including additional salaries paid to employes,<sup>6</sup> and interest on money borrowed during such time,<sup>7</sup> may be recovered. Only the excess of expenditure due to such breach can be recovered, however.<sup>8</sup>

Unreasonable expenses which are incurred deliberately and not as mitigation of damages, can not be recovered, even if by such expenses the party who is not in default is placed in the position in which he would have been if the contract had been performed.<sup>9</sup> In case of breach of a contract to furnish transportation, the cost of a special train can not be recovered if no serious loss would have been sustained by waiting for the next train.<sup>10</sup> In case of refusal to pay money, it is said that interest on money borrowed and attorney's fees can not be recovered as damages for such delay.<sup>11</sup> If payment is to be made in one place, and the action is brought in another, the judgment must be for such sum as would give compensation at the time and place of the breach, in view of the rate of exchange then prevailing.<sup>12</sup>

**§ 3210. Interest as damages.** The right of the party who is not in default to recover interest as a part of his damages for the default of the adversary party depends in part upon what the party in default had agreed to do, and in part upon the certainty with which the amount of the claim can be computed.<sup>1</sup> If the

<sup>3</sup>Dickinson v. Talmage, 138 Mass. 249; Eunt v. Reilly, 50 Tex. 99.

<sup>4</sup>C. W. Hunt Co. v. Boston Elevated Ry., 199 Mass. 220, 85 N. E. 446.

<sup>5</sup>Seretto v. Rockland, South Thomaston & Owl's Head Ry., 101 Me. 140, 63 Atl. 651; Peterman v. Goss, 93 Wash. 184, 160 Pac. 432; Modern Steel Structural Co. v. English Construction Co., 129 Wis. 31, 108 N. W. 70.

<sup>6</sup>Modern Steel Structural Co. v. English Construction Co., 129 Wis. 31, 108 N. W. 70.

<sup>7</sup>Peterman v. Goss, 93 Wash. 184, 160 Pac. 432.

<sup>8</sup>Nason Mfg. Co. v. Stevens, 127 N. Y. 602, 14 L. R. A. 556, 28 N. E. 411.

<sup>9</sup>Le Blanche v. London & North Western Ry. Co., 1 C. P. D. 286.

<sup>10</sup>Le Blanche v. London & North Western Ry. Co., 1 C. P. D. 286.

<sup>11</sup>Horton v. Sherwin, — Okla. —, 164 Pac. 469.

<sup>12</sup>Lebaupin v. Crispin [1920], 2 K. B. 714; Di Ferdinando v. Simon Smits & Co., 89 L. J. K. B. N. S. 1039, 11 A. L. R. 358.

<sup>1</sup>On the general question, see Interest, by J. Robertson Christie, 6 Juridical Review, 362, and 7 Juridical Review, 119.

covenant upon which the action is brought is one for the payment of a liquidated sum of money, interest is, or may be, allowed as damages for default in such payment.<sup>2</sup> Interest may be allowed upon money due on a bond although the addition of such interest results in a judgment in excess of the penalty of the bond.<sup>3</sup> If money is payable on demand, interest should be allowed at least from demand therefor or the equivalent of such demand.<sup>4</sup>

In cases of this sort interest is allowed as damages; and, accordingly, it is not allowed against a custodian of a fund who is holding it rightfully until the happening of circumstances which will make it his duty to pay it over.<sup>5</sup>

<sup>2</sup> **England.** *Arnott v. Redfern*, 3 Bing. 353.

**United States.** *Stewart v. Barnes*, 153 U. S. 456, 38 L. ed. 781.

**Connecticut.** *American Surety Co. v. Pacific Surety Co.*, 81 Conn. 252, 19 L. R. A. (N.S.) 83, 70 Atl. 534; *Lowndes v. City Nat. Bank*, 82 Conn. 8, 22 L. R. A. (N.S.) 408, 72 Atl. 150.

**Georgia.** *Fitzpatrick v. McGregor*, 133 Ga. 332, 25 L. R. A. (N.S.) 50, 65 S. E. 859.

**Illinois.** *Kuh v. O'Reilly*, 261 Ill. 437, 51 L. R. A. (N.S.) 420, 104 N. E. 5.

**Kansas.** *Hupe v. Sommer*, 88 Kan. 561, 43 L. R. A. (N.S.) 565, 129 Pac. 136.

**Maryland.** *Palatine Insurance Co. v. O'Brien*, 107 Md. 341, 16 L. R. A. (N. S.) 1055, 68 Atl. 484.

**Massachusetts.** *C. W. Hunt Co. v. Boston Elevated Ry.*, 217 Mass. 319, 104 N. E. 728.

**Minnesota.** *Fallon v. Fallon*, 110 Minn. 213, 32 L. R. A. (N.S.) 486, 124 N. W. 994.

**Nebraska.** *In re Sanford*, 90 Neb. 410, 45 L. R. A. (N.S.) 228, 133 N. W. 870.

**New York.** *In re Burke*, 191 N. Y. 437, 84 N. E. 405.

**North Carolina.** *Hilton Lumber Co. v. Atlantic Coast Line Ry. Co.*, 141 N. Car. 171, 6 L. R. A. (N.S.) 225, 53 S. E. 823.

**North Dakota.** *Dickinson v. White*,

25 N. D. 523, 49 L. R. A. (N.S.) 362, 143 N. W. 754.

**Rhode Island.** *Pearson v. Ryan*, 42 R. I. 83, 3 A. L. R. 805, 105 Atl. 513.

**West Virginia.** *Peirpoint v. Peirpoint*, 71 W. Va. 431, 43 L. R. A. (N. S.) 783, Ann. Cas. 1914C, 241, 76 S. E. 848.

**Wisconsin.** *Peters v. National Surety Co.*, 167 Wis. 131, 166 N. W. 43, 1087.

Contra, that the right to recover interest is statutory. *Young v. Kimber*, 44 Colo. 448, 28 L. R. A. (N.S.) 626, 98 Pac. 1132.

Interest is not allowed against a debtor who has in good faith attempted to pay such debt. *Mason v. Wolkowich*, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N.S.) 765; *State v. Mutual Life Insurance Co.*, 175 Ind. 59, 42 L. R. A. (N.S.) 256, 93 N. E. 213.

<sup>3</sup> *American Surety Co. v. Pacific Surety Co.*, 81 Conn. 252, 19 L. R. A. (N.S.) 83, 70 Atl. 584; *Dickinson v. White*, 25 N. D. 523, 49 L. R. A. (N. S.) 362, 143 N. W. 754.

<sup>4</sup> *Lowndes v. City Nat. Bank*, 82 Conn. 8, 22 L. R. A. (N.S.) 408, 72 Atl. 150; *Fallon v. Fallon*, 110 Minn. 213, 32 L. R. A. (N.S.) 486, 124 N. W. 994; *Peirpoint v. Peirpoint*, 71 W. Va. 431, 43 L. R. A. (N.S.) 783, Ann. Cas. 1914C, 241, 76 S. E. 848.

<sup>5</sup> *Ice v. Kilworth*, 84 Kan. 458, 35 L. R. A. (N.S.) 220, 114 Pac. 857; *DeWitt*

Whether the allowance of interest as damages in case of default in the payment of a liquidated sum of money is a matter of right, or whether it is within the discretion of the jury, is a question upon which the courts of the United States have taken a position different than that taken by the courts of England. In the United States, interest is allowed as a matter of right in cases of this sort;<sup>6</sup> so that a provision in a contract of insurance to the effect that interest should not be allowed on the face of the policy in case of default, is invalid as contrary to public policy.<sup>7</sup> In England the allowance of interest seems to be within the discretion of the tribunal which decides the facts of the case.<sup>8</sup>

If the amount due from the party in default is liquidated, the fact that such amount may be reduced by a set-off or a counterclaim does not render it unliquidated, for the purpose of determining whether or not interest can be allowed thereon, even if the amount of such counterclaim is unliquidated so that the net amount which is due can not be ascertained in advance.<sup>9</sup>

If the amount which is due is unliquidated the question as to the allowance of interest as damages, depends, in part, on whether the amount due can be ascertained or computed readily, and with reasonable certainty. A claim which can be thus computed is not very different, for the purpose of determining whether to allow interest or not, from a liquidated claim; and accordingly it is generally held that interest may be allowed on such claims.<sup>10</sup> The

v. Keystone Nat. Bank, 243 Pa. St. 534, 52 L. R. A. (N.S.) 522, 90 Atl. 340; Condon v. Callahan, 115 Tenn. 285, 1 L. R. A. (N.S.) 643, 5 Ann. Cas. 659, 89 S. W. 400.

<sup>6</sup> Sanderson v. Trump Mfg. Co., 180 Ind. 197, 102 N. E. 2; Lefebure v. American Express Co., 160 Ia. 54, 139 N. W. 1117; McCall v. Icks, 107 Wis. 232, 83 N. W. 300; Modern Brotherhood of America Lodge v. Bailey, 50 Okla. 54, L. R. A. 1916A, 551, Ann. Cas. 1918E, 744, 150 Pac. 673.

<sup>7</sup> Modern Brotherhood of America Lodge v. Bailey, 50 Okla. 54, L. R. A. 1916A, 551, Ann. Cas. 1918E, 744, 150 Pac. 673.

<sup>8</sup> Cook v. Fowler, L. R. 7 H. L. 27.

<sup>9</sup> Henrylyn Orchards Co. v. F. W. Meneray Crescent Nursery Co., 55 Colo.

438, 135 Pac. 980; Pearson v. Ryan, 42 R. I. 83, 3 A. L. R. 805, 105 Atl. 513; Dickinson Fire & Pressed Brick Co. v. Crowe, 63 Wash. 550, 115 Pac. 1087; Laycock v. Parker, 103 Wis. 161, 79 N. W. 327.

Contra, Excelsior Terra Cotta Co. v. Harde, 181 N. Y. 11, 106 Am. St. Rep. 493, 73 N. E. 494.

<sup>10</sup> United States. Barrow v. Reab, 50 U. S. (9 How.) 366, 13 L. ed. 177.

Illinois. Murray v. Doud, 167 Ill. 368, 59 Am. St. Rep. 297, 47 N. E. 717.

Montana. Leggat v. Gerrick, 35 Mont. 91, 8 L. R. A. (N.S.) 1238, 88 Pac. 788 (by statute).

New York. Faber v. New York, 222 N. Y. 255, 118 N. E. 609.

West Virginia. Bennett v. Federal Coal & Coke Co., 70 W. Va. 456, 40 L.

fact that the party who is in default believes in good faith that he has a defense, is said not to relieve him from the obligation to pay interest.<sup>11</sup> If the amount which is due is unliquidated, and if the exact amount can not readily be ascertained, or computed, it is generally held that interest can not be allowed as damages, since the party who is bound to pay such claim can not tell exactly what amount he should pay until it is liquidated, and therefore he can not be said to be in default.<sup>12</sup>

Here again the courts seem to prefer to deny all recovery to the party who is not in default rather than take the risk of making the slightest overcharge against the party who is in default. Unless we are to adopt the theory that a contract is not a mere obligation to perform the terms thereof, but is an alternative obligation to perform or to pay damages, at the election of the wrongdoer, the default of the party who breaks the contract exists from the time at which he should have performed such contract, but would not; and the fact that he does not know exactly how much he should pay does not in the least lessen the damage of the party who is not in default, and who is not only kept out of the principal sum until after judgment, but is denied interest altogether, under this theory.

In some jurisdictions a compromise rule is adopted; and it is said that interest may be allowed in cases of this sort as a favor in the discretion of the tribunal that determines the facts.<sup>13</sup>

R. A. (N.S.) 588, Ann. Cas. 1913E, 578, 74 S. E. 418.

**Wisconsin.** *Peters v. National Surety Co.*, 167 Wis. 131, 166 N. W. 43; *Edward E. Gillen Co. v. John H. Parker Co.*, 170 Wis. 264, 171 N. W. 61.

<sup>11</sup> *Kuh v. O'Reilly*, 261 Ill. 437, 51 L. R. A. (N.S.) 420, 104 N. E. 5; *Mount Pleasant Stable Co. v. Steinberg*, — Mass. —, 131 N. E. 295.

Interest on the difference between the contract price and the cost of performing a contract for work and labor has been allowed. *Mount Pleasant Stable Co. v. Steinberg*, — Mass. —, 131 N. E. 295.

<sup>12</sup> **United States.** *Lincoln v. Claffin*, 74 U. S. (7 Wall.) 132, 19 L. ed. 106.

**Kansas.** *Evans v. Moseley*, 84 Kan. 322, 50 L. R. A. (N.S.) 889, 114 Pac. 374.

**Maryland.** *Williams v. New York Life Ins. Co.*, 122 Md. 141, 89 Atl. 97.

**Massachusetts.** *Thorndike v. Wells Memorial Association*, 146 Mass. 619, 16 N. E. 747.

**New Jersey.** *E. Clements Horst Co. v. Peter Breidt City Brewery*, 94 N. J. L. 230, 109 Atl. 727.

**New York.** *People v. Wilcox*, 207 N. Y. 743, 101 N. E. 174.

**Oklahoma.** *Chickasha v. Hollingsworth*, 56 Okla. 341, 155 Pac. 859; *Speed v. McMurray*, — Okla. —, 176 Pac. 506.

**Oregon.** *Duncan Lumber Co. v. Willapa Lumber Co.*, 93 Or. 386, 182 Pac. 172.

**Rhode Island.** *Pearson v. Ryan*, 42 R. I. 83, 105 Atl. 513.

<sup>13</sup> *Stoddard v. Sagal*, 86 Conn. 346, 85 Atl. 519; *Cohen v. Hayden*, 180 Ia.

If interest is to be recovered as damages, compound interest is not allowed.<sup>14</sup> Whether compound interest or interest on interest, can be recovered in accordance with the terms of a specific contract therefor, is considered elsewhere.<sup>15</sup>

**§ 3211. Interest as damages—Specific applications.** In specific cases, the courts have been more ready to allow the recovery of interest as damages than might be inferred from the abstract statement of the general principles which control this subject.<sup>1</sup> If the buyer accepts goods under a contract of sale and delays payment therefor, interest upon the purchase price is allowed as damages.<sup>2</sup> This is in accordance with the general principles which control this subject, since a liquidated amount is withheld from the party who is entitled thereto. If the buyer refuses to accept the goods, the measure of damages is the difference between the market price and the contract price;<sup>3</sup> and interest upon this amount has been awarded as damages.<sup>4</sup> In jurisdictions in which the manufacturer or seller may hold the goods and recover the contract price, he may recover interest thereon.<sup>5</sup> If the seller refuses or fails to deliver the goods which he has agreed to sell, the measure of damages is the difference between the market price and the contract price;<sup>6</sup> and interest upon such difference has been allowed as an item of damage.<sup>7</sup> If a warranty is broken, the measure of damages is ordinarily the value the article would have had

232, 157 N. W. 217; *Babayan v. Reed*, 257 Pa. St. 206, 101 Atl. 339; *Gallum v. Seymour*, 76 Wis. 251, 45 N. W. 115; *Allen v. Murray*, 87 Wis. 41, 57 N. W. 979.

This rule has been adopted in division of conjugal property. *De la Rama v. De la Rama*, 241 U. S. 154, 60 L. ed. 932.

<sup>14</sup> *Smith v. Yancey*, 198 Ala. 221, 73 So. 477; *Barker v. Chicago International Bank*, 80 Ill. 96; *Wilcox v. Howland*, 40 Mass. (23 Pick.) 167; *Van Benschooten v. Lawson*, 6 John. Ch. (N. Y.) 313, 10 Am. Dec. 333.

<sup>15</sup> See § 984.

<sup>1</sup> See § 3210.

<sup>2</sup> *Central of Georgia Ry. v. Isbell*, 198 Ala. 469, 73 So. 648; *Leffel v.*

*Pratt*, 126 Mich. 443, 86 N. W. 65.

<sup>3</sup> See § 3224.

<sup>4</sup> *McCall Co. v. Icks*, 107 Wis. 232, 83 N. W. 300.

*Contra*, *E. Clemens Horst Co. v. Peter Breidt City Brewery*, 94 N. J. L. 230, 109 Atl. 727.

<sup>5</sup> *Bond v. Bourk*, 54 Colo. 51, 43 L. R. A. (N.S.) 97, Ann. Cas. 1914C, 581, 129 Pac. 223.

<sup>6</sup> See §§ 3220 et seq.

<sup>7</sup> *Brackett v. Edgerton*, 14 Minn. 174, 100 Am. Dec. 211; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *N. P. Sloan Corporation v. Linton*, 260 Pa. St. 569, 6 A. L. R. 633, 103 Atl. 1011 (obiter); *Vogt v. Schienbeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 67 L. R. A. 756, 2 Ann. Cas. 814, 100 N. W. 820.

if it had complied with the warranty and its value as it is;<sup>8</sup> and interest on this amount is allowed as an item of damage.<sup>9</sup> If a carrier renders himself liable for the value of the goods by reason of loss, destruction, etc., interest upon the value of such goods is allowed.<sup>10</sup> If the goods are delayed in shipment in such a way as to render the carrier liable for damages for such delay, interest upon the value of the goods has been said to be the proper measure of damages.<sup>11</sup> If other special or consequential damages are shown, it is said that interest can not be allowed thereon.<sup>12</sup> If a carrier has exacted over-payments in freight rates by unlawful discrimination, interest on such over-payments may be recovered.<sup>13</sup> If a contractor has performed a building or construction contract and the like, and the money which is due under such contract is withheld wrongfully, he may recover interest thereon.<sup>14</sup> If the owner prevents the contractor from performing, the measure of damages is the difference between the contract price and the cost of performance.<sup>15</sup> It is said that interest can not be allowed upon the amount of damages thus ascertained;<sup>16</sup> but in other jurisdictions it is said that it is proper to let the jury award or withhold

<sup>8</sup> See § 3227.

<sup>9</sup> *Ferris v. Comstock, Ferre & Co.*, 33 Conn. 513; *Christie v. Crawford*, 152 Mich. 400, 116 N. W. 202; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280.

Contra, *Graham v. Brown Brothers Co.*, 30 Ida. 651, 168 Pac. 9.

<sup>10</sup> *United States. New York, Lake Erie & Western Ry. v. Estill*, 147 U. S. 591, 37 L. ed. 292.

*Massachusetts. Forbes v. Boston & Lowell Ry.*, 133 Mass. 154.

*Nevada. Southern Pacific Co. v. Haug*, 43 Nev. 102, 182 Pac. 92.

*New York. Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442.

*Vermont. Haglin-Stahar Co. v. Montpelier & W. R. R.*, 92 Vt. 258, 102 Atl. 940.

*Wisconsin. Whitney v. Chicago & Northwestern Ry.*, 27 Wis. 327.

So in an action *ex delicto*. *Fell v. Union P. R. Co.*, 32 Utah 101, 28 L. R. A. (N.S.) 1, 13 Ann. Cas. 1137, 88 Pac. 1003.

<sup>11</sup> *Southern Express Co. v. Hanaw*, 134 Ga. 445, 137 Am. St. Rep. 227, 67 S. E. 944; *Atchison, Topeka & Santa Fe Ry. v. Sun Drilling Co.*, — Okla. —, 165 Pac. 1133; *Newell v. Smith*, 49 Vt. 255.

<sup>12</sup> *Illinois Central Ry. v. Southern Seating & Cabinet Co.*, 104 Tenn. 568, 78 Am. St. Rep. 933, 50 L. R. A. 729, 58 S. W. 303.

<sup>13</sup> *Hilton Lumber Co. v. Atlantic Coast Line Ry. Co.*, 141 N. Car. 171, 6 L. R. A. (N.S.) 225, 53 S. E. 823.

Contra, if the contract price is reduced for defective performance. *Excelsior Terra Cotta Co. v. Harde*, 181 N. Y. 11, 106 Am. St. Rep. 493, 73 N. E. 494.

<sup>14</sup> *Downey v. O'Donnell*, 92 Ill. 559; *Ford v. Burchard*, 130 Mass. 424; *Peters v. National Surety Co.*, 167 Wis. 131, 166 N. W. 43, 1087.

<sup>15</sup> See § 3215.

<sup>16</sup> *Swanson v. Andrus*, 83 Minn. 505, 86 N. W. 465.

such interest in its discretion.<sup>17</sup> A physician may recover interest on the amount of his claim for professional services, from the time that such claim is due and payable.<sup>18</sup>

## III

## DAMAGES IN SPECIFIC CLASSES OF CONTRACTS

**§ 3212. Contract of employment—Wrongful discharge—Contract for exclusive services.** If a contract of employment or for the rendition of services is broken by the wrongful discharge of the employe by the employer, the measure of damages depends in part on whether the contract of employment required the employe to devote his entire time to the services of his employer or whether the contract required him to devote only a part of his time, or to perform certain acts, and the like. If the contract is one which requires the employe to devote his entire time to the service of the employer, the tendency of the court to award full compensation on the one hand, and on the other hand to require the party who is not in default to do everything that a reasonable and prudent man would to lessen the amount of damages, results in the rule that, in such cases, the measure of damages is the contract price for the entire term, less whatever it can be shown that such employe could have earned in that locality in a similar employment if he had exercised due care to obtain such other employment.<sup>1</sup>

<sup>17</sup> *Allen v. Murray*, 87 Wis. 41, 57 N. W. 979.

<sup>18</sup> *Leggat v. Gerrick*, 35 Mont. 91, 8 L. R. A. (N.S.) 1238, 88 Pac. 788.

<sup>1</sup> *United States. Pierce v. Tennessee Coal, Iron & Ry. Co.*, 173 U. S. 1, 48 L. ed. 591.

*Delaware. Ogden-Howard Company v. Brand*, 30 Del. (7 Boyce) 492, 8 A. L. R. 334, 108 Atl. 277.

*Indiana. Hamilton v. Love*, 152 Ind. 641, 71 Am. St. Rep. 384, 53 N. E. 181, 54 N. E. 437.

*Illinois. Fuller v. Little*, 61 Ill. 21.

*Iowa. Worthington v. Park Improvement Co.*, 100 Ia. 39, 69 N. W. 258; *Bertholf v. Fisk*, 182 Ia. 1308, 166 N. W. 713.

*Maryland. Baltimore Base Ball Club & Exhibition Co. v. Pickett*, 78 Md. 375, 44 Am. St. Rep. 304, 22 L. R. A. 690, 28 Atl. 279.

*Minnesota. Bennett v. Morton*, 46 Minn. 113, 48 N. W. 678.

*Mississippi. Lee v. Hampton*, 79 Miss. 321, 30 So. 721.

*North Carolina. Smith v. Lumber Co.*, 142 N. Car. 26 [sub nomine, *Smith v. Cashie & Chowan Ry. & Lumber Co.*, 5 L. R. A. (N.S.) 439, 54 S. E. 788].

*Ohio. James v. Allen County*, 44 O. S. 226, 6 N. E. 246; *Kelly v. Carthage Wheel Co.*, 62 O. S. 598, 57 N. E. 984.

*Tennessee. East Tennessee, Virginia & Georgia Ry. Co. v. Staub*, 75 Tenn. (7 Lea) 397.

The employe can not, therefore, maintain the action of debt to recover an installment of his salary for the period following his discharge.<sup>2</sup> If his expenses while on the road were to have been paid by his employer, they may also be considered as an item of damage to the employe.<sup>3</sup> If the employe is entitled to a portion of the net profits as part of his compensation, and such profits are to be ascertained at certain intervals, the employe is entitled to the portion of such profits which have accrued at the time of his discharge, if he is discharged during such period for ascertaining profits.<sup>4</sup> If it is impracticable to obtain other employment, the contract price is the amount of recovery.<sup>5</sup> The employe is not bound to accept different employment.<sup>6</sup> If he enters into a different employment, the amount which he earns in such business need not be deducted from the contract price;<sup>7</sup> and he does not lose his right to recover damages by reason thereof.<sup>8</sup> If he could have obtained employment of like nature, however, the amount which he could have earned at such employment is to be deducted in spite of the fact that he is engaged in some other employment or business.<sup>9</sup> If a discharged employe undertakes business on his own account, the court will not deduct from the contract price of employment the reasonable value of his services in such business,<sup>10</sup> especially if such business is unprofitable.<sup>11</sup>

**Virginia.** *Virginia Talc & Soapstone Co. v. Hurkamp*, 124 Va. 721, 98 S. E. 681.

**Washington.** *Howay v. Going-Northrup Co.*, 24 Wash. 88, 85 Am. St. Rep. 942, 64 Pac. 135.

**West Virginia.** *Rhoades v. Chesapeake & Ohio Ry. Co.*, 49 W. Va. 494, 87 Am. St. Rep. 828, 55 L. R. A. 170, 39 S. E. 209; *Davis v. Laurel River Lumber Co.*, 85 W. Va. 191, 101 S. E. 447.

**Wisconsin.** *Babcock v. Appleton Mfg. Co.*, 93 Wis. 124; 67 N. W. 33.

<sup>2</sup>*Ogden-Howard Company v. Brand*, 30 Del. (7 Boyce) 482, 8 A. L. R. 334, 108 Atl. 277.

<sup>3</sup>*Estes v. Desnoyers Shoe Co.*, 155 Mo. 577, 56 S. W. 316.

<sup>4</sup>*Myers v. Roger J. Sullivan Co.*, 166 Mich. 193, 34 L. R. A. (N.S.) 1217, 131 N. W. 521.

<sup>5</sup>*Hathaway v. Sabin*, 63 Vt. 527, 22 Atl. 633.

<sup>6</sup>*Saunders v. Smith Granite Co.*, 232 Mass. 1, 121 N. E. 431; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Waldrup v. Hill*, 70 Wash. 187, 126 Pac. 409.

<sup>7</sup>*Redfield v. Boston Piano & Music Co.*, 183 Ia. 194, 165 N. W. 365; *Hanneman v. Shlivek*, — Mass. —, 126 N. E. 671.

<sup>8</sup>*Bertholf v. Fisk*, 182 Ia. 1308, 166 N. W. 713; *Henneman v. Shlivek*, — Mass. —, 126 N. E. 671.

<sup>9</sup>*Bertholf v. Fisk*, 182 Ia. 1308, 166 N. W. 713.

<sup>10</sup>*Stewart Dry Goods Co. v. Hutchinson*, 177 Ky. 757, L. R. A. 1918C, 704, 198 S. W. 17.

<sup>11</sup>*Stewart Dry Goods Co. v. Hutchinson*, 177 Ky. 757, L. R. A. 1918C, 704, 198 S. W. 17.

In some jurisdictions the theory of constructive service is still recognized, and the employe may recover the contract rate of compensation, although he has not attempted to secure other employment.<sup>12</sup>

**§ 3213. Contract not for exclusive services.** If the contract is one which does not require the employe to devote his entire working time to the business of his employer, he is not bound to credit the amount which he obtained or could have obtained at other employment, on the contract price, on the theory that he would have been entitled to earn such amount at such other employment if he had not been discharged.<sup>1</sup> Whether a different principle would apply if it could be shown that the employe would not have been able to have accepted the new employment, unless he had been discharged from the original contract, is a question which does not seem to have been considered. This principle has been applied to a contract of an attorney at law who undertakes to render legal services for a certain fee. Unless the contract requires him to give his entire time to this particular client, he is free, under the contract, to receive compensation from other clients; and, accordingly, no reduction is to be made from the contract price because of the amounts which he has received from other clients.<sup>2</sup> This must be qualified by the view occasionally

<sup>12</sup> Iowa. *Weeksman v. Powell*, 178 Ia. 991, 160 N. W. 377.

Massachusetts. *Allen v. Chicago Pneumatic Tool Co.*, 205 Mass. 569, 91 N. E. 887.

Michigan. *Hinchman v. Matheson Motor Car Co.*, 151 Mich. 214, 115 N. W. 48.

Pennsylvania. *Allen v. Colliery Engineers Co.*, 196 Pa. St. 512, 46 Atl. 899.

South Carolina. *Sistare v. People's Supply Co.*, 87 S. Car. 171, 69 S. E. 152.

<sup>1</sup> Florida. *Sullivan v. McMillan*, 37 Fla. 134, 56 Am. St. Rep. 239, 19 So. 340.

Kentucky. *Burleigh v. Overton*, 173 Ky. 70, 190 S. W. 472.

Massachusetts. *Dixon v. Volunteer Co-operative Bank*, 213 Mass. 345, 100 N. E. 655; *Mount Pleasant Stable Co.*

*v. Steinberg*, — Mass. —, 131 N. E. 295.

Ohio. *Scheinesohn v. Lemonek*, 84 O. S. 424, Ann. Cas. 1912C, 737, 95 N. E. 913.

Washington. *Watson v. Gray's Harbor Brick Co.*, 3 Wash. 283, 28 Pac. 527.

<sup>2</sup> United States. *McGowan v. Parish*, 237 U. S. 285, 59 L. ed. 955.

Arkansas. *Brodie v. Watkins*, 33 Ark. 545, 34 Am. St. Rep. 49.

California. *Webb v. Trescony*, 76 Cal. 621, 18 Pac. 796.

Massachusetts. *Dixon v. Volunteer Co-operative Bank*, 213 Mass. 345, 100 N. E. 655.

Michigan. *Genrow v. Flynn*, 166 Mich. 564, 35 L. R. A. (N.S.) 960, Ann. Cas. 1912D, 638, 131 N. W. 1115.

Missouri. *Kersey v. Garton*, 77 Mo. 645.

expressed to the effect that the client may discharge his attorney at any time without breaking a contract; and that the amount of recovery will be the reasonable value of the services rendered.<sup>3</sup> Different considerations exist where the attorney is to receive a contingent fee, and the client discharges the attorney and compromises the case. It is said that in such case the attorney's compensation is to be based on the amount which the client received by such compromise.<sup>4</sup> It has, however, been said that only reasonable compensation for services rendered can be obtained,<sup>5</sup> not on the theory of the measure of damages, however, but on the theory that any agreement, express or implied, on the part of the client, not to dismiss the action, is invalid.<sup>6</sup> In like manner, on breach of contract by a broker, the measure of compensation is the amount that he would have earned under the contract less the expenses to which he would have been put in performing the contract,<sup>7</sup> except as far as restricted by the rules forbidding the recovery of speculative or uncertain damages.<sup>8</sup>

If the employe is to be paid by the piece, or a job, the measure of the damages is the contract price less what it would cost to

**Nebraska.** Dorshimer v. Herndon, 98 Neb. 421, 153 N. W. 496.

**Ohio.** Scheinesohn v. Lemonek, 84 O. S. 424, Ann. Cas. 1912C, 737, 95 N. E. 913.

<sup>3</sup> Southworth v. Rosendahl, 133 Minn. 447, 3 A. L. R. 468, 158 N. W. 717; Lawler v. Dunn, 145 Minn. 281, 176 N. W. 989 [overruling Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060].

<sup>4</sup> Proctor v. Louisville & Nashville Railroad Co., 156 Ky. 465, 3 A. L. R. 461, 161 S. W. 518; Grand Rapids & Indiana Ry. v. Cheboygan Circuit Judge, 161 Mich. 181, 137 Am. St. Rep. 495, 126 N. W. 56; Johnson v. Great Northern Ry., 128 Minn. 365, L. R. A. 1917B, 1140, 151 N. W. 125.

<sup>5</sup> Andrews v. Haas, 214 N. Y. 255, 3 A. L. R. 458, Ann. Cas. 1916D, 1161, 108 N. E. 423.

<sup>6</sup> See § 711.

<sup>7</sup> **Canada.** Laishley v. Goold Bicycle Co., 6 Ont. L. Rep. 319.

**Arkansas.** Blumenthal v. Bridges, 91 Ark. 212, 24 L. R. A. (N.S.) 279, 120 S. W. 974.

**Iowa.** McDermott v. Mahoney, 139 Ia. 292, 106 N. W. 925, 115 N. W. 32.

**Michigan.** Holton v. Monarch Motor Car Co., 202 Mich. 271, 168 N. W. 539.

**Minnesota.** Emerson v. Pacific Coast & Norway Packing Co., 96 Minn. 1, 1 L. R. A. (N.S.) 445, 6 Ann. Cas. 973, 104 N. W. 573; Newhall v. Journal Printing Co., 105 Minn. 44, 20 L. R. A. (N.S.) 899, 117 N. W. 228.

**Oklahoma.** Cloe v. Rogers, 31 Okla. 255, 38 L. R. A. (N.S.) 366, 121 Pac. 201.

Contra, that he can recover only expenses actually incurred. Girardey v. Stone, 24 La. Ann. 286.

<sup>8</sup> Gregory v. Harlan Home Coal Co., 182 Ky. 524, 206 S. W. 765; McGinnis v. Studebaker Corporation of America, 75 Or. 519, L. R. A. 1916B, 868, Ann. Cas. 1917B, 1190, 146 Pac. 825.

See §§ 3185 et seq.

complete the contract.<sup>9</sup> This rule gives the employe the benefit of the contract in the form of the profits that would accrue from performance, but does not allow him for the loss of his time as such.<sup>10</sup>

**§ 3214. Breach by employe.** The employe may break his contract of employment either by abandoning it entirely or by performing it in a defective manner. If he abandons it entirely, and his employer is able to secure similar services so as to avoid further loss by reason of such breach, the measure of damages is the amount which the employer is obliged to pay for such services, less the amount which he had agreed to pay to the employe.<sup>1</sup> If an agent who has agreed to sell stock for his principal breaks such contract, and the principal is obliged to raise money elsewhere, the measure of damages is the cost of raising such money, less the amount that it would have cost if the agent had performed.<sup>2</sup> If the employer is not able to secure similar service and consequential loss follows directly from the abandonment of the contract by the employe, he should be liable for the loss thus caused, at least if he had knowledge of the facts; and such measure of damages has been adopted in some jurisdictions.<sup>3</sup> In other jurisdictions rules of remoteness have been applied to prevent the employe from being held liable for such loss.

If the contract of employment is broken by defective performance on the part of the employe, the employer may recover the damage which he has sustained by reason of such breach.<sup>4</sup> If an

<sup>9</sup> *Reed v. Illinois Central Ry.* (Ky.), 75 S. W. 200; *Hollerbach & May Contract Co. v. Wilkins*, 130 Ky. 51, 112 S. W. 1126; *Mount Pleasant Stable Co. v. Steinberg*, — Mass. —, 131 N. E. 295; *Jewett v. Wilmot*, 51 Neb. 700, 71 N. W. 775; *Gould v. McCormick*, 75 Wash. 61, 47 L. R. A. (N.S.) 765, Ann. Cas. 1915A, 710, 134 Pac. 676.

<sup>10</sup> *Jewett v. Wilmot*, 51 Neb. 700, 71 N. W. 775.

For breach of building and construction contracts, see §§ 3215 et seq.

<sup>1</sup> *California. Hartman v. Rogers*, 69 Cal. 643, 11 Pac. 581.

*Delaware. Truitt v. Fahey*, 19 Del. (3 Penn.) 573, 52 Atl. 339.

*Idaho. Dover Lumber Co. v. Case*, 31 Ida. 276, 170 Pac. 108.

*Maryland. Middendorf, Williams & Co. v. Alexander Milburn Co.*, 134 Md. 385, 107 Atl. 7.

*New York. Peters v. Whitney*, 23 Barb. (N. Y.) 24; *Triangle Waist Co. v. Todd*, 223 N. Y. 27, 119 N. E. 85.

*Wisconsin. Eastern Ry. Co. of Minnesota v. Triteur*, 127 Wis. 382, 105 N. W. 1067.

<sup>2</sup> *Middendorf, Williams & Co. v. Alexander Milburn Co.*, 134 Md. 385, 107 Atl. 7.

<sup>3</sup> *Houser v. Pearce*, 13 Kan. 104.

<sup>4</sup> *California. Lally v. Kuster*, 177 Cal. 783, 171 Pac. 961.

*Florida. Bayshore Development Co. v. Bondfoye*, 75 Fla. 455, L. R. A. 1918D, 889, 78 So. 507.

agent to sell property has broken his contract by selling his principal's property to himself, the measure of damages is said to be the difference between the value of the property when sold and the property when the principal discovered the facts and repudiated the contract.<sup>5</sup> If an agent who is employed to select lands for the principal, locates the wrong land, the measure of damages is the difference between the value of the land as in accordance with the terms of the contract, and the value of such inferior land.<sup>6</sup> Where a contract to deliver lumber at a yard was broken by piling some elsewhere, the measure of recovery was held to be the difference between the contract price and the cost of the work done, and not the cost of moving the rest of the lumber.<sup>7</sup> The measure of damages for delay in setting up a heater is the cost of completing it, and not the value of the personal services of the vendee.<sup>8</sup> If an architect prepares plans and specifications improperly, the measure of damages is the value that the building would have had if constructed properly, and its actual value.<sup>9</sup>

If an attorney does not exercise due skill and diligence, he is liable to his client in damages.<sup>10</sup> If an attorney permits a foreclosure suit to be dismissed through his negligence, he is liable for the amount which could have been recovered, less the value, if any, of the right of action which the client has after such dismissal.<sup>11</sup> If his negligence results in the loss of the cause of action, the measure of damages is the amount which the client could have recovered, with interest.<sup>12</sup>

**Massachusetts.** *Hall v. Paine*, 224 Mass. 62, L. R. A. 1917C, 737, 112 N. E. 153.

**New York.** *Trimboli v. Kinkel*, 226 N. Y. 147, 5 A. L. R. 1385, 123 N. E. 205.

**South Dakota.** *Hickok v. Adams Co.*, 18 S. D. 14, 99 N. W. 77.

**Washington.** *Carroll v. Caine*, 27 Wash. 402, 67 Pac. 993.

**Wisconsin.** *Noble v. Libby*, 144 Wis. 632, 129 N. W. 791.

<sup>5</sup> *Hall v. Paine*, 224 Mass. 62, L. R. A. 1917C, 737, 112 N. E. 153.

<sup>6</sup> *Noble v. Libby*, 144 Wis. 632, 129 N. W. 791.

<sup>7</sup> *Carroll v. Caine*, 27 Wash. 402, 67 Pac. 993.

<sup>8</sup> *Hickok v. Adams Co.*, 18 S. D. 14, 99 N. W. 77.

<sup>9</sup> *Bayshore Development Co. v. Bondfoey*, 75 Fla. 455, L. R. A. 1918D, 889, 78 So. 507 (loss of rentals is too remote).

<sup>10</sup> *McLellan v. Fuller*, 226 Mass. 374, 115 N. E. 481; *Trimboli v. Kinkel*, 226 N. Y. 147, 5 A. L. R. 1385, 123 N. E. 205; *Lally v. Kuster*, 177 Cal. 783, 171 Pac. 961.

<sup>11</sup> *Lally v. Kuster*, 177 Cal. 783, 171 Pac. 961. (The cause of action was barred by the Statute of Limitations.)

<sup>12</sup> *McLellan v. Fuller*, 226 Mass. 374, 115 N. E. 481.

If the contract is ended by mutual consent, the amount of recovery for work and labor is such proportion of the contract price as the amount of work done is to the entire amount.<sup>13</sup>

**§ 3215. Building and construction contracts—Renunciation and abandonment.** If a building or construction contract is broken by the contractor's renunciation or abandonment thereof, the measure of damages is the cost of performing such contract in accordance with its terms, less the contract price or so much thereof as has not been paid to the contractor.<sup>1</sup> Substantially the same result is reached when it is said that the measure of damages is the reasonable cost to the owner of completing the contract.<sup>2</sup> If the owner has paid a reasonable amount to a third person to get him to perform the contract, it is said that such amount measures the owner's damages, although such third person had in the outset agreed to complete such contract for a less amount, and later had refused performance unless the larger amount was paid.<sup>3</sup> If a public corporation has no power to award a contract to one who did not bid, the price at which such contract is relet to such person can not be taken as a basis for determining the amount of damages to be recovered from the successful bidder who refuses performance.<sup>4</sup>

If the party for whom the work is to be performed renounces the contract or otherwise prevents the contractor from performing, the measure of damages is said to be the contract price less the cost of completing the performance of such contract.<sup>5</sup> It is

<sup>13</sup> *Connolly v. Sullivan*, 173 Mass. 1, 53 N. E. 143.

<sup>1</sup> *Arkansas. Northern Construction Co. v. Johnson*, 132 Ark. 528, 201 S. W. 510.

*Maryland. Davis v. Ford*, 81 Md. 333, 33 Atl. 280.

*Michigan. Newton v. Consolidated Construction Co.*, 184 Mich. 63, 150 N. W. 348.

*Missouri. Kennett v. Katz Construction Co.*, 273 Mo. 279, 202 S. W. 558.

*Washington. Smith Sand & Gravel Co. v. Corbin*, 102 Wash. 306, 173 Pac. 16.

<sup>2</sup> *Nelson v. San Antonio Traction Co.*, 107 Tex. 180, 175 S. W. 434; *Garrett-*

*son v. Rinehart*, 75 W. Va. 700, 84 S. E. 929.

<sup>3</sup> *Smith Sand & Gravel Co. v. Corbin*, 102 Wash. 306, 173 Pac. 16.

<sup>4</sup> *Cedar Rapids Lumber Co. v. Fisher*, 129 Ia. 332, 4 L. R. A. (N.S.) 177, 105 N. W. 595.

<sup>5</sup> *California. McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929.

*Connecticut. Warner v. McLay*, 92 Conn. 427, 103 Atl. 113.

*Kansas. McGrew v. Ide Estate Investment Co.*, 106 Kan. 348, 187 Pac. 887.

*Massachusetts. Millen v. Gulesian*, 229 Mass. 27, 118 N. E. 267.

also said that the proper measure of damages is that proportion of the contract price which the work which has been done bears to the entire work, plus the profits which would have been earned by performing the rest of the contract.<sup>6</sup> Apparently these two different rules are regarded as giving substantially the same result, and as being interchangeable.<sup>7</sup> The fact that it is not possible to ascertain with absolute accuracy the cost of completing the contract does not prevent this measure of damages.<sup>8</sup> If the contract is broken after the contractor has performed the most expensive part of the work, he may resort to an action on the theory of quasi-contract,<sup>9</sup> for the additional expense thus imposed upon him.<sup>10</sup>

For breach of a contract to make an improvement which will increase the value of certain realty, such improvement not being made upon the realty, the measure of damages is said by some courts to be a difference between the value of such realty on the day when such improvements should have been completed and its value upon that day had the improvement been completed as contracted for.<sup>11</sup>

**§ 3216. Building and construction contracts—Defective performance.** If the contractor delays performance beyond the time agreed upon, the measure of damages is said to be the rental value

**New Jersey.** *Cavanagh v. Ridgefield*, 94 N. J. L. 147, 109 Atl. 515.

**South Carolina.** *Jenkins v. Charleston Street Ry.*, 58 S. Car. 373, 36 S. E. 703.

**Washington.** *Bromley v. Heffernan Engine Works*, 108 Wash. 31, 182 Pac. 929; *Di Luck v. Bradner Co.*, 111 Wash. 291, 190 Pac. 904.

<sup>6</sup>*McGrew v. Ide Estate Investment Co.*, 106 Kan. 348, 187 Pac. 887; *Cavanagh v. Ridgefield*, 94 N. J. L. 147, 109 Atl. 515; *Kehoe v. Rutherford*, 56 N. J. L. 23, 27 Atl. 912; *Wilson v. Borden*, 68 N. J. L. 627, 54 Atl. 815.

See also, *Maryland Casualty Co. v. East Baltimore Driving Association*, 135 Md. 105, 108 Atl. 517.

<sup>7</sup>*McGrew v. Ide Estate Investment Co.*, 106 Kan. 348, 187 Pac. 887.

<sup>8</sup>*McConnell v. Corona City Water Co.*, 149 Cal. 60, 8 L. R. A. (N.S.) 1171, 85 Pac. 929.

<sup>9</sup>See §§ 3236 et seq.

<sup>10</sup>*Hayden v. Astoria*, 84 Or. 205, 164 Pac. 729.

<sup>11</sup>*Sandy Valley & Elkhorn Ry. Co. v. Hughes*, 181 Ky. 558, 205 S. W. 607; *Blagen v. Thompson*, 23 Or. 239, 18 L. R. A. 315, 31 Pac. 647; *Belt v. Washington Water Power Co.*, 24 Wash. 387, 64 Pac. 525.

In *Hudson v. Archer*, 9 S. D. 240, 68 N. W. 541, damages caused by a failure to operate a mill in a given town for a specified time were held too remote to allow recovery by one who had paid money to induce such mill to be located there.

of the property for the time of such delay.<sup>1</sup> If it has no rental value, the measure of damages is the value of the loss of its possession for the time of the delay, as a thing of use.<sup>2</sup> If the owner is not deprived of the use of the building or other work, but is merely hindered in his employment thereof, it is said that loss of tenants is too remote, uncertain and contingent to be a basis for allowing damages.<sup>3</sup> If the owner is obliged to expend an additional amount for inspection and supervision by reason of the contractor's delay, such item of expense may be recovered as damages.<sup>4</sup>

If the contractor has performed a building or construction contract either substantially,<sup>5</sup> or to such a degree that recovery is allowed to him upon the contract, but there is a variance between the performance which is required by the terms of the contract and the performance which is actually furnished, it is said by some courts that the measure of damages is the value of the building if constructed in accordance with the terms of the contract, less its value as actually constructed.<sup>6</sup> While this rule does not inflict any financial loss upon the property owner, it frequently makes him pay according to the rate fixed by the contract for something for which he did not bargain. It is accordingly held by many courts, and apparently with better reason, that if the contract is performed substantially, but not literally, the measure of damages is the cost of remedying the defects if this does not involve an unreasonable expenditure.<sup>7</sup> Where this rule is adopted it is occasion-

<sup>1</sup> *Cannon v. Hunt*, 113 Ga. 501, 38 S. E. 983; *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292; *Graves v. Allert*, 104 Tex. 614, 39 L. R. A. (N.S.) 591, 142 S. W. 869.

<sup>2</sup> *Lee v. Normal School Co.*, 1 Neb. (unofficial) 681, 96 N. W. 65.

<sup>3</sup> *Winslow Elevator & Machine Co. v. Hoffman*, 107 Md. 621, 17 L. R. A. (N. S.) 1130, 69 Atl. 394.

<sup>4</sup> *United States v. Breymann*, 228 Fed. 808.

<sup>5</sup> See §§ 2778 et seq.

<sup>6</sup> *White v. McLaren*, 151 Mass. 553, 24 N. E. 911; *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650; *Lincoln Stone & Supply Co. v. Ludwig*, 94 Neb. 722, 144 N. W. 782.

<sup>7</sup> *England. Thornton v. Place*, 1 M. & R. 218.

*United States. Turner v. Henning*, 262 Fed. 637.

*Massachusetts. Norcross v. Vose*, 199 Mass. 81, 85 N. E. 468.

*Minnesota. Snider v. Peters Home Bldg. Co.*, 139 Minn. 413, 167 N. W. 108.

*New Jersey. Drummond v. Hughes*, 91 N. J. L. 563, 104 Atl. 137.

*Texas. Graves v. Allert*, 104 Tex. 614, 39 L. R. A. (N.S.) 591, 142 S. W. 869.

*Washington. Electric Sales Corporation v. Radford*, 103 Wash. 130, 173 Pac. 942.

ally held that the difference between the value of the performance, if in accordance with the terms of the contract, and the value of the actual performance, is not the correct measure of damages.<sup>8</sup>

If the contractor's variance from the contract was not wilful, and the cost of remedying the defects will be unreasonably large so as to impose a burden on the contractor, out of all proportion to the benefit which is conferred upon the property owner, it is said that the measure of damages is the difference between the value of the performance in accordance with the terms of the contract and the value of the performance as actually furnished.<sup>9</sup> If the variance in performance is wilful and intentional, it is said that the measure of damages is the cost of reconstructing the building in accordance with the original contract, no matter how expensive this may be.<sup>10</sup> If the contractor deliberately places defective materials in the walls of the building, the measure of damages is said to be the cost of removing such portions of the walls and of reconstructing them in accordance with the terms of the contract.<sup>11</sup> Even where the contractor may be held for the cost of completing performance in accordance with the terms of the contract, he can not be held for the cost of performance in excess of his obligation under the contract.<sup>12</sup>

In many jurisdictions material variance from the terms of the contract prevents the contractor from recovering anything for his services.<sup>13</sup> It is said that in case of a substantial variance the amount of recovery is the reasonable value of the performance not exceeding the contract price less the difference between the value of the performance in accordance with the terms of the contract and

**Wisconsin.** *Ashland Lime, Salt & Cement Co. v. Shores*, 105 Wis. 122, 81 N. W. 136; *Manning v. Ft. Atkinson School District*, 124 Wis. 84, 102 N. W. 356.

This corresponds to the rule which measures the right of the contractor to recover. See § 2784.

<sup>8</sup> *Snider v. Peters Home Bldg. Co.*, 139 Minn. 413, 167 N. W. 108; *Graves v. Allert*, 104 Tex. 614, 39 L. R. A. (N. S.) 591, 142 S. W. 869; *Electric Sales Corporation v. Radford*, 103 Wash. 130, 173 Pac. 942.

<sup>9</sup> *Taulbee v. Moore*, 106 Ky. 749, 51

S. W. 564; *Young v. Cumberland County Educational Society*, 183 Ky. 625, 6 A. L. R. 135, 210 S. W. 494; *White v. McLaren*, 151 Mass. 553, 24 N. E. 911.

<sup>10</sup> *Turner v. Henning*, 262 Fed. 637; *Young v. Cumberland County Educational Society*, 183 Ky. 625, 6 A. L. R. 135, 210 S. W. 494.

<sup>11</sup> *Young v. Cumberland County Educational Society*, 183 Ky. 625, 6 A. L. R. 135, 210 S. W. 494.

<sup>12</sup> *Drummond v. Hughes*, 91 N. J. L. 563, 104 Atl. 137.

<sup>13</sup> See § 2795.

the value of the performance actually furnished.<sup>14</sup> This rule is based on the theory that the contractor is bound to perform and not to furnish any building or construction that he may wish, as long as it is worth the contract price. The theory would, however, seem to result in denying to the contractor the right to recover and in requiring him to repay to the property owner any payments in advance.

If a contractor knows that defective construction may result in injury to the contents of the building he is liable for injury to such contents due to such defective construction,<sup>15</sup> at least as long as the owner could not prevent such loss, by reasonable diligence. The measure of damages for failure to extend water mains and sewers so as to benefit realty which will adjoin such improvement, is the value of such realty if such improvements had been constructed, less its value without such improvements.<sup>16</sup> The measure of damages for delay in improving realty by constructing streets, water mains and sewers is the reasonable rental value of the realty in its actual condition as distinguished from the rental value which it would have had if the owner had built thereon the building that he would have built if such streets, water mains, and sewers had been built.<sup>17</sup>

If the contractor wrongfully makes use of material belonging to the property owner, he is liable for the diminution in value of such material due to such use.<sup>18</sup>

If the property owner fails to furnish certain appliances which the contractor can obtain at a comparatively slight expense, the measure of damages is the cost of obtaining such appliances and not the entire additional expense of performance due to attempting to perform without such necessary appliances.<sup>19</sup>

If the property owner delays performance, the rental value of equipment which can not be used by reason of such delay is the measure of damages.<sup>20</sup>

<sup>14</sup> *Pierson v. Smith*, — Mich. —, 178 N. W. 659.

<sup>15</sup> *Dickson v. Alabama Machinery & Supply Co.*, — Ala. App. —, 84 So. 416; *Dondis v. Borden*, 230 Mass. 73, 119 N. E. 184.

<sup>16</sup> *Lambeth v. Thomasville*, 179 N. Car. 452, 102 S. E. 775.

<sup>17</sup> *Boston Trust Co. v. Evelon Co.*, 96 Wash. 31, 164 Pac. 606.

<sup>18</sup> *Clarke v. Blue Licks Springs Co.*, 184 Ky. 827, 5 A. L. R. 234, 213 S. W. 222.

<sup>19</sup> *Stonega Coke & Coal Co. v. Ad-dington*, 112 Va. 807, 37 L. R. A. (N. S.) 969, 73 S. E. 257.

<sup>20</sup> *Terrell Co. v. Davis*, 77 Okla. 302, 188 Pac. 676.

**§ 3217. Other contracts for services.** If a contract to furnish advertising is renounced by the party for whom it is to be furnished, the full contract price may be recovered, less whatever it can be shown that the advertiser could have earned as a result of such breach, in addition to his actual earnings.<sup>1</sup> On the other hand, it has been said that the measure of damages is the contract price, less the cost of furnishing such advertising.<sup>2</sup> The publisher is bound to take reasonable precaution to lessen the amount of damages by accepting other advertising matter, and he can not insist on continuing performance and recovering the full contract price.<sup>3</sup> On breach of a contract to cut timber the measure of damages is the difference between the reasonable cost of completing the performance and the contract price.<sup>4</sup>

**§ 3218. Contract not to compete.** If one who has entered into a valid contract not to engage in a certain business, breaks such contract, and competes with the promisee, the only available measure of damages is the amount of profits which the promisee has lost by reason of such breach, together with the diminution in value, if any, of the property which the promisee purchased from the promisor under the contract for the sale of his business, and the like, of which the covenant not to compete was a part. In spite of the fact that this rule permits the recovery of profits,<sup>1</sup> it has been adopted by the courts, as the only alternative to denying recovery.<sup>2</sup> If the promisee is unable to show the amount of profits which he has lost by reason of such breach, he can recover only nominal damages.<sup>3</sup> He can not recover the profits which the

<sup>1</sup> Ware Brothers Co. v. Cortland Cart & Carriage Co., 192 N. Y. 439, 22 L. R. A. (N.S.) 272, 85 N. E. 666; McDermott v. De Meridor Co., 80 N. J. L. 67, 76 Atl. 331 [affirmed, 82 N. J. L. 530, 82 Atl. 900].

<sup>2</sup> Haynes v. Nye, 185 Mass. 507, 70 N. E. 932; Barron G. Collier, Inc., v. Kindy, — Minn. —, 178 N. W. 584.

<sup>3</sup> Haynes v. Nye, 185 Mass. 507, 70 N. E. 932.

<sup>4</sup> Dover Lumber Co. v. Case, 31 Ida. 276, 170 Pac. 108.

<sup>1</sup> See §§ 3199 et seq.

<sup>2</sup> Alabama. Howard v. Taylor, 90 Ala. 241, 8 So. 36.

Georgia. Shaw v. Jones, 133 Ga. 446, 66 S. E. 240.

Indiana. Rawson v. Pratt, 91 Ind. 9.

Nebraska. Wittenberg v. Mollyneaux, 60 Neb. 583, 83 N. W. 842.

Ohio. Burckhardt v. Burckhardt, 36 O. S. 261.

Oregon. Dose v. Tooze, 37 Or. 13, 60 Pac. 380.

Tennessee. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 9 L. R. A. (N.S.) 970, 92 S. W. 1104.

<sup>3</sup> Taylor v. Howard, 110 Ala. 468, 18 So. 311.

promisor has earned in such competing business.<sup>4</sup> The net result of these rules is that, in most cases, it is impossible for the promisee to recover any adequate compensation for his loss; and, accordingly, covenants to pay liquidated damages in cases of this sort, are treated more favorably in most cases;<sup>5</sup> and relief is given by injunction on the theory that the legal remedy is inadequate.<sup>6</sup>

**§ 3219. Contract for sale of realty.** If an executory contract for the sale of realty is broken by the failure of the vendor to perform, there is, in the first place, as has already been said,<sup>1</sup> a conflict of authority as to whether compensatory damages can be recovered if the breach is not wilful. Where compensatory damages can be recovered, the measure of damages in such cases is the actual value of the realty, less the contract price in case no part of the contract price has been paid by the purchaser.<sup>2</sup> If the purchase price or a part thereof has been paid by the purchaser, he can recover such amount in addition to the damage sustained by the loss of his bargain.<sup>3</sup> While this bears some relation to recovery in quasi-contract,<sup>4</sup> the resemblance is superficial rather than real. If the purchaser is entitled to compensatory damages the court allows him the reasonable value of the property for which he had bargained, less the amount which is still due under the contract.<sup>5</sup>

<sup>4</sup> *Dose v. Tooze*, 37 Or. 13, 60 Pac. 380.

<sup>5</sup> See § 2133.

<sup>6</sup> See ch. XC.

<sup>1</sup> See § 3178.

<sup>2</sup> *England. Godwin v. Francis*, L. R. 5 C. P. 295.

*United States. Harten v. Loeffler*, 212 U. S. 397, 53 L. ed. 568.

*Iowa. Yokom v. McBride*, 56 Ia. 139, 8 N. W. 795; *Cornell v. Rodabaugh*, 117 Ia. 287, 94 Am. St. Rep. 298, 90 N. W. 599; *Sawyer v. Hawthorne*, 178 Ia. 407, 158 N. W. 665; *Carter v. Schrader*, 187 Ia. 1245, 175 N. W. 329.

*Michigan. Zimmerman v. Miller*, 206 Mich. 599, 173 N. W. 364.

*Minnesota. Nostldal v. Morehart*, 132 Minn. 351, 157 N. W. 584.

*Missouri. Kirkpatrick v. Downing*, 58 Mo. 32, 17 Am. Rep. 678.

*Nebraska. Beck v. Staats*, 80 Neb. 482, 16 L. R. A. (N.S.) 768, 114 N. W. 633.

*Wisconsin. Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57; *Muenchow v. Roberts*, 77 Wis. 520, 46 N. W. 802; *McLennan v. Church*, 163 Wis. 411, 161 N. W. 14; *Lommen v. Danaher*, 165 Wis. 15, 161 N. W. 14.

<sup>3</sup> *Breja v. Pryne*, 94 Ia. 755, 64 N. W. 669; *Bartlett v. Smith*, 146 Mich. 188, 117 Am. St. Rep. 625, 109 N. W. 260; *Beck v. Staats*, 80 Neb. 482, 16 L. R. A. (N.S.) 768, 114 N. W. 633; *Herbert v. Hillman*, 50 Wash. 83, 96 Pac. 837.

<sup>4</sup> See ch. LXXXVIII.

<sup>5</sup> *Neppach v. Oregon & California Ry.*, 46 Or. 374, 7 Ann. Cas. 1035, 80 Pac. 482; *Brink v. Mitchell*, 135 Wis. 416, 116 N. W. 16.

If the entire purchase price has been paid in, the measure of damages is the value of the realty.<sup>6</sup> These are different applications of what is, essentially, the same rule, although stated in different forms.

If the contract is for the conveyance of an easement, and the purchaser has actually made use thereof for the time agreed upon, only nominal damages can be recovered for the failure of the vendor to convey the legal title.<sup>7</sup>

If the purchaser abandons the contract and fails to perform, the measure of damages is the contract price less the value of the realty.<sup>8</sup> It has been held that the vendor may, if he pleases, treat the equitable interest as being in the vendee and recover the entire contract price.<sup>9</sup> This is, in effect, granting specific performance at law, without the checks and safeguards of which equity makes use when application is made for such remedy.<sup>10</sup>

On breach of a contract to make use of realty for a certain purpose, the owner may recover the depreciation in the value thereof due to such breach.<sup>11</sup> If A and B have exchanged lands and as a part of the consideration therefor, B has agreed to construct buildings upon the property conveyed to him, A may recover the value of such buildings in case of B's failure to construct them.<sup>12</sup>

If the vendor has sold the property a second time to a bona fide purchaser, the original purchaser may recover the payments which he has made, together with the value of the improvements which

<sup>6</sup> *Hopkins v. Lee*, 19 U. S. (6 Wheat.) 109, 5 L. ed. 218; *Doty v. Doty*, 118 Ky. 204, 2 L. R. A. (N.S.) 713, 4 Ann. Cas. 1064, 80 S. W. 803; *Jennings v. Oregon Land Co.*, 48 Or. 287, 86 Pac. 367; *Haralson v. McGavock*, 78 Tenn. (10 Lea) 719.

<sup>7</sup> *Gates v. Detroit & Mackinac Ry.*, 147 Mich. 523, 111 N. W. 101.

<sup>8</sup> *Georgia*. *Cowdrey v. Greenlee*, 126 Ga. 786, 8 L. R. A. (N.S.) 137, 55 S. E. 918.

*Illinois*. *Burnham v. Roberts*, 70 Ill. 19.

*Indiana*. *Millikin v. Hunter*, 180 Ind. 149, 100 N. E. 1041.

*Kansas*. *First Methodist Episcopal*

*Church v. North*, 92 Kan. 381, 140 Pac. 888.

*Michigan*. *Allen v. Mohn*, 86 Mich. 328, 24 Am. St. Rep. 126, 49 N. W. 52.

*Minnesota*. *Wilson v. Hoy*, 120 Minn. 451, 139 N. W. 817.

<sup>9</sup> *Ehrich v. Durkee*, 18 Colo. App. 502, 72 Pac. 814; *Gray v. Meek*, 199 Ill. 136, 64 N. E. 1020 [affirming, 101 Ill. App. 463]; *Murray v. Ellis*, 112 Pa. St. 485, 3 Atl. 845; *Walker v. Emerson*, 20 Tex. 706, 73 Am. Dec. 207.

<sup>10</sup> See ch. LXXXIX.

<sup>11</sup> *Camp v. Gress*, 250 U. S. 308, 63 L. ed. 997.

<sup>12</sup> *Braddy v. Elliott*, 146 N. Car. 578, 16 L. R. A. (N.S.) 1121, 60 S. E. 507.

he has made, less the value of the use of the premises.<sup>13</sup> If the vendor has given two successive deeds to different purchasers and the first purchaser has omitted to place his deed on record, the first grantee may recover the full value of the property, less the unpaid part of the purchase price,<sup>14</sup> together with attorney's fees where allowed as damages.<sup>15</sup>

**§ 3220. Executory contract for sale of personalty—Breach by seller.** If an executory contract for the sale of personalty is broken by the refusal or inability of the seller to perform, the measure of damages is the market value of such property less the contract price.<sup>1</sup> If the buyer purchases similar goods in the open market,

<sup>13</sup> *Bartlett v. Smith*, 146 Mich. 188, 117 Am. St. Rep. 625, 109 N. W. 260.

<sup>14</sup> *Madden v. Caldwell Land Co.*, 16 Ida. 59, 21 L. R. A. (N.S.) 332, 100 Pac. 358.

<sup>15</sup> *Madden v. Caldwell Land Co.*, 16 Ida. 59, 21 L. R. A. (N.S.) 332, 100 Pac. 358.

<sup>1</sup> *England. Tyers v. Rosedale & Ferryhill Iron Co.*, L. R. 8 Exch. 305.

*United States. Roberts v. Benjamin*, 124 U. S. 64, 31 L. ed. 334.

*Alabama. W. F. Covington Mfg. Co. v. Ferguson*, 204 Ala. 192, 85 So. 726.

*Arkansas. Arkansas Short Leaf Lumber Co. v. McInturf*, 134 Ark. 284, 203 S. W. 1047.

*Connecticut. Crug v. Gorham*, 74 Conn. 541, 51 Atl. 519; *Progressive Smelting & Metal Corporation v. Ansonia Foundry Co.*, 93 Conn. 123, 105 Atl. 322.

*Indiana. Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141.

*Iowa. Welch v. Urbany*, 112 Ia. 531, 84 N. W. 497; *Sapulpa Refining Co. v. Cedar Rapids Oil Co.*, — Ia. —, 179 N. W. 168.

*Kansas. Bagby v. Straub*, 105 Kan. 382, 184 Pac. 716; *Brumely v. Thompson*, 106 Kan. 67, 186 Pac. 986.

*Kentucky. Asher v. Stacy* (Ky.), 65 S. W. 603; *Royster v. Waller*, 186 Ky. 476, 217 S. W. 684.

*Louisiana. Williams v. Bienvenue*, 109 La. 1023, 34 So. 63; *Gallaspy v. Ingersoll*, 147 La. 102, 84 So. 510.

*Maryland. Phillips Sheet & Tin Plate Co. v. Boyer*, 133 Md. 119, 105 Atl. 166.

*Massachusetts. Bartlett v. Blanchard*, 79 Mass. (13 Gray) 429.

*Minnesota. Coxe v. Anoka Waterworks, Electric Light & Power Co.*, 87 Minn. 56, 91 N. W. 265.

*Montana. Montana Live Stock & Loan Co. v. Stewart*, 58 Mont. 221, 190 Pac. 985.

*Nebraska. Fahey v. Updike Elevator Co.*, 102 Neb. 249, 166 N. W. 622.

*New Jersey. Stone v. West Jersey Ice Mfg. Co.*, 65 N. J. L. 20, 46 Atl. 696.

*New York. Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L. R. A. (N.S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090; *Orester v. Dayton Rubber Mfg. Co.*, 228 N. Y. 134, 126 N. E. 510.

*North Carolina. Cooper v. Clute*, 174 N. Car. 366, 93 S. E. 915; *Hunter v. Gerson*, 178 N. Car. 485, 101 S. E. 26.

*North Dakota. Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026.

*Ohio. Smith v. Sloss Marblehead Lime Co.*, 57 O. S. 518, 49 N. E. 695.

*Oklahoma. Kingfisher Mill & Elevator Co. v. Westbrook*, 79 Okla. 188, 192 Pac. 209.

and acts reasonably and in good faith, the price which he pays for such goods is to be regarded as the market price,<sup>2</sup> especially if the seller has advised the buyer to purchase such goods.<sup>3</sup> If the seller has wrongfully sold the goods in question to a third party, the buyer may treat the price thus obtained as the market price.<sup>4</sup> If the seller has a choice as to the quantity which he will deliver, the minimum quantity must be taken as the basis for measuring damages.<sup>5</sup>

The value of a note whose sale is contracted for is its selling price and not its face, within the meaning of this rule.<sup>6</sup> If a higher price must be paid in open market for buying on short notice, this must be considered in determining damages.<sup>7</sup> If a contract to sell at private sale is broken by a sale at auction, the measure of damages is the difference between the price obtained and the price that would have been obtained by a sale under the contract.<sup>8</sup>

If there is a comparatively slight shortage, the measure of damages is a pro rata abatement from the contract price.<sup>9</sup>

**Pennsylvania.** *Kimports v. Breon*, 193 Pa. St. 309, 44 Atl. 436; *N. P. Sloan Corporation v. Linton*, 280 Pa. St. 569, 6 A. L. R. 633, 103 Atl. 1011; *Seward v. Pennsylvania Salt Mfg. Co.*, 266 Pa. St. 457, 109 Atl. 617.

**South Carolina.** *Clinton Oil & Mfg. Co. v. Carpenter*, 113 S. Car. 10, 101 S. E. 47.

**Tennessee.** *Harris v. Rodgers*, 53 Tenn. (6 Heisk.) 626.

**Vermont.** *Auer v. Robertson Paper Co.*, — Vt. —, 111 Atl. 570.

**Washington.** *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621; *Marden, Orth & Hastings Corporation v. Trans-Pacific Corporation*, 109 Wash. 296, 186 Pac. 884.

**West Virginia.** *Elias v. Boone Timber Co.*, 85 W. Va. 508, 102 S. E. 488.

**Wisconsin.** *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 67 L. R. A. 756, 2 Ann. Cas. 814, 100 N. W. 820; *Allen v. Wolf River Lumber Co.*, 169 Wis. 253, 9 A. L. R. 271, 172 N. W. 158.

<sup>2</sup> Police Jury for Parish of St. Lan-

dry v. Alexandria Gravel Co., 146 La. 1, 83 So. 316; *Oil City Iron Works v. S. Bender Supply Co.*, 147 La. 450, 85 So. 201; *New England Box Co. v. Tibbetts*, — Vt. —, 110 Atl. 434.

<sup>3</sup> Police Jury for Parish of St. Landry v. Alexandria Gravel Co., 146 La. 1, 83 So. 316.

<sup>4</sup> *McVeety v. Hayes*, 111 Wash. 457, 191 Pac. 401.

<sup>5</sup> *Bagby v. Straub*, 105 Kan. 382, 184 Pac. 716.

<sup>6</sup> *Kory v. Layman*, 108 La. 247, 32 So. 441.

<sup>7</sup> *Christopher & Simpson Architectural Iron & Foundry Co. v. Yeager*, 202 Ill. 486, 67 N. E. 166 [affirming, 105 Ill. App. 126].

<sup>8</sup> *Paxton v. Vadbouker*, 1 Neb. (unofficial) 776, 96 N. W. 378.

<sup>9</sup> *Mente v. Kaplan*, 146 La. 678, 83 So. 895; *Kavanaugh Mfg. Co. v. Rosen*, 132 Mich. 44, 102 Am. St. Rep. 378, 92 N. W. 788; *Driggs v. Bush*, 152 Mich. 53, 15 L. R. A. (N.S.) 654, 15 Ann. Cas. 30, 115 N. W. 985; *Vos v. Child*, 171 Mich. 595, 43 L. R. A. (N. S.) 368, 137 N. W. 209.

**§ 3221. Time at which market value is to be determined.** The market price for this purpose must be determined as of the time and place of the delivery agreed upon.<sup>1</sup> If delivery has been postponed by mutual consent, the time fixed by the last postponement is the time at which damages should be estimated.<sup>2</sup> If delivery is to be made between certain dates, the market price is to be taken as of the last day on which delivery could be made.<sup>3</sup> If no fixed date for the performance of the contract is agreed upon, the measure of damages is to be taken as of the date of refusal on the part of the seller to perform the contract at the demand of the buyer if such demand is reasonable.<sup>4</sup> Neither party can change

<sup>1</sup> **England.** *Michael v. Hart* [1902], 1 K. B. 482.

**Alabama.** *W. F. Covington Mfg. Co. v. Ferguson*, 204 Ala. 192, 85 So. 726.

**California.** *Cummings v. Dudley*, 60 Cal. 383, 44 Am. Rep. 58.

**Illinois.** *Murray v. Doud*, 167 Ill. 368, 59 Am. St. Rep. 297, 47 N. E. 717.

**Indiana.** *Fink v. Tatman*, 36 Ind. 259, 10 Am. Rep. 19.

**Kansas.** *Brumely v. Thompson*, 106 Kan. 67, 186 Pac. 986.

**Kentucky.** *Cole v. Ross*, 48 Ky. (9 B. Mon.) 393, 50 Am. Dec. 517; *Royster v. Waller*, 186 Ky. 476, 217 S. W. 684.

**Louisiana.** *Gallaspy v. Ingersoll*, 147 La. 102, 84 So. 510.

**Maryland.** *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502.

**Michigan.** *Austrian v. Springer*, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50; *Driggs v. Bush*, 152 Mich. 53, 15 L. R. A. (N.S.) 654, 15 Ann. Cas. 30, 115 N. W. 985.

**Montana.** *Montana Live Stock & Loan Co. v. Stewart*, 58 Mont. 221, 190 Pac. 985.

**New York.** *Cahen v. Platt*, 69 N. Y. 348, 25 Am. Rep. 203; *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L. R. A. (N.S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090; *Orester v. Dayton Rubber Mfg. Co.*, 228 N. Y. 134, 126 N. E. 510.

**North Carolina.** *Hunter v. Gerson*, 178 N. Car. 485, 101 S. E. 26.

**Oklahoma.** *Kingfisher Mill & Elevator Co. v. Westbrook*, 79 Okla. 188, 192 Pac. 209.

**Pennsylvania.** *N. P. Sloan Corporation v. Linton*, 260 Pa. St. 569, 6 A. L. R. 633, 103 Atl. 1011.

**South Carolina.** *Clinton Oil & Mfg. Co. v. Carpenter*, 113 S. Car. 10, 101 S. E. 47.

**Washington.** *Marden, Orth & Hastings Corporation v. Trans-Pacific Corporation*, 109 Wash. 296, 186 Pac. 884.

**West Virginia.** *Elias v. Boone Timber Co.*, 85 W. Va. 508, 102 S. E. 488.

**Wisconsin.** *Vogt v. Schienebeck*, 122 Wis. 491, 106 Am. St. Rep. 989, 67 L. R. A. 756, 2 Ann. Cas. 814, 100 N. W. 820; *Allen v. Wolf River Lumber Co.*, 169 Wis. 253, 9 A. L. R. 271, 172 N. W. 158.

See § 3198.

<sup>2</sup> *W. F. Covington Mfg. Co. v. Ferguson*, 204 Ala. 192, 85 So. 726; *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899; *Fahey v. Updike Elevator Co.*, 102 Neb. 249, 171 N. W. 50.

<sup>3</sup> *Gallaspy v. Ingersoll*, 147 La. 102, 84 So. 510.

<sup>4</sup> **United States.** *Roberts v. Benjamin*, 124 U. S. 64, 31 L. ed. 334.

**Illinois.** *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

the time for measuring damages by renunciation in advance.<sup>5</sup>

If the seller refuses to perform a contract for the sale of stocks, the value of which is fluctuating, and the buyer has furnished the consideration therefor, it is said that the measure of damages is the difference between the highest market price within a reasonable time, after the time fixed for performance, to enable the buyer to protect himself by buying such stock in the open market.<sup>6</sup>

**§ 3222. Place at which market price is to be determined.** If there is no market at the place of delivery, but there is one within a reasonable distance, and the seller is to pay the cost of transportation, and the buyer will be obliged to obtain such goods at such market and transport them to the place of delivery, the market price at such market with the cost of transportation must be taken as the measure of damages.<sup>1</sup> If the parties contemplate the removal of the goods from the point at which they are located to a market in order that the buyer may resell them, and the buyer is to pay the cost of transportation, the cost of transportation is to be deducted from the market price.<sup>2</sup> If the buyer is to remove the goods from their location, the value of the goods in such location is to be taken as the market value.<sup>3</sup>

**§ 3223. Article without market price.** If, however, the supply of the article contracted for is limited so that it can not be

**Iowa.** *Brown v. Sharkey*, 93 Ia. 157, 61 N. W. 364.

**Kentucky.** *Royster v. Waller*, 186 Ky. 476, 217 S. W. 684.

**Maryland.** *United Railways & Electric Co. v. Wehr*, 103 Md. 323, 63 Atl. 475.

**New Hampshire.** *Trask v. Hamburger*, 70 N. H. 453, 48 Atl. 1087.

**Washington.** *R. J. Menz Lumber Co. v. McNeeley*, 58 Wash. 223, 28 L. R. A. (N.S.) 1007, 108 Pac. 621.

<sup>5</sup> See §§ 2898, et seq. and §§ 3193 et seq.

<sup>6</sup> *Galigher v. Jones*, 129 U. S. 193, 32 L. ed. 658; *Hoyt v. Fuller*, 104 Fed. 192; *Vos v. Child*, 171 Mich. 595, 43 L. R. A. (N.S.) 368, 137 N. W. 209; *Baker v. Drake*, 53 N. Y. 211, 13 Am. St. Rep.

507; *Colt v. Owens*, 90 N. Y. 368; *Wright v. Bank of Metropolis*, 110 N. Y. 237, 6 Am. St. Rep. 356, 1 L. R. A. 289, 18 N. E. 79.

<sup>1</sup> *Hardwood Lumber Co. v. Adam*, 134 Ga. 821, 32 L. R. A. (N.S.) 192, 68 S. E. 725; *Log Mountain Coal Co. v. White Oak Coal Co.*, 177 Ky. 166, 197 S. W. 659; *Coxe v. Anoka Waterworks, Electric Light & Power Co.*, 87 Minn. 56, 91 N. W. 265; *Clinton Oil & Mfg. Co. v. Carpenter*, 113 S. Car. 10, 101 S. E. 47.

<sup>2</sup> *N. P. Sloan Corporation v. Linton*, 260 Pa. St. 569, 6 A. L. R. 633, 103 Atl. 1011.

<sup>3</sup> *Hunter v. Gerson*, 178 N. Car. 485, 101 S. E. 26 (sale of rails which were part of a track).

bought in open market and has no market price, a different rule must apply. The cost of getting the article, less the contract price, has been said to be the measure of damages.<sup>1</sup> It is said that the reasonable value of the article must be taken as a basis for measuring damages.<sup>2</sup> If it is impracticable to obtain a similar article, the cost of the most available substitute may be taken as a factor in determining the amount of damages.<sup>3</sup> He is not allowed the cost of an unreasonable or extravagant substitute.<sup>4</sup> If the buyer is unable to secure a similar article or a satisfactory substitute and he is thus prevented from completing the transaction, in aid of which he entered into such contract, it is said that he may recover the profits which he otherwise would have made.<sup>5</sup> On breach of a contract to furnish feed for animals, the injury which the animals sustain by reason of such breach is an element of damage, if it is not practicable to obtain other feed for them.<sup>6</sup>

**§ 3224. Contract for sale of goods—Executory contract—Breach by buyer.** If an executory contract of sale in which title has not been passed to the buyer is broken by the buyer in such a way as to operate as a discharge, the measure of damages, according to the weight of authority, is the contract price, less the market price.<sup>1</sup> If the contract is executory and the title remains

<sup>1</sup> *McFadden v. Henderson*, 128 Ala. 221, 29 So. 640.

<sup>2</sup> *McFadden v. Shanley*, 16 Ariz. 91, 141 Pac. 732; *Warren v. A. B. Mayer Mfg. Co.*, 161 Mo. 112, 61 S. W. 644.

<sup>3</sup> *England. Hinde v. Liddell*, L. R. 10 Q. B. 265.

*Connecticut. Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521.

*Georgia. Hardwood Lumber Co. v. Adam*, 134 Ga. 821, 32 L. R. A. (N.S.) 102, 68 S. E. 725.

*Iowa. Sapulpa Refining Co. v. Cedar Rapids Oil Co.*, — Ia. —, 179 N. W. 168.

*Massachusetts. Johnston v. Faxon*, 172 Mass. 466, 52 N. E. 539.

<sup>4</sup> *Warren v. Stoddart*, 105 U. S. 224, 26 L. ed. 1117 (in part obiter, as no breach was shown).

<sup>5</sup> *Border City Ice & Coal Co. v. Adams*, 69 Ark. 219, 62 S. W. 591; *Ma-*

*rion Hotel Co. v. Dickinson*, 141 Ark. 188, 216 S. W. 1049.

See §§ 3201 et seq.

<sup>6</sup> *Marion Hotel Co. v. Dickinson*, 141 Ark. 188, 216 S. W. 1049.

<sup>1</sup> *United States. Clews v. Jamieson*, 182 U. S. 461, 45 L. ed. 1183.

*Alabama. Peck-Hammond Co. v. Heifner*, 136 Ala. 473, 96 Am. St. Rep. 36, 33 So. 807.

*California. Scribner v. Schenkel*, 128 Cal. 250, 60 Pac. 860.

*Colorado. Kincaid v. Price*, 18 Colo. App. 73, 70 Pac. 153.

*Georgia. Rounsaville v. Leonard Mfg. Co.*, 127 Ga. 735, 56 S. E. 1030.

*Kentucky. Wallingford v. Aitkins (Ky.)*, 72 S. W. 794; *Bell v. Hatfield*, 121 Ky. 560, 2 L. R. A. (N.S.) 529, 89 S. W. 544; *Louisville & Nashville Ry. v. Coyle*, 123 Ky. 854, 8 L. R. A. (N.S.) 433, 97 S. W. 772.

in the seller, he can not recover the contract price in many jurisdictions.<sup>2</sup> In some jurisdictions, however, the seller is allowed to recover the purchase price in full.<sup>3</sup> The disadvantages of allow-

**Nebraska.** *Schaaf v. Hamilton*, 2 Neb. (unofficial) 577, 89 N. W. 614; *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271.

**North Carolina.** *Cherry v. Upton*, 180 N. Car. 1, 103 S. E. 912.

**Ohio.** *Cullen v. Bimm*, 37 O. S. 236.

**Pennsylvania.** *Jones v. Jennings*, 168 Pa. St. 493, 32 Atl. 51.

**South Carolina.** *Huguenot Mills v. Jempeon*, 68 S. Car. 363, 102 Am. St. Rep. 673, 47 S. E. 687.

**Tennessee.** *Alpha Portland Cement Co. v. Oliver*, 125 Tenn. 135, 38 L. R. A. (N.S.) 416, Ann. Cas. 1913C, 120, 140 S. W. 595.

**West Virginia.** *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L. R. A. (N. S.) 807, 61 S. E. 235.

**Wisconsin.** *Saveland v. Western Wisconsin Ry.*, 118 Wis. 267, 95 N. W. 130; *Lincoln v. Charles Alshuler Mfg. Co.*, 142 Wis. 475, 28 L. R. A. (N.S.) 780, 125 N. W. 908.

See also, *Petrich v. Berkner*, 142 Minn. 451, 172 N. W. 770.

For the recovery of special damages, see §§ 3187 et seq. and §§ 3199 et seq., and also *Freeman v. Macon Gas Light & Water Co.*, 126 Ga. 843, 7 L. R. A. (N.S.) 917, 56 S. E. 61; *American Steam Laundry Co. v. Riverside Printing Co.*, 171 Wis. 644, 177 N. W. 852.

<sup>2</sup>**England.** *Valpy v. Oakeley*, 16 Q. B. 841; *Laird v. Pim*, 7 Mees. & W. 474.

**Georgia.** *Rounsaville v. Leonard Mfg. Co.*, 127 Ga. 735, 56 S. E. 1030.

**Kentucky.** *Fairbanks, Morse & Co. v. Heltsley*, 135 Ky. 397, 26 L. R. A. (N.S.) 248, 122 S. W. 198.

**Maine.** *Arons v. Cummings*, 107 Me. 19, 31 L. R. A. (N.S.) 942, 78 Atl. 98.

**Massachusetts.** *Clement & Hawkes Mfg. Co. v. Meserole*, 107 Mass. 362;

*Collins v. Delaporte*, 115 Mass. 159; *Whitney v. Thacher*, 117 Mass. 523; *Whitney v. Boardman*, 118 Mass. 242; *Barry v. Cavanagh*, 127 Mass. 394; *Schramm v. Boston Sugar Refining Co.*, 146 Mass. 211, 15 N. E. 571; *Tufts v. Bennett*, 163 Mass. 308, 40 N. E. 172; *White v. Solomon*, 164 Mass. 516, 30 L. R. A. 537, 42 N. E. 104.

**New Hampshire.** *Gordon v. Norris*, 49 N. H. 376.

**Vermont.** *Manning Mfg. Co. v. Miller*, 87 Vt. 455, 89 Atl. 479.

**West Virginia.** *Acme Food Co. v. Older*, 64 W. Va. 255, 17 L. R. A. (N. S.) 807, 61 S. E. 235.

**Wisconsin.** *Lincoln v. Charles Alshuler Mfg. Co.*, 142 Wis. 475, 28 L. R. A. (N.S.) 780, 125 N. W. 908.

See, *The Right of a Seller of Goods to Recover the Price*, by Samuel Williston, 20 Harvard Law Review, 363.

<sup>3</sup>**United States.** *Bookwalter v. Clark*, 10 Fed. 793; *Kinkead v. Lynch*, 132 Fed. 692.

**Colorado.** *Colorado Springs Live Stock Co. v. Godding*, 20 Colo. 249, 38 Pac. 58; *Bond v. Bourk*, 54 Colo. 51, 43 L. R. A. (N.S.) 97, 129 Pac. 223.

**Illinois.** *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869.

**Indiana.** *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140 (obiter); *Garr v. Fleshman*, 38 Ind. App. 400, 77 N. E. 744, 78 N. E. 348.

**Iowa.** *McCormick Harvesting Machine Co. v. Markert*, 107 Ia. 340, 78 N. W. 33.

**Massachusetts.** *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. E. 117.

**Michigan.** *Meagher v. Cowing*, 149 Mich. 416, 112 N. W. 1074.

**Missouri.** *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Crown Vinegar & Spice Co. v. Wehrs*,

ing such a rule, as a matter of strict law, have already been discussed. It amounts to specific performance at law as a matter of strict right, without any of the restrictions which equity imposes when it grants specific performance. In many cases a just result may be reached. In other cases, a loss may be inflicted upon the buyer out of all proportion to the advantage given to the seller. Unless we are ready to grant specific performance as a general remedy, and as a matter of course, for every breach of contract, no reason appears for singling out this type of contract for especial favorable distinction.

If the seller resells the goods after breach, acting in good faith and with reasonable attempt to secure the best price available, the selling price may be regarded as the market price,<sup>4</sup> even if the vendor buys the property in himself.<sup>5</sup> The right to fix the price by a resale is especially clear if the property is of such sort as depreciates rapidly,<sup>6</sup> or if there is no purchaser available at the place of delivery except the buyer.<sup>7</sup> The price obtained at resale

59 Mo. App. 493; *St. Louis Range Co. v. Kline-Drummond Mercantile Co.*, 120 Mo. App. 438, 96 S. W. 1040 (obiter).

**New York.** *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271 (obiter); *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. Rep. 728, 53 L. R. A. 867, 60 N. E. 750 (obiter); *Schwarzer v. Karsch Brewing Co.*, 74 App. Div. 383, 77 N. Y. Supp. 719 (semble).

**North Carolina.** *National Cash Register Co. v. Hill*, 136 N. Car. 272, 68 L. R. A. 100, 48 S. E. 637.

**Ohio.** *Shawhan v. Van Nest*, 25 O. S. 490, 18 Am. Rep. 313; *Rhodes v. Mooney*, 43 O. S. 421, 4 N. E. 233.

[See, however, *Cullen v. Bimm*, 37 O. S. 236, and *Dayton, Watervleit Valley & Xenia Turnpike Co. v. Coy*, 13 O. S. 84.]

**Oregon.** *Smith v. Wheeler*, 7 Or. 49, 33 Am. Rep. 698.

**Pennsylvania.** *Balletine v. Robinson*, 46 Pa. St. 177.

<sup>4</sup>**Georgia.** *Robson v. Hale*, 139 Ga. 753, 78 S. E. 177.

**Kansas.** *In re Mills' Estate*, 107 Kan. 492, 192 Pac. 761.

**Massachusetts.** *Whitney v. Boardman*, 118 Mass. 242.

**Minnesota.** *Baesetti v. Shenango Furnace Co.*, 122 Minn. 335, 142 N. W. 422.

**New York.** *Dustan v. McAndrew*, 44 N. Y. 72; *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. Rep. 728, 53 L. R. A. 867, 60 N. E. 750.

**Oklahoma.** *Rose v. Woldert Grocery Co.*, 54 Okla. 566, 154 Pac. 531.

**Virginia.** *American Hide & Leather Co. v. Chalkley*, 101 Va. 458, 44 S. E. 705.

**Wisconsin.** *Gehl v. Milwaukee Produce Co.*, 116 Wis. 263, 93 N. W. 26.

<sup>5</sup> *Ackerman v. Rubens*, 167 N. Y. 405, 82 Am. St. Rep. 728, 53 L. R. A. 867, 60 N. E. 750.

<sup>6</sup> *Puritan Coke Co. v. Clark*, 204 Pa. St. 556, 54 Atl. 350.

<sup>7</sup> *Louisville & Nashville Ry. Co. v. Coyle*, 123 Ky. 854, 8 L. R. A. (N.S.) 433, 97 S. W. 772.

is not, however, conclusive.<sup>6</sup> The fact that the agent of the seller resells to the buyer at a price less than the contract price does not amount to a waiver of the right of the seller to recover such difference as damages.<sup>9</sup> If no market price can be shown, the measure of damages is the difference between the contract price and the amount which it would have cost the seller to perform.<sup>10</sup>

**§ 3225. Time and place for fixing damages.** The market price at the time and place of delivery is to be taken as the basis of ascertaining damages.<sup>1</sup> If by the contract the property is to be delivered "during" a certain month,<sup>2</sup> or if it is to be delivered as ordered during the year, any arrears in the total amount to be delivered on the last day,<sup>3</sup> the market price on such last day is to be taken as the standard. If the seller has extended the time for performance, and finally declares the contract discharged on the continued default of the buyer, the damages are to be fixed as of the time at which the seller declares such contract as discharged.<sup>4</sup> If a contract is to be performed by delivery in installments, the difference between the market price and the contract price at the time that each installment is to be delivered, is to be ascertained; and the sum of such amounts is the damage sustained by the seller.<sup>5</sup> If there is no market at the place of delivery, the market

<sup>6</sup> *Andrews v. Hoover*, 8 Watts (Pa.) 239.

<sup>9</sup> *Arkansas & Texas Grain Co. v. Young & Fresch Grain Co.*, 79 Ark. 603, 116 Am. St. Rep. 99, 96 S. W. 142.

<sup>10</sup> *Louisville & Nashville Ry. v. Coyle*, 123 Ky. 854, 8 L. R. A. (N.S.) 433, 97 S. W. 772.

<sup>1</sup> *Iowa. Hamilton v. Finnegan*, 117 Ia. 623, 91 N. W. 1039.

*Kentucky. Bell v. Hatfield*, 121 Ky. 560, 2 L. R. A. (N.S.) 529, 89 S. W. 544; *Louisville & Nashville Ry. v. Coyle*, 123 Ky. 854, 8 L. R. A. (N.S.) 433, 97 S. W. 772.

*Montana. Church v. Zywert*, 58 Mont. 102, 190 Pac. 291.

*North Carolina. Cherry v. Upton*, 180 N. Car. 1, 103 S. E. 912.

*South Carolina. Huguenot Mills v. Jempeon*, 68 S. Car. 363, 102 Am. St. Rep. 673, 47 S. E. 687.

*West Virginia. Acme Food Co. v. Older*, 64 W. Va. 255, 17 L. R. A. (N. S.) 807, 61 S. E. 235.

*Wisconsin. Pratt v. Freeman & Sons Mfg. Co.*, 115 Wis. 648, 92 N. W. 368; *Gehl v. Milwaukee Produce Co.*, 116 Wis. 263, 93 N. W. 26; *Lincoln v. Charles Alshuler Mfg. Co.*, 142 Wis. 475, 28 L. R. A. (N.S.) 780, 125 N. W. 908.

<sup>2</sup> *J. P. Gentry Co. v. Margolius*, 110 Tenn. 669, 75 S. W. 959.

<sup>3</sup> *Duluth Furnace Co. v. Iron Belt Mining Co.*, 117 Fed. 138, 55 C. C. A. 154.

<sup>4</sup> *Fahey v. Updike Elevator Co.*, 102 Neb. 249, 171 N. W. 50.

<sup>5</sup> *Alpha Portland Cement Co. v. Oliver*, 125 Tenn. 135, 38 L. R. A. (N. S.) 416, Ann. Cas. 1913C, 120, 140 S. W. 595.

price at the nearest available and convenient market is to be taken as the basis for determining the amount of damages.<sup>6</sup> The price at a different market is not to be taken as the means of measuring damages.<sup>7</sup> The place at which title is to pass to the buyer and to which the seller is to send the goods f. o. b., is the place of delivery.<sup>8</sup>

**§ 3226. Contract for sale of goods—Executed, contract—Breach by buyer.** If the title has passed from the seller to the buyer the amount of recovery is the contract price.<sup>1</sup> If title is passed under a contract to pay a note and mortgage the amount of recovery is the contract price;<sup>2</sup> and if foreclosure proceedings have been brought, it is the amount of deficiency after such foreclosure.<sup>3</sup> If the buyer has agreed to execute a note for the price of the goods, and he refuses so to do, the amount of recovery is the contract price.<sup>4</sup> While this amount of recovery is sometimes spoken of as a measure of damages, it is not damages in the proper sense of the term; since it is not the act which will compensate the party who is not in default for a loss of his bargain, but rather

<sup>6</sup>*Kirchman v. Tuffle Bros. Co.*, 92 Ark. 111, 122 S. W. 239; *Gaines v. R. J. Reynolds Tobacco Co.*, 163 Ky. 716, 174 S. W. 482; *Church v. Zywert*, 58 Mont. 102, 190 Pac. 291; *White v. Matador Land & Cattle Co.*, 75 Tex. 465, 12 S. W. 876.

<sup>7</sup>*Church v. Zywert*, 58 Mont. 102, 190 Pac. 291.

<sup>8</sup>*Rounsavall v. H. Herstein Seed Co.*, 25 N. M. 626, 186 Pac. 1678.

<sup>1</sup>*England. Scott v. England*, 2 Dowl. & L. 520; *Leeds v. Burrows*, 12 East 1.

*United States. Atlantic Phosphate Co. v. Graffin*, 114 U. S. 492, 29 L. ed. 221; *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. 66, 27 C. C. A. 442.

*Alabama. Vinegar Bend Lumber Co. v. Soule Steam Feed Works*, 182 Ala. 146, 62 So. 279.

*California. Lassing v. James*, 107 Cal. 348, 40 Pac. 534.

*Illinois. Olcese v. Mobile Fruit & Trading Co.*, 211 Ill. 539, 71 N. E. 1084.

*Iowa. Austin Mfg. Co. v. Decker*, 109 Ia. 277, 80 N. W. 312.

*Massachusetts. Obery v. Lander*, 179 Mass. 125, 60 N. E. 378.

*Michigan. Yeiter v. Campau*, 174 Mich. 94, 140 N. W. 479.

*Missouri. Moore v. Gaus & Sons Mfg. Co.*, 113 Mo. 98, 20 S. W. 975.

*North Dakota. Kelly v. Pierce*, 16 N. D. 234, 12 L. R. A. (N.S.) 180, 112 N. W. 995.

*Oregon. Brigham v. Hibbard*, 28 Or. 386, 43 Pac. 383.

*Pennsylvania. Henderson v. Jennings*, 228 Pa. St. 188, 30 L. R. A. (N. S.) 827, 77 Atl. 453.

*South Dakota. Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330.

<sup>2</sup>*Henderson v. Jennings*, 228 Pa. St. 188, 30 L. R. A. (N.S.) 827, 77 Atl. 453.

<sup>3</sup>*Loeb v. Stern*, 198 Ill. 371, 64 N. E. 1043 [affirming, 99 Ill. App. 637].

<sup>4</sup>*Kelly v. Pierce*, 16 N. D. 234, 12 L. R. A. (N.S.) 180, 112 N. W. 995.

the contract price which remains due after full performance on the part of such party.

**§ 3227. Breach by seller—Breach of warranty.** If the title to personal property has passed to the purchaser, and there is a breach of warranty, for which he does not elect to avoid the contract, assuming that he had the right to do so,<sup>1</sup> the measure of damages is the value that the property would have had at the time and place of delivery, if it had complied with the terms of the warranty, less its actual value.<sup>2</sup> This is the rule for the measure of damages for the breach of warranty considered as a breach of a covenant in a contract, although no fraud exists.<sup>3</sup> If the article is without any value the measure of damages is the value that it would have had if it had complied with the terms of the warranty.<sup>4</sup> While language is occasionally used which seems to imply that the measure of damages is the difference between the

<sup>1</sup> See § 2992.

<sup>2</sup> **England.** *Jones v. Just*, L. R. 3 Q. B. 197.

**United States.** *Cleveland Linseed Oil Co. v. Buchanan*, 120 Fed. 906, 57 C. C. A. 498.

**Alabama.** *Landman v. Bloomer*, 117 Ala. 312, 23 So. 75.

**Georgia.** *Berry v. Shannon*, 98 Ga. 459, 58 Am. St. Rep. 313, 25 S. E. 514.

**Illinois.** *E. A. Moore Furniture Co. v. Sloane*, 166 Ill. 457, 46 N. E. 1128.

**Iowa.** *Alpha Checkrower Co. v. Bradley*, 105 Ia. 537, 75 N. W. 369; *Loxterkamp v. Lininger Implement Co.*, 147 Ia. 29, 33 L. R. A. (N.S.) 501, 125 N. W. 830.

**Maryland.** *Carlin v. Biddison*, 135 Md. 458, 109 Atl. 316.

**Montana.** *Lander v. Sheehan*, 32 Mont. 25, 79 Pac. 406; *Advance-Rumely Thresher Co. v. Terpening*, 58 Mont. 507, 193 Pac. 752.

**Nebraska.** *Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. Rep. 474, 88 N. W. 693; *Burnham v. Meredith*, — Neb. —,

91 N. W. 553; *King v. Day*, — Neb. —, 177 N. W. 160.

**North Carolina.** *Swift & Co. v. Meekins*, 179 N. Car. 173, 102 S. E. 138.

**Oklahoma.** *Wiggins v. Jackson*, 31 Okla. 292, 43 L. R. A. (N.S.) 153, 121 Pac. 662; *Western Silo Co. v. Cousins*, 76 Okla. 154, 184 Pac. 92.

**Oregon.** *Dean Pump Works v. Astoria Iron Works*, 40 Or. 83, 66 Pac. 605.

**South Carolina.** *Ellison v. Johnson*, 74 S. Car. 202, 5 L. R. A. (N.S.) 1151, 54 S. E. 202.

**South Dakota.** *Hermon v. Silver*, 15 S. D. 476, 90 N. W. 141.

**Washington.** *Connor v. Forest Mills of British Columbia, Ltd.*, 108 Wash. 468, 184 Pac. 319.

**Wisconsin.** *Parry Mfg. Co. v. Tobin*, 106 Wis. 286, 49 L. R. A. 859, 82 N. W. 154.

<sup>3</sup> *Carlin v. Biddison*, 135 Md. 458, 109 Atl. 316; *Swift & Co. v. Meekins*, 179 N. Car. 173, 102 S. E. 138.

<sup>4</sup> *Wiggins v. Jackson*, 31 Okla. 292, 43 L. R. A. (N.S.) 153, 121 Pac. 662.

value of the article and the contract price,<sup>5</sup> this is generally in cases in which the contract price and the value which the article would have had if it had complied with the terms of the warranty are assumed to be the same. If it is shown that there is a substantial difference,<sup>6</sup> as where the market price has advanced after the contract has been made,<sup>7</sup> the courts deny the correctness of this rule. This does not give to either party the benefit of the contract which they made; a benefit which should be secured to each party, since the action for damages is brought on the theory that the contract is in force and that the title has passed.

The place at which the value of the property is to be fixed is that which is specified in the contract;<sup>8</sup> and it is not affected by the fact that the purchaser has caused the goods to be shipped to a different place.<sup>9</sup>

In some cases, however, this rule can not be applied as the value of the article as it is, or as represented, may be impossible to ascertain. Thus in a breach of warranty that a judgment sold by the warrantor was valid, it has been held that the measure of damages is the amount paid therefor with interest.<sup>10</sup> In such a case as this, there is moreover a total failure of consideration. If A sells personal property to B with warranty of title, and B sells to C, from whom it is taken under legal process by the real owner, X, A is not liable to B for more than the price paid by B to A. A is not liable for the amount of the judgment recovered by C from B, including C's attorney fees in resisting X's action.<sup>11</sup>

If seed fails to conform to a warranty, and there is a partial failure of the crop or the crop which is raised is of a different kind from that bargained for, the measure of damages is the difference between the value of the crop which would have been raised if the seed had conformed to the warranty and the value of the crop

<sup>5</sup> *Sanderson v. Trump Mfg. Co.*, 180 Ind. 197, 102 N. E. 2; *Punteney Mitchell Mfg. Co. v. T. J. Northwall Co.*, 66 Neb. 5, 91 N. W. 863; *Swift & Co. v. Meekins*, 179 N. Car. 173, 102 S. E. 138; *Feeney v. Stone*, 89 Or. 360, 174 Pac. 152.

<sup>6</sup> *Ellison v. Johnson*, 74 S. Car. 202, 5 L. R. A. (N.S.) 1151, 54 S. E. 202; *Park v. Richardson & Boynton Co.*, 91 Wis. 180, 64 N. W. 859.

<sup>7</sup> *Ellison v. Johnson*, 74 S. Car. 202, 5 L. R. A. (N.S.) 1151, 54 S. E. 202.

<sup>8</sup> *Connor v. Forest Mills of British Columbia, Ltd.*, 108 Wash. 468, 184 Pac. 319.

<sup>9</sup> *Connor v. Forest Mills of British Columbia, Ltd.*, 108 Wash. 468, 184 Pac. 319.

<sup>10</sup> *Duecker v. Goeres*, 104 Wis. 29, 80 N. W. 91.

<sup>11</sup> *Smith v. Williams*, 117 Ga. 782, 97 Am. St. Rep. 220, 45 S. E. 394.

which was, in fact, raised.<sup>12</sup> A similar rule applies as to fruit trees which were warranted sound and sold to be planted at once in an orchard.<sup>13</sup> If plants are sold which must be cultivated for one or more seasons before they produce and before breach of warranty is discovered, the measure of damages for breach of warranty as to the identity of such plants, is the difference between the value of the produce thereof if it had been as warranted, and the actual value of the produce thereof for the first year, together with the cost of cultivating the plants for the time during which they did not produce and also the cost of replacing such plants with others which conformed to such warranty.<sup>14</sup> If the seed fails to germinate and the crop fails entirely, there is a conflict of authority as to the proper measure of damages. Some courts hold that it is the difference between the value of the crop which would have been raised if the seed had conformed to the warranty, and the value of the crop as raised; a difference which amounts to the total value of the crop that would have been raised, if the seed had conformed to the warranty, since, in this case, the value of the crop which was actually raised is nothing.<sup>15</sup> Other courts hold that the measure of damages is the cost of the seed plus the cost of the planting, plus the value of the use of the land, for that season, less the value of the use of the land to which it might be put with reasonable diligence on learning that the crop had failed.<sup>16</sup>

<sup>12</sup> England. *Randall v. Raper*, El. Bl. & El. 84.

United States. *Buckbee v. P. Hohenadel, Jr., Co.*, 224 Fed. 14, L. R. A. 1916C, 1001, 139 C. C. A. 478.

Massachusetts. *Edgar v. Joseph Breck & Sons Corporation*, 172 Mass. 581, 52 N. E. 1083.

Minnesota. *Johnson v. Foley Milling & Elevator Co.*, — Minn. —, 179 N. W. 488.

Mississippi. *Grafton-Stamps Drug Co. v. Williams*, 105 Miss. 296, 62 So. 273.

Nebraska. *Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. Rep. 474, 88 N. W. 693.

New Jersey. *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 438 [affirmed, 38 N. J. L. 496, 20 Am. Rep. 425].

New York. *Passinger v. Thorburn*,

34 N. Y. 634, 90 Am. Dec. 753; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13.

Tennessee. *Ford v. Farmers' Exchange*, 136 Tenn. 287, L. R. A. 1917B, 1106, 189 S. W. 368.

<sup>13</sup> *Heilman v. Pruyn*, 122 Mich. 301, 80 Am. St. Rep. 570, 81 N. W. 97.

<sup>14</sup> *Smeltzer v. Tippin*, 109 Ark. 275, 49 L. R. A. (N.S.) 1156, 160 S. W. 221 (strawberries).

<sup>15</sup> *Shaw v. Smith*, 45 Kan. 334, 11 L. R. A. 681, 25 Pac. 886; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136.

<sup>16</sup> *Moorhead v. Minneapolis Seed Co.*, 139 Minn. 11, L. R. A. (N.S.) 1918C, 391, 101 Am. Cas. 1018F, 481, 165 N. W. 484; *Reiger v. Worth*, 127 N. Car. 230, 80 Am. St. Rep. 704, 52 L. R. A. 362, 37 S. E. 217.

The rules as to certainty, remoteness and liability for damage due to the special circumstances of the case apply to breaches of warranty. Special damage which complies with these requirements may be recovered;<sup>17</sup> while if it does not comply with these requirements recovery is not allowed.<sup>18</sup>

It has been held that in contracts for the sale of machinery which does not conform to the warranty, the measure of damages is the cost of making such machinery conform to the warranty,<sup>19</sup> especially if the vendor has requested the vendee to put it in condition.<sup>20</sup> If the breach of warranty is such as to justify the purchaser in treating the contract as discharged and he elects to treat it as discharged,<sup>21</sup> the purchaser may recover the purchase money which he has paid in.<sup>22</sup> While this is sometimes spoken of as a measure of damages, it is merely a recovery in quasi-contract.

The purchaser may also be allowed such expenses as have followed naturally from the breach,<sup>23</sup> including freight which he has been obliged to pay upon such articles.<sup>24</sup>

**§ 3228. Contract to manufacture goods.** If a contract to manufacture and deliver goods in the future is broken by the manufacturer, the measure of damages is substantially the same as in case of breach of executory contracts of sale by the seller,<sup>1</sup>

<sup>17</sup> *Jackson v. Watson* (1909), 2 K. B. 193; *McDonald v. Kansas City Bolt & Nut Co.*, 149 Fed. 360, 8 L. R. A. (N. S.) 1110, 79 C. C. A. 298; *Smeltzer v. Tippin*, 109 Ark. 275, 49 L. R. A. (N. S.) 1156, 160 S. W. 221; *Leavitt v. The Fiberloid Co.*, 196 Mass. 440, 15 L. R. A. (N.S.) 855, 82 N. E. 682.

<sup>18</sup> *Corbin v. Thompson*, 39 Can. S. C. 575; *John Deere Plow Co. v. Spatz*, 78 Kan. 786, 20 L. R. A. (N.S.) 492, 99 Pac. 221; *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 27 L. R. A. (N.S.) 925, 101 Pac. 894.

For recovery of profits, see §§ 3199 et seq.

<sup>19</sup> *Bixby v. Normal School Association* (Ia.), 78 N. W. 234; *North Bergen Board of Education v. Jaeger*, 67 N. J. L. 39, 50 Atl. 583.

<sup>20</sup> *Aultman Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980.

<sup>21</sup> See § 2992.

<sup>22</sup> See § 3253.

<sup>23</sup> *McDonald v. Kansas City Bolt & Nut Co.*, 149 Fed. 360, 8 L. R. A. (N. S.) 1110, 79 C. C. A. 298; *Thorne v. McVeagh*, 75 Ill. 81; *Briggs v. M. Rumely Co.*, 96 Ia. 202, 64 N. W. 784; *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 27 L. R. A. (N.S.) 925, 101 Pac. 894.

See § 3209.

<sup>24</sup> *Thorne v. McVeagh*, 75 Ill. 81; *Briggs v. M. Rumely Co.*, 96 Ia. 202, 64 N. W. 784; *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 27 L. R. A. (N.S.) 925, 101 Pac. 894.

<sup>1</sup> *Roller v. Leonard*, 229 Fed. 607, 143 C. C. A. 629; *Jordan v. Patterson*, 67 Conn. 473, 35 Atl. 521; *Summers v. Hibbard*, 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899.

See § 3220.

and if the goods have a market price and the purchaser can readily purchase such goods in the open market, the measure of damages is the difference between the market price of such goods and the contract price. If the goods have no market price or can not be purchased readily, in the open market, the measure of damages is the cost of having such goods manufactured elsewhere, less the contract price.<sup>2</sup> If the purchaser manufactures the article himself the measure of damages is the contract price less the cost of manufacturing the article, allowing nothing to the vendee for a manufacturer's profit.<sup>3</sup>

If the contract is broken by the buyer, the ordinary rules which govern damages in case of a breach of an executory contract of sale by renunciation on the part of the seller,<sup>4</sup> are modified to some extent by the rules which require the party who is not in default to take such precautions as a reasonable and prudent man would take, in his own affairs, to lessen the amount of damages.<sup>5</sup> It has been said that the measure of damages is the contract price less the market price.<sup>6</sup> It is also said that the measure of damages is the contract price less the cost of performance.<sup>7</sup> A agreed

<sup>2</sup> *Weed v. Draper*, 104 Mass. 28; *Rhode Island Malleable Iron Works v. O. K. Nut & Lock Co.*, — R. I. —, 103 Atl. 1036.

<sup>3</sup> *Pittsburg Sheet Mfg. Co. v. West Penn Sheet Steel Co.*, 201 Pa. St. 150, 520 Atl. 935.

<sup>4</sup> See § 3224.

<sup>5</sup> See §§ 3192 et seq.

<sup>6</sup> *Dolph v. Troy Laundry Machine Co.*, 28 Fed. 553; *Greenhut Cloak Co. v. Oreck*, 130 Minn. 304, 153 N. W. 613; *Rider v. Kelley*, 32 Vt. 268, 76 Am. Dec. 176.

<sup>7</sup> *England. Cort v. Ambergate, Nottingham, Boston & Eastern Junction Ry.*, 17 Q. B. 127.

*United States. Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 30 L. ed. 967.

*California. Hale v. Trout*, 35 Cal. 229; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020.

*Connecticut. Torkomian v. Russell*, 90 Conn. 481, 97 Atl. 760.

*Iowa. Kimball v. Deere*, 108 Ia. 676, 77 N. W. 1041.

*Kentucky. Ayer & Lord Tie Co. v. O'Bannon*, 164 Ky. 34, 174 S. W. 783.

*Massachusetts. Collins v. Delaporte*, 115 Mass. 150; *Bullard v. Eames*, 219 Mass. 49, 106 N. E. 584.

*Michigan. Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716.

*Minnesota. Periodical Press Co. v. Sherman-Elliott Co.*, 143 Minn. 489, 174 N. W. 516.

*Missouri. Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Crescent Mfg. Co. v. N. O. Nelson Mfg. Co.*, 100 Mo. 325, 13 S. W. 503.

*Pennsylvania. Muskegon Curtain Roll Co. v. Keystone Mfg. Co.*, 135 Pa. St. 132, 19 Atl. 1008; *Ridgeway Dynamo & Engine Co. v. Pennsylvania Cement Co.*, 221 Pa. St. 160, 18 L. R. A. (N.S.) 613, 70 Atl. 557.

*Tennessee. Gardner v. Deeds*, 116 Tenn. 128, 4 L. R. A. (N.S.) 740, 7 Ann. Cas. 1172, 92 S. W. 518; *John Deere*

to get logs, cut them into lumber, and deliver the lumber to B. After A had obtained the logs and before he had cut them, B repudiated the contract. A could recover the profit that he would have made had there been no breach.<sup>8</sup>

While, in many cases, approximately the same result is reached by using either of these rules, the manufacturer should not be required or permitted to increase damages by proceeding with the performance of the contract if the buyer has notified him to discontinue performance, unless it is clear that it will reduce the total amount of damages to continue performance and to sell the goods on the open market. Except in the latter case, the manufacturer should be permitted to recover the difference between the contract price and the cost of manufacture; and this is especially clear where the contract is renounced by the buyer before the manufacturer has incurred any expense thereunder. If he has incurred a portion of the expense of manufacture he should be permitted to recover the contract price less the cost of manufacturing the goods,<sup>9</sup> especially if the article can not readily be sold in the open market when manufactured.<sup>10</sup> If the manufacturer will lose money in case of performance, he should not be permitted to recover the cost of performance up to the time of such breach, together with net profits on the rest of the contract; but both the actual expenditure and prospective expenditure should be added together to determine whether any profits will be made.<sup>11</sup> If material has been used in the performance of such contract before renunciation by the buyer, and such material can not be used for any other purposes, the cost thereof may be considered as an item of expense.<sup>12</sup>

In some jurisdictions it is said that the manufacturer may, at his election, hold the article for the purchaser and recover the

Plow Co. v. Shellabarger, 140 Tenn. 123, 203 S. W. 756.

Texas. Tufts v. Lawrence, 77 Tex. 526, 14 S. W. 165.

Wisconsin. Cameron v. White, 74 Wis. 425, 5 L. R. A. 493, 43 N. W. 155; Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. 992; Walsh v. Myers, 92 Wis. 397, 66 N. W. 250.

<sup>8</sup> Cameron v. White, 74 Wis. 425, 5 L. R. A. 493, 43 N. W. 155.

<sup>9</sup> Ridgeway Dynamo & Engine Co. v. Pennsylvania Cement Co., 221 Pa. St. 160, 18 L. R. A. (N.S.) 613, 70 Atl. 557.

<sup>10</sup> Ridgeway Dynamo & Engine Co. v. Pennsylvania Cement Co., 221 Pa. St. 160, 18 L. R. A. (N.S.) 613, 70 Atl. 557.

<sup>11</sup> Periodical Press Co. v. Sherman-Elliott Co., 143 Minn. 489, 174 N. W. 516.

<sup>12</sup> Chicago v. Greer, 76 U. S. (9 Wall.) 726, 19 L. ed. 769.

entire contract price.<sup>13</sup> The objections to allowing this measure of recovery are the same as those which exist in the case of breach by the purchaser of an executory contract for the sale of personalty.<sup>14</sup>

**§ 3229. Contract to pay money.** If a contract to pay money is broken by the refusal or omission of the debtor to make such payment, the amount of recovery is the amount due under the contract, with interest.<sup>1</sup> The rule allowing recovery of the amount due is frequently referred to as a rule for measuring damages; but it is rather the recovery of the contract price than an award of damages.

If a contract to pay money is broken by the delay of the debtor in making such payment, the measure of damages is the interest upon the amount due under such contract.<sup>2</sup> For breach of a contract to send money by telegraph, the measure of damages is the interest upon such amount for such delay, and actual expense made necessary by such breach.<sup>3</sup> The rule that damages must be cer-

<sup>13</sup> **United States.** *Bookwalter v. Clark*, 11 Biss. 126, 10 Fed. 793; *Kinhead v. Lynch*, 132 Fed. 692.

**Colorado.** *Colorado Springs Live Stock Co. v. Godding*, 20 Colo. 249, 38 Pac. 58; *Bond v. Bourk*, 54 Colo. 51, 43 L. R. A. (N.S.) 97, Ann. Cas. 1914C, 559, 129 Pac. 223.

**Iowa.** *McCormick Harvesting Machine Co. v. Markert*, 107 Ia. 340, 78 N. W. 33.

**Massachusetts.** *Mitchell v. Le Clair*, 165 Mass. 308, 43 N. E. 117.

**Michigan.** *Meagher v. Cowing*, 149 Mich. 416, 112 N. W. 1074.

**Missouri.** *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210.

**New York.** *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Moore v. Potter*, 155 N. Y. 481, 63 Am. St. Rep. 692, 50 N. E. 271.

**North Carolina.** *National Cash Register Co. v. Hill*, 136 N. Car. 272, 68 L. R. A. 100, 48 S. E. 637.

**Ohio.** *Shawhan v. Van Nest*, 25 O. S. 490, 18 Am. St. Rep. 313.

**Oklahoma.** *American Soda Fountain Co. v. Gerrer's Bakery*, 14 Okla. 258, 2 Ann. Cas. 318, 78 Pac. 115.

**Oregon.** *Smith v. Wheeler*, 7 Or. 49, 33 Am. St. Rep. 698.

**Pennsylvania.** *Balletine v. Robinson*, 46 Pa. 177.

<sup>14</sup> See § 3224.

<sup>1</sup> *Moore v. Moore*, 68 Ind. 152; *Lodge v. Spooner*, 74 Mass. (8 Gray) 166; *Hatch v. Attrell*, 118 N. Y. 383, 23 N. E. 549; *Jefferson Bank v. Chapmann*, *White & Lyons Co.*, 122 Tenn. 415, 123 S. W. 641.

<sup>2</sup> *Curtis v. Innerarity*, 47 U. S. (6 How.) 146, 12 L. ed. 380; *Spalding v. Mason*, 161 U. S. 375, 40 L. ed. 738; *Huie v. Sommer*, 88 Kan. 561, 43 L. R. A. (N.S.) 565, 129 Pac. 136; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Colonna Dry Dock Co. v. Colonna*, 108 Va. 230, 61 S. E. 770.

See § 3210.

<sup>3</sup> *Robinson v. Western Union Telegraph Co. (Ky.)*, 57 L. R. A. 611, 68 S. W. 656; *Smith v. Western Union Telegraph Co.*, 150 Pa. St. 561, 24 Atl. 1049.

tain, that they must follow naturally from the breach and that the party who is not in default can not be held liable for damages which arise from special facts which are not known to him when he enters into the contract, are frequently invoked, in cases of this sort, to relieve the telegraph company from liability for serious injury inflicted upon the party to whom such money was to be sent.<sup>4</sup>

On the wrongful refusal of a bank to honor a check, recovery may be had for loss of business and credit.<sup>5</sup> Substantial damage will be presumed if the drawer of the check is engaged in business;<sup>6</sup> and, in some jurisdictions, even if he is not engaged in business.<sup>7</sup> Punitive damages can not be recovered without proof of malice.<sup>8</sup>

**§ 3230. Contract to lend money.** In the absence of special circumstances, the measure of damages in case of breach of a contract to make a loan, is the difference between the rate of interest which the borrower actually had to pay and the rate of interest which he was to pay under the contract if he acted with reasonable diligence and in good faith in securing such loan.<sup>1</sup> The borrower is also entitled to the reasonable value of his services in securing such new loan;<sup>2</sup> but not to compensation for the use of securities which he is obliged to use as collateral to obtain it.<sup>3</sup> The practical result of this rule, in many jurisdictions, is that the

<sup>4</sup> See §§ 3186 et seq.

<sup>5</sup> *McFall v. First National Bank*, 138 Ark. 370, 4 A. L. R. 940, 211 S. W. 919; *Hilton v. Jesup Banking Co.*, 128 Ga. 30, 11 L. R. A. (N.S.) 224, 10 Ann. Cas. 987, 57 S. E. 78; *American National Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379, 58 L. R. A. 956, 69 S. W. 759.

<sup>6</sup> *Fleming v. Bank of New Zealand* [1900], A. C. 577; *McFall v. First National Bank*, 138 Ark. 370, 4 A. L. R. 940, 211 S. W. 919; *Winkler v. Citizens' State Bank*, 89 Kan. 279, 131 Pac. 597; *Wiley v. Bunker Hill National Bank*, 183 Mass. 495, 97 N. E. 655.

<sup>7</sup> *Jaselli v. Riggs National Bank*, 36 App. (D. C.) 159, 31 L. R. A. (N.S.) 763; *American National Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379, 58

L. R. A. 956, 69 S. W. 759; *Commercial National Bank v. Latham*, 29 Okla. 88, Ann. Cas. 1913A, 999, 116 Pac. 197.

<sup>8</sup> *American National Bank v. Morey*, 113 Ky. 857, 101 Am. St. Rep. 379, 58 L. R. A. 956, 69 S. W. 759.

<sup>1</sup> *Anderson v. Hilton & Dodge Lumber Co.*, 121 Ga. 688, 49 S. E. 725; *New York Life Ins. Co. v. Pope* (Ky.), 68 S. W. 851; *McGee v. Wineholt*, 23 Wash. 748, 63 Pac. 571; *Hubbard v. Equitable Life Assurance Society*, 81 W. Va. 663, 4 A. L. R. 886, 95 S. E. 811.

<sup>2</sup> *Hubbard v. Equitable Life Assurance Society*, 81 W. Va. 663, 4 A. L. R. 886, 95 S. E. 811.

<sup>3</sup> *Hubbard v. Equitable Life Assurance Society*, 81 W. Va. 663, 4 A. L. R. 886, 95 S. E. 811.

borrower will recover only nominal damages unless he is able to show that he is obliged to pay a higher rate of interest than that fixed by the contract;<sup>4</sup> since, in theory, he is able to obtain a loan from other persons, and in most cases, if he could obtain a loan at all, he would not have to pay a higher rate of interest than that fixed by the contract.

In some jurisdictions, however, he is allowed to recover damages which arise out of the special circumstances of the case if these are within the contemplation of the parties when the contract of loan is made.<sup>5</sup> It is accordingly an error to sustain a

<sup>4</sup> *Gooden v. Moses*, 99 Ala. 230, 13 So. 765; *Thorp v. Bradley*, 75 Ia. 50, 39 N. W. 177.

<sup>5</sup> *Alabama*. *Bixby-Theirson Lumber Co. v. Evans*, 167 Ala. 431, 29 L. R. A. (N.S.) 194, 52 So. 843.

*Kentucky*. *Pugh v. Jackson*, 154 Ky. 649, 157 S. W. 1082.

*Massachusetts*. *Banewur v. Levenson*, 171 Mass. 1, 50 N. E. 10.

*Nebraska*. *Shurtleff v. Occidental Building & Loan Association*, — Neb. —, 181 N. W. 374.

*New Jersey*. *Holt v. United Security Life Insurance & Trust Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

*North Carolina*. *Newby v. Atlantic Coast Realty Co.*, 180 N. Car. 51, 103 S. E. 909.

*North Dakota*. *Murphy v. Hanna*, 37 N. D. 156, L. R. A. 1918B, 135, 164 N. W. 32.

*Washington*. *Graham v. McCoy*, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235.

*Wisconsin*. *Lloyd Investment Co. v. Illinois Surety Co.*, 164 Wis. 282, 160 N. W. 58.

"Plaintiff alleges 'that by reason of the default of defendants in failing and refusing to advance and furnish to said bank the cash necessary to enable it to continue in business it was forced to close its doors and discontinue its banking business, and as direct results thereof the proceedings [receivership] were commenced, as hereinbefore mentioned.'

"If the plaintiff can prove this allegation with sufficient directness and certainty to render improbable all other causes of the result alleged than that attributable to these defendants we have no doubt that the law will be satisfied in its requirement of certainty of causation. As to the recovery of the special damages which the plaintiff asks, he may safely rely upon the rule announced in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Reprint 145, 23 L. Exch. (N.S.) 179, 2 C. L. R. 517, 18 Jur. 358, 2 Week Rep. 302, 5 Eng. Rul. Cas. 502. In passing, however, it should be said that an examination of the authorities cited to the effect that only nominal damages are recoverable for breach of a contract to loan money shows them to be not applicable to the situation described in this complaint.<sup>6</sup> There is no reason why substantial damages may not be allowed for the breach of a contract to loan money, within the rule of *Hadley v. Baxendale* (9 Exch. 341, 156 Eng. Reprint 145, 23 L. J. Exch. [N.S.] 179, 2 C. L. R. 517, 18 Jur. 358, 2 Week Rep. 302, 5 Eng. Rul. Cas. 502), where special circumstances were known by both parties to exist at the time the contract was made, from which it must have been apparent that special damages would be suffered in case of the failure to fulfil the obligation.

"We find a very satisfactory discussion of the legal principles involved in

demurrer to a complaint which sets forth a contract to lend money, a breach of which will be followed by a suspension of the business of the borrower.<sup>6</sup> If the lender knows that the loan is made to take up an option, the measure of damages is based on the difference between the price at which such property could be resold in a reasonable time and the price at which it could be acquired under the option.<sup>7</sup> If the lender knows that the loan is made to carry out a favorable composition of creditors, the measure of damages is the loss by inability to carry out such composition agreement.<sup>8</sup> It is said that the borrower may recover the loss of profits in the contemplated transaction if the lender knows of such transaction and knows that the borrower can not secure money elsewhere.<sup>9</sup> In other jurisdictions it is said that profits arising out of the contemplated transaction can not be the measure of damages.<sup>10</sup> If A has agreed to lend money to B, a member of a mer-

the case of *Holt v. United Security L. Ins. & T. Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301. In this case the action was brought to recover damages for a breach of contract to loan money. The contract for the loan embodied a special arrangement whereby one Chapman was to have from the defendant \$32,500 to reimburse him for the cost of a new building, the repayment of which amount was to be secured by endowment policies upon the lives of Chapman and the plaintiff, Holt. It was argued that only nominal damages could be recovered for the failure of the defendant to loan the money; but the court held, in view of the special circumstances, substantial damages covering losses directly accruing, as well as gains prevented, might furnish a legitimate basis for compensation to the injured party. It was held, further, that expenditures fairly incurred in preparation for performance, or part performance, where such expenditures are not otherwise reimbursed, would be proper subjects for consideration in estimating the damages. The court quotes with approval from the opinion of Mr. Justice Bradley, in *United States v. Behan*,

110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81, as follows: 'It does not lie, however, in the mouth of the party who has voluntarily and wrongfully put an end to the contract to say that the party injured has not been damaged, at least, to the amount of what he has been induced fairly and in good faith to lay out and expend.' *Murphy v. Hanna*, 37 N. D. 156, L. R. A. 1918B, 135, 164 N. W. 32.

Loss of prospective rent of a building, through delay in construction due to refusal to make the agreed loan can not be recovered, as being too remote. *Shurtleff v. Occidental Building & Loan Association*, — Neb. —, 181 N. W. 374.

<sup>6</sup> *Murphy v. Hanna*, 37 N. D. 156, L. R. A. 1918B, 135, 164 N. W. 32 (in this case, a bank).

<sup>7</sup> *Newby v. Atlantic Coast Realty Co.*, 180 N. Car. 51, 103 S. E. 909.

<sup>8</sup> *Banewur v. Levenson*, 171 Mass. 1, 50 N. E. 10.

<sup>9</sup> *Graham v. McCoy*, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235.

<sup>10</sup> *Bixby-Theirson Lumber Co. v. Evans*, 167 Ala. 431, 29 L. R. A. (N.S.) 194, 52 So. 843; *Holt v. United Security Life Insurance & Trust Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

chants' exchange, knowing that B is about to buy grain, and A refuses to make such loan, it is said that B may recover the difference between the contract price of such grain and the price at which B is forced to sell by reason of such default, but not damages for loss of profits.<sup>11</sup> Accordingly, it has been said that the expenses incurred in reliance on the contract may be recovered as damages.<sup>12</sup>

**§ 3231. Contract concerning securities.** If a contract to collect<sup>1</sup> or deliver a note,<sup>2</sup> or procure an assignment of stock,<sup>3</sup> is broken, the measure of damages is prima facie the par value of such note or security.

**§ 3232. Breach of contract for lease—Breach by lessor.** If the lessor fails to perform a contract for the lease of realty, and does not place the tenant in possession, the measure of damages is the market value of the term, less the rent fixed in the contract,<sup>1</sup> together with any special damages which may be shown to exist.<sup>2</sup> If the rent has been paid in advance and the rental value and the contract rate are the same, a proportionate amount of the rent may be recovered on the theory of quasi-contract.<sup>3</sup> In case of a slight delay in placing the tenant in possession, the measure of general damages is the difference between the rental value of the

<sup>11</sup> *Farabee-Treadwell Co. v. Union & Planters' Bank & Trust Co.*, 135 Tenn. 208, L. R. A. 1916F, 501, 186 S. W. 92.

<sup>12</sup> *Holt v. United Security Life Insurance & Trust Co.*, 76 N. J. L. 585, 21 L. R. A. (N.S.) 691, 72 Atl. 301.

Contra, under the special terms of the contract which restricted preliminary expenditures to the proceeds of the loan. *Bixby-Theirson Lumber Co. v. Evans*, 167 Ala. 431, 29 L. R. A. (N.S.) 194, 52 So. 843.

<sup>1</sup> *Ft. Dearborn National Bank v. Bank*, 87 Minn. 81, 91 N. W. 257.

<sup>2</sup> *Deering v. Johnson*, 86 Minn. 172, 90 N. W. 363; *Standard Lumber Co. v. Deer Park Lumber Co.*, 104 Wash. 84, 175 Pac. 578 [opinion modified, 176 Pac. 332].

<sup>3</sup> *First National Bank v. Park*, 117 Ia. 552, 91 N. W. 826.

<sup>1</sup> *Arkansas. Reeves v. Romines*, 132 Ark. 599, 201 S. W. 822.

*Florida. Moses v. Autuono*, 56 Fla. 499, 20 L. R. A. (N.S.) 350, 47 So. 925.

*Massachusetts. Neal v. Jefferson*, 212 Mass. 517, 41 L. R. A. (N.S.) 387, Ann. Cas. 1913D, 205, 90 N. E. 334.

*North Carolina. Sloan v. Hart*, 150 N. Car. 269, 21 L. R. A. (N.S.) 239, 63 S. E. 1037.

*Ohio. Rhodes v. Baird*, 16 O. S. 573.

*Washington. King v. King*, 83 Wash. 615, 145 Pac. 971.

<sup>2</sup> *Moses v. Autuono*, 56 Fla. 499, 20 L. R. A. (N.S.) 350, 47 So. 925; *Sloan v. Hart*, 150 N. Car. 269, 21 L. R. A. (N.S.) 239, 63 S. E. 1037.

<sup>3</sup> *Henry Rahrs' Sons Co. v. Buckley*, 159 Wis. 589, 150 N. W. 994.

premises for the period for which the tenant is deprived of possession, less the rent reserved in the lease,<sup>4</sup> in case the tenant can take possession when it is offered to him without serious inconvenience to himself.<sup>5</sup> In addition thereto, special damages may be recovered if any are shown to exist.<sup>6</sup>

If the lessor fails to perform a covenant to repair, the measure of damages is said to be the cost of making such repairs,<sup>7</sup> at least if such cost is a comparatively small item with reference to the rent.<sup>8</sup> It has been said, however, that the measure of damages is the difference between the rental value of premises if kept in repair in accordance with the contract and the value of the premises in the condition in which they were;<sup>9</sup> and if special damages have followed as a result of such breach, they, too, may be recovered.<sup>10</sup>

The measure of damages for the lessor's breach of a covenant to renew a lease is ordinarily the difference between the rental value of such property for the period of renewal and the rent fixed by the contract.<sup>11</sup> If it is understood, however, that the lessee's profits will be made entirely in the renewal period, the loss of such profits is the measure of damages.<sup>12</sup>

In case of eviction, the measure of damages is the expense of removal, together with the value of the necessary loss of time,<sup>13</sup> in addition to the value of the residue of the term. The lessor can

<sup>4</sup> *Herpolsheimer v. Christopher*, 76 Neb. 352, 9 L. R. A. (N.S.) 1127, 14 Ann. Cas. 399, 111 N. W. 359; *Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 9 L. R. A. (N.S.) 1130, 57 S. E. 253.

<sup>5</sup> *Huntington Easy Payment Co. v. Parsons*, 62 W. Va. 26, 9 L. R. A. (N.S.) 1130, 57 S. E. 253.

<sup>6</sup> *Herpolsheimer v. Christopher*, 76 Neb. 352, 9 L. R. A. (N.S.) 1127, 14 Ann. Cas. 399, 111 N. W. 359.

<sup>7</sup> *Young v. Berman*, 96 Ark. 78, 34 L. R. A. (N.S.) 977, 131 S. W. 62; *Wood v. Sharpless*, 174 Pa. St. 588, 34 Atl. 319.

<sup>8</sup> *Young v. Berman*, 96 Ark. 78, 34 L. R. A. (N.S.) 977, 131 S. W. 62.

<sup>9</sup> *Miller v. Sullivan*, 77 Kan. 252, 16 L. R. A. (N.S.) 737, 15 Ann. Cas. 561,

94 Pac. 266; *Murrell v. Crawford*, 102 Kan. 118, 169 Pac. 561; *Warren v. Hodges*, 137 Minn. 389, 163 N. W. 739; *Thompson-Houston Electric Co. v. Durant Land Improvement Co.*, 144 N. Y. 34, 39 N. E. 7; *Partridge v. Dykins*, 28 Okla. 54, 34 L. R. A. (N.S.) 984, 113 Pac. 928.

<sup>10</sup> *Miller v. Sullivan*, 77 Kan. 252, 16 L. R. A. (N.S.) 737, 15 Ann. Cas. 561, 94 Pac. 266.

<sup>11</sup> *Neal v. Jefferson*, 212 Mass. 517, 41 L. R. A. (N.S.) 387, Ann. Cas. 1913D, 205, 99 N. E. 334.

<sup>12</sup> *Neal v. Jefferson*, 212 Mass. 517, 41 L. R. A. (N.S.) 387, Ann. Cas. 1913D, 205, 99 N. E. 334.

<sup>13</sup> *Wade v. Herndl*, 127 Wis. 544, 5 L. R. A. (N.S.) 855, 7 Ann. Cas. 591, 107 N. W. 4.

not avoid such liability on the ground that the tenant would have been obliged to remove at the end of the term.<sup>14</sup>

The measure of damages for breach of a cropping contract by the lessor, appears to be the amount that could have been earned under such contract, less the cost of performance, and also less the amount which the cropper could have earned in like employment, if he had used reasonable diligence to secure it.<sup>15</sup> The value of the services which the cropper has rendered is not the proper measure of damages.<sup>16</sup>

**§ 3233. Breach of contract for lease—Breach by lessee.** If the lessee refuses to take possession of the premises and to pay rent, the measure of damages is the difference between the amount of rent fixed by the contract, and the amount for which such premises can be rented,<sup>1</sup> together with such special damages as may be shown to exist.<sup>2</sup>

The measure of damages for tenant's breach of a covenant to repair or to keep in good condition, is the cost of putting such premises in repair or in good condition,<sup>3</sup> together with the depreciation in the rental value of the premises during the time which is necessary for restoring them to their proper condition.<sup>4</sup> The damages for the breach by the lessee of a covenant to leave straw or manure on the land, is said to be amount of injury to the land;<sup>5</sup> but it is also said to be the value of the straw or manure when spread on the land.<sup>6</sup> If the sub-lessee of a mine has failed to perform his covenant to keep the mine free from water, and the

<sup>14</sup> *Wade v. Herndl*, 127 Wis. 544, 5 L. R. A. (N.S.) 855, 7 Ann. Cas. 591, 107 N. W. 4.

<sup>15</sup> *Crews v. Cortez*, 102 Tex. 111, 38 L. R. A. (N.S.) 713, 113 S. W. 523.

<sup>16</sup> *Pace v. Beckett*, — Colo. —, L. R. A. 1918B, 1053, 169 Pac. 142.

<sup>1</sup> *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 35 L. R. A. (N.S.) 426, Ann. Cas. 1912C, 1050, 113 Pac. 630.

Whether the lessor is bound to mitigate damages by reletting, see § 3194.

<sup>2</sup> *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 35 L. R. A. (N. S.) 426, Ann. Cas. 1912C, 1050, 113 Pac. 630.

<sup>3</sup> *Penley v. Watts*, 7 Mees. & W. 601; *Joyner v. Weeks* [1891], 2 Q. B. 31; *Brown Land Co. v. Lehman*, 134 Ia. 712, 12 L. R. A. (N.S.) 88, 112 N. W. 185; *Appleton v. Marx*, 191 N. Y. 81, 16 L. R. A. (N.S.) 210, 14 Ann. Cas. 150, 83 N. E. 563.

<sup>4</sup> *Brown Land Co. v. Lehman*, 134 Ia. 712, 12 L. R. A. (N.S.) 88, 112 N. W. 185.

<sup>5</sup> *Munier v. Zachary*, 138 Ia. 219, 18 L. R. A. (N.S.) 572, 16 Ann. Cas. 526, 114 N. W. 525.

<sup>6</sup> *Saasen v. Haegle*, 125 Minn. 441, 52 L. R. A. (N.S.) 1176, 147 N. W. 445.

cost of so doing is comparatively slight, such cost is the measure of damages, and not the value of the term, if the lessee permits the term to be forfeited by failure to keep it free from water.<sup>1</sup>

The measure of damages for failure of a lessee under an oil lease to drill wells, to protect the leased premises from wells on adjoining land, is said to be the diminution of the royalties caused by such omission.<sup>2</sup> The measure of damages for failure of a lessee to drill wells for developing the leased property, is the amount of royalties which the lessor would have received from each well if it had been drilled in accordance with the terms of the contract.<sup>3</sup>

**§ 3234. Breach of covenant for title in deed.** After English land law began to take definite shape under the so-called feudal law, and after property rights began to be expressed in feudal terms, it was held that a tenant to whom the lord was bound to warrant his title, could have the lord vouched in, in an action in which the title of the tenant was attacked; and where he could not have him vouched in, he could have the writ de warrantia chartae.<sup>1</sup> By either of these methods of enforcing the old real warranty, the tenant who lost his land was adjudged to recover lands of equal value from the lord.<sup>2</sup> This rule probably worked fairly well during the period in which it was applied. The value of land changed slowly, and improvements were likely to be of comparatively little value. There was no means of determining the value of the land at the time of the eviction, except the personal knowledge of the jury; and the judgment for lands of equal value probably came as near to adjusting questions of change of value, and the like, as it was practicable to do. Under the conditions of modern life, the value of land may change quite rapidly, and improvements upon land are frequently made, the value of which exceeds the original value of the land itself. Under our rules of evidence, it is no more difficult to determine the value of

<sup>1</sup> *Bear Cat Mining Co. v. Grasselli Chemical Co.*, 247 Fed. 286, L. R. A. 1918C, 907, 159 C. C. A. 380.

<sup>2</sup> *Steele v. American Oil Development Co.*, 80 W. Va. 206, L. R. A. 1917E, 975, 92 S. E. 410.

<sup>3</sup> *Howerton v. Kansas Natural Gas Co.*, 81 Kan. 553, 34 L. R. A. (N.S.) 34, 106 Pac. 47.

<sup>1</sup> II Pollock and Maitland's *History of English Law*, 659 (original paging) [citing Bracton's *Note Book* pl. 196, 284, 600, 633, 945, 1717, 1803]; Viner's *abridgment*, *Voucher T* pl. 1, 2, 3, *Warranty K* pl. 11; Fitzherbert's *Natura Brevium*; *Writ de Warrantia Chartae*.

<sup>2</sup> *Ballet v. Ballet*, Godbolt 151; *Humphreys v. Knight*, Cro. Car. 455.

the land in question at the time of eviction than it is to determine any other question of value. If the original rule were adhered to, the greater part of the loss arising from the breach of a covenant for title, would be cast upon the grantee, who is not the party in default. For these reasons the English courts, and some of the American courts, in the New England states, have abandoned the original rule, and have held that the measure of damages is the value of the land at the time of the eviction,<sup>3</sup> including the value of improvements upon the land,<sup>4</sup> even if made after the title of the grantee was attacked, as long as made in bona fide reliance on the covenant for title.<sup>5</sup> If the grantor, whether fraudulently or negligently, delivers two successive deeds to different grantees for the same tract of land, and the second deed is recorded first, the first grantee may recover "for the loss of the bargain."<sup>6</sup> By the great weight of American authority, however, the measure of damages in an action for the breach of a covenant, for title, is the amount of the actual damage, limited, however, to the amount of the purchase price, with interest, as a maximum.<sup>7</sup>

<sup>3</sup> **England.** *Bunny v. Hopkinson*, 27 Beav. 565; *Jenkins v. Jones*, 9 Q. B. Div. 128.

**United States.** *Bender v. Fromberger*, 4 U. S. (4 Dall.) 442, 1 L. ed. 901.

**Connecticut.** *Horsford v. Wright, Kirby* (Conn.) 3, 1 Am. Dec. 8.

**Maine.** *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677.

**Massachusetts.** *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Norton v. Babcock*, 43 Mass. (2 Met.) 510; *White v. Whitney*, 44 Mass. (3 Met.) 81; *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749.

**Vermont.** *Park v. Bates*, 12 Vt. 381, 36 Am. Dec. 347.

<sup>4</sup> *Bunny v. Hopkinson*, 27 Beav. 565; *Jenkins v. Jones*, 9 Q. B. Div. 128; *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749.

<sup>5</sup> *Cecconi v. Rodden*, 147 Mass. 164, 16 N. E. 749.

<sup>6</sup> *Madden v. Caldwell Land Co.*, 16 Ida. 59, 21 L. R. A. (N.S.) 332, 100 Pac. 358.

<sup>7</sup> **Alabama.** *Bibb v. Freeman*, 59 Ala. 612; *Allinder v. Bessemer Coal Iron & Land Co.*, 164 Ala. 275, 51 So. 234 (obiter; as cause of action was for mistake in pointing out boundaries).

**Arkansas.** *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 344.

**California.** *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456.

**Connecticut.** *Gilbert v. Bulkley*, 5 Conn. 262, 13 Am. Dec. 57.

**Iowa.** *Swafford v. Whipple*, 3 Green. (Iowa) 261, 54 Am. Dec. 498.

**Kentucky.** *Helton v. Asher*, 135 Ky. 751, 123 S. W. 285.

**Minnesota.** *Brooks v. Mohl*, 104 Minn. 404, 17 L. R. A. (N.S.) 1195, 116 N. W. 931.

**Mississippi.** *Herndon v. Harrison*, 34 Miss. 486, 69 Am. Dec. 399.

**New York.** *Pitcher v. Livingstone*, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229.

**North Carolina.** *Pridgen v. Long*, 177 N. Car. 189, 98 S. E. 451.

**Ohio.** *Backus v. McCoy*, 3 Ohio 211, 17 Am. Dec. 585; *Clark v. Parr*, 14

The rental value for the time during which the grantee was in possession must be deducted from the amount of recovery.<sup>8</sup> Whether attorney's fees can be recovered as an element of damage depends on the local practice as to such item.<sup>9</sup> If the grantee is obliged to buy in a paramount title, the measure of damages is the amount thus expended, if it does not exceed the purchase price, with interest;<sup>10</sup> and if the title to only a part of the land has failed, the maximum amount of damages is reduced proportionately.<sup>11</sup>

The measure of damages for breach of a covenant against encumbrances, in case of a permanent easement, which can not be extinguished, is the market value of the land if free from such easement, less its market value as subject thereto.<sup>12</sup> If the encumbrance consists of an outstanding lease, the measure of damages is said to be the rental value of the property for the term of such lease.<sup>13</sup>

Consequential damages can not be recovered if the grantor had no notice of the special circumstances which resulted in such damage,<sup>14</sup> or if such damages would have been sustained even if the covenant had not been broken.<sup>15</sup>

In some cases the rule which forbids recovery of the value of the land at the time of eviction is justified on the theory that the

Ohio 118, 45 Am. Dec. 529; Conklin v. Hancock, 67 O. S. 455, 66 N. E. 518.

**Tennessee.** Kincaid v. Brittain, 37 Tenn. (5 Sneed.) 119; Park v. Cheek, 44 Tenn. (4 Cold.) 20; Recohs v. Younglove, 67 Tenn. (8 Baxt.) 385.

**Virginia.** Morgan v. Haley, 107 Va. 331, 13 L. R. A. (N.S.) 732, 13 Ann. Cas. 204, 58 S. E. 564.

**Washington.** Brown v. Carpenter, 99 Wash. 227, 169 Pac. 331.

**Wisconsin.** Rich v. Johnson, 2 Pinn. (Wis.) 88, 52 Am. Dec. 144; Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 73; McLennan v. Prentice, 77 Wis. 124, 45 N. W. 943; Daggett v. Reas, 79 Wis. 60, 48 N. W. 127.

<sup>8</sup> Curtis v. Brannon, 98 Tenn. 153, 69 L. R. A. 760, 38 S. W. 1073.

<sup>9</sup> Attorneys fees recovered. Brooks v. Mohl, 104 Minn. 404, 17 L. R. A. (N.S.) 1195, 116 N. W. 931.

Attorneys fees not recovered. Morgan v. Haley, 107 Va. 331, 13 L. R. A. (N.S.) 732, 13 Ann. Cas. 204, 58 S. E. 564.

<sup>10</sup> Brooks v. Mohl, 104 Minn. 404, 17 L. R. A. (N.S.) 1195, 116 N. W. 931.

<sup>11</sup> Brooks v. Mohl, 104 Minn. 404, 17 L. R. A. (N.S.) 1195, 116 N. W. 931.

<sup>12</sup> Smith v. White, 71 W. Va. 639, 48 L. R. A. (N.S.) 623, 78 S. E. 378.

<sup>13</sup> Brown v. Taylor, 115 Tenn. 1, 4 L. R. A. (N.S.) 309, 88 S. W. 933.

<sup>14</sup> Beutel v. American Mach. Co., 144 Ky. 57, 35 L. R. A. (N.S.) 779, 137 S. W. 799.

<sup>15</sup> Brown v. Taylor, 115 Tenn. 1, 4 L. R. A. (N.S.) 309, 88 S. W. 933.

grantee can recover the value of the improvements from the holder of a paramount title.<sup>16</sup> The rule, however, is not limited to cases of this sort. It has been adopted, apparently, in analogy to the original real warranty; and it has been justified on the ground that it would be unjust to charge the grantor with the subsequent appreciation of the value of the land and with the value of improvements which have been made after he has conveyed it. It has been pointed out that he might be ruined as a result of the breach of a covenant for title to one tract of land, in case the land appreciated in value, or valuable improvements were erected thereon.<sup>17</sup> Although not formulated deliberately, it seems to be assumed that if either party is to be ruined because of a defect in the title, the interests of the grantor who is in default are to be preferred to the interests of the grantee who has performed in full. It was based originally on the unjustifiable assumption that the measure of damages must be the same in the real warranties and in personal actions for breach of a covenant.<sup>18</sup> It is justified as having the advantage of certainty;<sup>19</sup> which it undoubtedly has, whatever might be thought of its justice. It has been justified on the theory that it divides the damages between the grantor, who is in default, and the grantee, who is not.<sup>20</sup> The rule which restricts the maximum amount of damages to the purchase price, with interest, might be justified in case of covenants of seisin, if they are to be construed in the rather technical way in which they usually are construed; that is, that they are satisfied by actual seisin by the grantor at the time of the conveyance, and that if they are not broken at that time, they are never broken. It seems impracticable to justify this rule on any theory of construction, in case of covenants of warranty and quiet enjoyment, since they are prospective in their operation by their very terms, and since the breach, if any, usually occurs at some time after the original conveyance has taken effect.

**§ 3235. Other illustrations of measure of damages.** On a breach of a contract for support for life by the party to furnish

<sup>16</sup> Webb v. Wheeler, 80 Neb. 438, 17 L. R. A. (N.S.) 1178, 114 N. W. 636.

<sup>17</sup> Willson v. Willson, 25 N. H. 229.

<sup>18</sup> Pitcher v. Livingstone, 4 Johns. (N. Y.) 1, 4 Am. Dec. 229.

<sup>19</sup> Pitcher v. Livingstone, 4 Johns. (N. Y.) 21, 4 Am. Dec. 229.

<sup>20</sup> Willson v. Willson, 25 N. H. 229.

such support, the measure of damages is the value of such support for the life of the person to be supported.<sup>1</sup> In case of breach of a contract to devise or bequeath property, which the promisee has performed in full, the measure of damages, in most jurisdictions, is the value of the property which the promisor promised to bequeath or devise.<sup>2</sup> In some jurisdictions, however, the right to recover damages is denied in legal effect, and it is said that the so-called measure of damages is the value of the consideration furnished,<sup>3</sup> at least if the consideration was furnished before the promise to devise or bequeath was made.<sup>4</sup> This rule has been adopted because of the chance of an excessive recovery against the estate of the promisor, if the property has appreciated in value.<sup>5</sup> This rule has been adopted in analogy to the rule which restricts the amount of recovery in actions by a purchaser of realty against a vendor, to nominal damages, if the vendor is unable to perform through no fault of his own.<sup>6</sup> However, it overlooks the qualifications of this rule; and it applies it to cases in which the promisor was guilty of deliberate default. In some jurisdictions the same rule has been applied to breach of a contract for adoption;<sup>7</sup> and it has been said that the measure of recovery is the value of the services which are performed, or the expenditures made in reliance upon such promise.<sup>8</sup> This is, in effect, a denial of damages, and a restriction of the party who is not in default to a right to recover in quasi-contract.<sup>9</sup>

In a breach of a contract of bailment, which consists in the bailee's appropriation of certain property, the measure of damages is the value of the property thus taken.<sup>10</sup> If an insurance company cancels a policy wrongfully, the measure of damages is the amount

<sup>1</sup> *Paro v. St. Martin*, 180 Mass. 29, 61 N. E. 268.

<sup>2</sup> *California. Morrison v. Land*, 169 Cal. 580, 147 Pac. 259.

*Iowa. Thompson v. Romack*, 174 Ia. 155, 156 N. W. 310.

*Kentucky. Bengé v. Hiatt*, 82 Ky. 666, 56 Am. Rep. 912.

*New York. Porter v. Dunn*, 131 N. Y. 314, 30 N. E. 122 (contract to bequeath a certain sum of money).

*West Virginia. Jefferson v. Simpson*, 83 W. Va. 274, 98 S. E. 212.

<sup>3</sup> *Graham v. Graham*, 34 Pa. St. 475.

<sup>4</sup> *Murtha v. Donohoo*, 149 Wis. 481 134 N. W. 406, 136 N. W. 158.

<sup>5</sup> *Graham v. Graham*, 34 Pa. St. 475.

<sup>6</sup> See § 3178.

<sup>7</sup> *In re Carroll's Estate*, 219 Pa. St. 440, 123 Am. St. Rep. 673, 68 Atl. 1038.

<sup>8</sup> *In re Carroll's Estate*, 219 Pa. St. 440, 123 Am. St. Rep. 673, 68 Atl. 1038.

<sup>9</sup> See Chapter LXXXVIII.

<sup>10</sup> *Upmago Lumber Co. v. Monroe*, 148 Ga. 847, 98 S. E. 498.

of the policy less the amount of premiums which would have been paid up to maturity if it had remained in effect.<sup>11</sup> If a contract to levy an assessment by a beneficial society is broken, the prima facie measure of damages is the amount which would have been realized from such assessment.<sup>12</sup> The measure of damages for breach of a contract to furnish water for irrigation, is said to be the difference in the rental value of the land if water were furnished, less the rental value of such land if water is not furnished;<sup>13</sup> although it is said that if crops are growing thereon at the time of the breach, the measure of damages is the value of such crops at maturity, less the cost of bringing them to maturity, and of transporting them to the most available market.<sup>14</sup>

In case of breach of a contract to use reasonable care that the person who is recommended as a good stock broker should conform to such description, the measure of damages is the amount misappropriated by the broker;<sup>15</sup> and it is not limited to the amount named in the letter in which advice is asked as to the investment of a certain sum.<sup>16</sup> The measure of damages for breach of a contract of partnership is the profits which the plaintiff lost by reason of such breach, if they can be shown with sufficient certainty.<sup>17</sup> If A and B agree to enter into a partnership in a distant country which is sparsely settled under dangerous and adverse conditions, and B refuses to perform, A's measure of damages is not the loss of profits, but only the actual expenses which have been incurred, including compensation for time lost in attempting to establish such business.<sup>18</sup> On breach of a contract by a carrier to land passengers at a certain point, where the carrier lands them elsewhere, the measure of damages is the loss of time, including that of the plaintiff and his employes who were landed with him, the extra cost of living and the expense of getting to their destination.<sup>19</sup> Illustration of the measure of damages for

<sup>11</sup> *Mutual Reserve Fund Life Association v. Ferrenbach*, 144 Fed. 342, 7 L. R. A. (N.S.) 1163, 75 C. C. A. 304.

<sup>12</sup> *Lawler v. Murphy*, 58 Conn. 294, 8 L. R. A. 113, 20 Atl. 457.

<sup>13</sup> *Wade v. Belmont Irrigating Canal & Water Power Co.*, 87 Neb. 732, 31 L. R. A. (N.S.) 743, 128 N. W. 514.

<sup>14</sup> *Smith v. Hicks*, 14 N. M. 560, 10 L. R. A. (N.S.) 938, 98 Pac. 138.

<sup>15</sup> *De La Bere v. Pearson, Ltd.* [1908], 1 K. B. 280.

<sup>16</sup> *De La Bere v. Pearson, Ltd.* [1908], 1 K. B. 280.

<sup>17</sup> *Farwell v. Wilcox*, — Okla. —, 175 Pac. 936.

<sup>18</sup> *Webster v. Beau*, 77 Wash. 444, 51 L. R. A. (N.S.) 81, 137 Pac. 1013.

<sup>19</sup> *Bullock v. White Star Steam Ship Co.*, 30 Wash. 448, 70 Pac. 1106. (No other elements of damage being shown.)

breaches of other contracts are referred to in the subjoined note.<sup>20</sup>

<sup>20</sup> For damages arising from breach of contract to transport goods. *Bennett v. Missouri Pacific Railway Co.*, 100 Kan. 537, L. R. A. 1918A, 1081, 164 Pac. 1084; *Kennedy v. Atchison, Topeka & Sante Fe Ry.*, 104 Kan. 708, 5 A. L. R. 149, 181 Pac. 117; *Chapman v. Fargo*, 223 N. Y. 32, L. R. A. 1918F, 1049, Ann. Cas. 1918E, 1054, 119 N. E. 76; *O. K. Transfer & Storage Co. v. Neill*, 59 Okla. 291, L. R. A. 1917A, 58, 159 Pac. 272; *Chesapeake & Ohio Ry. Co. v. Rebman*, 120 Va. 71, 90 S. E. 629.

**United States.** For damages arising from breach of contract to intermarry, see, *Parsons v. Trowbridge*, 226 Fed. 15, Ann. Cas. 1917C, 750, 140 C. C. A. 310.

**Kansas.** *Dalrymple v. Green*, 88 Kan. 673, 43 L. R. A. (N.S.) 972, 129 Pac. 1145.

**Minnesota.** *Hively v. Golnick*, 123 Minn. 498, 49 L. R. A. (N.S.) 757, Ann. Cas. 1915A, 295, 144 N. W. 213.

**Oklahoma.** *Baumle v. Verde*, 33 Okla. 243, 41 L. R. A. (N.S.) 840, Ann. Cas. 1914B, 317, 124 Pac. 1083.

**Rhode Island.** *Wrynn v. Downey*, 27 R. I. 454, 114 Am. St. Rep. 63, 4 L. R. A. (N.S.) 615, 8 Ann. Cas. 912, 63 Atl. 401.

**Vermont.** *Stokes v. Mason*, 85 Vt. 164, 36 L. R. A. (N.S.) 388, Ann. Cas. 1914B, 1190, 81 Atl. 162.

For damages arising from breach of professional contract by a physician, see *Skillings v. Allen*, 143 Minn. 323, 5 A. L. R. 922, 173 N. W. 663; *Hood v. Moffett*, 109 Miss. 757, L. R. A. 1916B, 622, Ann. Cas. 1917E, 410, 69 So. 664.

For damages arising from breach of

contract by a boarding school, see *Kentucky Military Institute v. Cohen*, 131 Ark. 121, L. R. A. 1918B, 709, 198 S. W. 874.

For damages arising from breach of contract to exhibit machine, see *Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co.*, 141 N. Car. 284, 8 L. R. A. (N.S.) 255, 53 S. E. 885.

For damages due to failure of depositor to examine his bank book, see *National Dredging Co. v. Farmers' Bank*, 6 Penn. (Del.) 580, 16 L. R. A. (N.S.) 593, 69 Atl. 607.

For damages due to breach of contract by telegraph company, see *Western Union Telegraph Co. v. Lewis*, 203 Fed. 832, 49 L. R. A. (N.S.) 927; *Gardner v. Postal Telegraph-Cable Co.*, 171 N. Car. 405, L. R. A. 1916E, 484, 88 S. E. 630; *Bateman v. Western Union Telegraph Co.*, 174 N. Car. 97, L. R. A. 1918A, 803, 93 S. E. 467; *Western Union Telegraph Co. v. Sullivan*, 82 O. S. 14, 91 N. E. 867.

For damages arising from breach of contract by telephone company, see *Vinson v. Southern Bell Telephone & Telegraph Co.*, 188 Ala. 292, L. R. A. 1915C, 450, 66 So. 100; *Southern Telephone Co. v. King*, 103 Ark. 160, 39 L. R. A. (N.S.) 402, Ann. Cas. 1914B, 780, 146 S. W. 489; *Carmichael v. Southern Bell Telephone & Telegraph Co.*, 157 N. Car. 21, 39 L. R. A. (N.S.) 651, Ann. Cas. 1913B, 1117, 72 S. E. 619.

For damages arising from breach of contract for granting prizes in a circulation contest, see *Wachtel v. National Alfalfa Journal Co.*, — Ia. —, 176 N. W. 801.

## CHAPTER LXXXVIII

### QUASI-CONTRACTUAL RIGHTS ARISING ON PERFORMANCE AND BREACH

- § 3236. General principles of quasi-contract.
- § 3237. Outline of quasi-contract.
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§ 3270. Recovery for benefits not recognized where restoration in specie practicable.

§ 3271. Amount of recovery—General principles.

§ 3272. Amount of recovery—Defendant in default.

§ 3273. Amount of recovery—Plaintiff in default.

**§ 3236. General principles of quasi-contract.** While the history of quasi-contracts has already been discussed in an elementary way,<sup>1</sup> and while many of the quasi-contractual rights have been discussed in some detail,<sup>2</sup> a general summary of this topic may well be made in connection with a discussion of the quasi-contractual rights which arise on breach and performance. These are the last quasi-contractual rights to be discussed in connection with contract; and, as quasi-contractual rights have been discussed up to this point as incidental to questions of contract law, they have, for the most part, not been discussed in any order based on the nature of quasi-contract itself.

While the common law had passed between the primitive or archaic stage, and while it had reached the stage of development, which is sometimes known as "strict law," being administered by technical experts and having machinery for determining disputed questions of fact, nevertheless, like all systems of law which have just reached this stage, the action, rather than the right, was the important thing. Rights were based on actions, and not actions on rights. The form of action was for many purposes more important than the right which it was sought to enforce thereby. The result, in the law of quasi-contract, was that the real nature of

<sup>1</sup> See §§ 31 et seq.

For the general nature of quasi-contracts, see *A Summary of Quasi-contracts*, by John H. Wigmore, 25 *American Law Review*, 695; *Contract Distinguished from Quasi-contract*, by Joseph L. Lewinsohn, 2 *California Law Review*, 171; *Quasi-contract: Its Nature and Scope*, by William A. Keener, 7 *Harvard Law Review*, 57; *Covenants as Quasi-contracts*, by Louis L. Hammon, 2 *Michigan Law Review*, 106; *The Measure of Recovery upon Implied and Quasi-contracts*, by Joseph H. Beale, 19 *Yale Law Journal*, 609, and *Quasi-con-*

*tractual Obligations*, by Arthur Linton Corbin, 21 *Yale Law Journal*, 533.

For a discussion of the theory of unjust enrichment, see Keener on *Quasi-contracts*, by Everett V. Abbot, 10 *Harvard Law Review*, 209, 479.

See, however, *A Retraction*, by Everett V. Abbot, 11 *Harvard Law Review*, 402.

See also, *Restitution or Unjust Enrichment*, by Learned Hand, 11 *Harvard Law Review*, 249.

<sup>2</sup> See subsequent references in this section.

this substantive right was veiled by the forms of action by which it had to be enforced, even more than other forms of substantive right. In fact the question about the form of action which would lie, assumed such importance that it obscured what seems to us the fundamental question, whether any right at all existed in a given case; and it has forced us to group together, under quasi-contracts, a number of rights which have no real connection; and which are grouped together only because they were rights which were based neither on contract nor on tort (although they frequently arose out of either one or the other) and which could, nevertheless, be enforced by one of the contract actions.

This lack of any real connection between these various forms of rights was disguised at common law by the fact that, if the right was one on which the action of debt would lie, the law regarded only the nature of the debt itself; that is, it considered whether there was an obligation to pay a fixed and liquidated sum of money; and it made no practical distinction as far as any classification of rights was concerned between the various sources of duty to pay such fixed and liquidated sum.<sup>3</sup> If the right was one which could be enforced by the action of assumpsit, the lack of connection between the various kinds of rights was concealed by the fact that the courts insisted that this was an implied contract.<sup>4</sup> It carried this theory so far that a declaration was insufficient in common law which set up all the facts which would entitle the plaintiff to recover in quasi-contract, but which omitted the allegation of an express promise.<sup>5</sup>

In cases of this sort the promise was a sheer fiction, since it was not necessary for the plaintiff to prove it; but it was a necessary fiction, since it was necessary for the plaintiff to plead it. As has been pointed out, this fiction was at one time a great help in the development of the law. At a time in which the courts were unable to think of rights except through the actions which lay to enforce them, and at a time in which the courts were unwilling to develop new actions, the only way in which quasi-contract could develop was by resorting to the action of assumpsit and by treating the express promise as a fiction.<sup>6</sup> In the present condition of the law there should be no room for fictions. Our law has reached a stage of development at which we should be able to recognize the rights, at least, which we are attempting to enforce. They

<sup>3</sup> See § 1495.

<sup>4</sup> See § 1495.

<sup>5</sup> See § 1495, note 6.

<sup>6</sup> See § 1496.

should be grouped according to their essential nature. Forms of action should be abolished, in effect at least; and if possible, in outward form. It should no longer be necessary to make allegations which the jury would be instructed to ignore. The fictitious promise is one of the many things which were a great help at one time, but which now operate as a clog on further progress.

As a result of the common-law classification of quasi-contract as a form of contract, quasi-contract can be described from the standpoint of procedure as the residue of the rights which, at common law, could be enforced by one of the contract actions, after deducting therefrom those rights which were based on genuine agreement and in which the courts attempted to give effect to the will of the parties.<sup>7</sup> This, of course, tells us nothing about the nature of quasi-contract; but this is because the common law grouped these rights together without any regard to their real nature. Rights at modern law should be grouped with regard to their essential nature and not with reference to out-worn forms of action. An analysis of this sort will show that in addition to the questions of procedure and form of action, which were all-important at common law, there are also the important questions of the existence of the right to recover in quasi-contract at all; and the question of the amount and general theory of recovery in case the right is established.<sup>8</sup>

**§ 3237. Outline of quasi-contract.** Since the action of debt could be brought on a so-called contract of record,<sup>1</sup> or for breach of a customary,<sup>2</sup> or statutory,<sup>3</sup> duty, rights of this sort are grouped with quasi-contractual rights, although they have no relation whatever to genuine agreement. The general nature of rights of this sort is fairly well established; and, with the adoption of the code of civil procedure, and with its consequent abolition of forms of action, these rights have, for most purposes, ceased to be regarded as quasi-contractual. The last relic of their classification as contract actions, persists in cases in which the legislature has attempted to classify rights in personam into contract rights and tort rights, for the purpose of procedure, remedies, jurisdiction, limitations, and the like. Since this classification ignores quasi-contract, and since the courts do not like to assume that the legis-

<sup>7</sup> See § 47.

<sup>8</sup> See §§ 3238 et seq.

<sup>1</sup> See § 1134.

<sup>2</sup> See §§ 58 et seq.

<sup>3</sup> See § 66.

lature meant to deny remedies in cases of this sort, they prefer to assume that the legislature was using the obsolete common-law classification; and accordingly they say that quasi-contractual rights are to be classed as contract rights for the purpose of construing statutes of this sort.<sup>4</sup>

The class of quasi-contractual rights which is of practical importance in modern law consists of those rights which are based on the so-called doctrine of unjust enrichment or unmerited acquisition of benefits. As has been pointed out,<sup>5</sup> this doctrine is so broad and vague as to give no clue to its application to combination of facts as they arise. As has already been said,<sup>6</sup> these rights may be divided into three general classes: those which arise on contract, but in which the quasi-contractual right of recovery is given without regard to the actual intention of the parties and frequently in defiance of their intention;<sup>7</sup> those which arise out of a tort, but on which the common law, in its later development, allowed the injured party to bring an action in assumpsit, alleging a promise by the wrongdoer to make restitution or to pay a reasonable compensation for the thing of value which he had obtained as a result of such tort;<sup>8</sup> and those which arise neither out of contract nor out of tort, in which the common law compels restitution but requires the plaintiff to allege a promise by the defendant to make restitution.<sup>9</sup>

It is in this last class of rights that we find the greatest uncertainty as to the existence of a right of action. In the other two classes of quasi-contractual rights based on the theory of unjust enrichment, there is comparatively very little dispute, except as to questions of fact, of the right of plaintiff to recover on some theory, and in some form of action. The questions of law which

<sup>4</sup> See §§ 1498 et seq.

<sup>5</sup> See § 1503.

<sup>6</sup> See § 1503.

<sup>7</sup> See references in § 1503 to the various types of defective or voidable contracts or contracts which have been discharged by facts arising after their formation.

For quasi-contractual rights arising on discharge of a contract by voluntary agreement, see § 2405.

For quasi-contractual rights arising on discharge of a contract by breach of express condition, see § 2651.

For rights arising on discharge by impossibility, see § 2714.

For rights arising on discharge by alteration, see § 3113.

Rights arising on discharge by breach as well as the right to sue in general assumpsit after full performance, are discussed in this chapter.

<sup>8</sup> See §§ 1504 et seq.

<sup>9</sup> See §§ 1516 et seq. This class of rights includes payments under compulsion, payments by mistake, and the like.

are raised in cases under these classes deal chiefly with the plaintiff's right to avoid the necessity of setting up the specific facts on which his cause of action is based, either by a declaration in tort setting up the wrong of which he complains, or by declaration in special assumpsit, setting up the contract on which he relies, performance thereof on his part, and the breach thereof on the part of the adversary party; and with the right of plaintiff, instead of such specific allegations, to make use of the common counts in general assumpsit, by which he alleges, in general terms, a fictitious contract for the payment of money, the sale of goods, the performance of work and labor and the like, together with a fictitious promise on the part of the defendant to make restitution or to pay a reasonable compensation.

Since the entire transaction in the form in which it is alleged, under the common counts, is fictitious, no logical reason appears for permitting this fiction under one count any more than under another. As in the case of quasi-contractual rights arising out of tort,<sup>10</sup> the courts, however, have been far more ready to permit the use of the money counts to enforce quasi-contractual rights, arising on discharge of a contract by breach, than to permit the use of the counts for work and labor, goods sold and delivered, and the like.

**§ 3238. Nature and theory of quasi-contractual rights arising on breach.** The right of a party to a contract to recover the value of his performance without regard to the terms of the contract itself involves both a question of the nature of his remedial right and a question of pleading and procedure. Where this right exists, it involves the right of the party who seeks to assert it, to ignore the terms of the contract, to give up his claim for damages or specific performance if the adversary party is in default, and to assert, instead, a claim for the value of his performance of such contract. If the party who seeks to assert this right is himself the party who is in default, the existence of this right involves the right of such party to ignore the terms of the contract and to recover the value of his performance, even cases in which he could not recover anything upon the contract itself because he would be unable to show substantial performance.<sup>1</sup> The right itself is, accordingly, often spoken of as an equitable right, although en-

<sup>10</sup> See § 1504.

<sup>1</sup> See §§ 2778 et seq.

forceable in an action at law.<sup>2</sup> The theory of recovery in quasi-contract is, however, occasionally spoken of by the court as if it were a rule for determining the measure of damages.<sup>3</sup> This is usually a mere misuse of words without any attendant confusion in ideas. Occasionally, however, the courts seem to have confused the right to recover in quasi-contract, with the measure of recovery in case of substantial performance.<sup>4</sup> The use of the common counts as a method of recovering the purchase price on complete or substantial performance,<sup>5</sup> has probably been responsible for part of this confusion.

The question of pleading and procedure which arises in cases of this sort, involves the right of the party to ignore the contract in his writ and declaration; and, instead of setting up the terms of the contract itself, together with performance on the part of the plaintiff, and breach on the part of the defendant, to make use of the common counts in which he alleges that the defendant has re-

2 "The action of indebitatus assumpsit, in the form of a count for money had and received, is no doubt a very beneficial remedy. It lies whenever one has the money of another which he has no right to retain. Though an action at law, it is equitable in its nature, and it can be maintained in all cases where the defendant holds money of the plaintiff which in equity and good conscience he ought to repay. In such cases, no express promise to pay need be proved, because the law will imply a debt from such relation between the parties, and will give this action, founded on the equity of the plaintiff's case.

It has been frequently said that the action lies to recover back money which ought not to be kept—for money which *ex equo et bono* the defendant ought to return; for money which the defendant, upon the circumstances of the case, and by the ties of natural justice, is under obligation to refund; for money got through imposition, extortion, oppression, or by fraud, mistake, or by undue advantage taken of plaintiff's situation—but, after all,

such expressions are of such a general character as to afford no specific rule by which to test a particular case. The action has been held to apply to cases involving a great variety of circumstances, but, broad as it is, there are limits beyond which it ought not to go; and the great difficulty is to prescribe the limits, and mark them out by such specific and perceptible lines as relieves the mind of all doubt and perplexity. After the examination of numerous cases, this court declines to undertake the task, but it is safe to say that this form of action should not be held to apply to a case, under the facts of which a court of equity itself, were the plaintiff at liberty to go there, would not entertain a bill and grant the relief asked." *Indiana Business College v. Cline*, 187 Ind. 416, L. R. A. 1918E, 779, 119 N. E. 712.

<sup>3</sup> *Barlow v. Ancient Order of United Workmen*, 179 Ia. 1149, L. R. A. 1917E, 1032, 162 N. W. 757; *Douglas v. Lowell*, 194 Mass. 268, 80 N. H. 510.

<sup>4</sup> See § 2779.

<sup>5</sup> See §§ 3243 et seq.

ceived money to plaintiff's use, or that plaintiff has sold and delivered goods to the defendant, or has performed work and labor for him, and the like, at defendant's request, and that defendant has promised to pay therefor. This right of the plaintiff to resort to the common counts clearly demonstrates the fictitious character of this procedure, since the real facts of the transaction are suppressed and a fictitious promise is alleged; a promise which, as has already been said, is essential to a proper declaration, but which the plaintiff need not, and usually can not, prove.<sup>6</sup> Whatever was done under transactions of this sort was really done under an express promise which contemplated performance in full on the one side, and compensation on the other side, in accordance with the terms of the contract. The parties did not intend reasonable compensation for a partial performance. To allow recovery on the theory of quasi-contract is to ignore or defy the agreement of the parties; and to say that the defendant promised such compensation is to resort to a fiction.

Since the action in quasi-contract is not based on the contract, *assumpsit* may lie to recover money paid under a contract under seal.<sup>7</sup> The fact that a contract contains an express condition, does not prevent breach of other material covenants of such contract from operating as a discharge.<sup>8</sup>

The principles of so-called waiver by which the party who is not in default may preclude himself from treating his executory covenants as discharged, by his election to treat the contract as subsisting,<sup>9</sup> apply to recovery in quasi-contract; and a party who has treated the contract as in effect after the adversary party has broken it can not subsequently retract such election and recover on the theory of quasi-contract.<sup>10</sup>

As is the case in questions of the effect of breach in general,<sup>11</sup> the question of the right to recover in quasi-contract in case of breach depends in part on the question whether the contract is

<sup>6</sup> See § 1495.

<sup>7</sup> *Ballou v. Billings*, 136 Mass. 307; *American Life Insurance Co. v. McAden*, 109 Pa. 399, 1 Atl. 256.

<sup>8</sup> *Contra*, *Western v. Sharp*, 53 Ky. (14 B. Mon.) 144; *Storey v. Nampa & Meridian Irrigation District*, 32 Ida. 713, 187 Pac. 946; *Dalton v. American Ammonia Co.*, — Mass. —, 127 N. E. 504; *Stanley v. Pilker*, 40 S. D. 403, 167 N. W. 393.

See §§ 2881 et seq and §§ 2906 et seq.

<sup>9</sup> *Martin v. Cunningham*, 231 Mass. 280, 1 A. L. R. 1511, 121 N. E. 21.

<sup>10</sup> See §§ 3037 et seq.

<sup>11</sup> *North American Dredging Co. v. Outer Harbor Dock & Wharf Co.*, 178 Cal. 406, 173 Pac. 756; *Olson v. Harvey*, 68 Colo. 751, 188 Pac. 751; *McGregor v. Ross*, 96 Mich. 103, 55 N. W. 658.

<sup>12</sup> See §§ 2904 et seq.

entire or severable. If the contract is severable, it is, in effect, for this purpose a series of distinct contracts; and the breach of one covenant does not give the right to treat the entire contract as discharged and to recover the value of the performance on the remaining covenants.<sup>12</sup> The courts are apparently more willing to treat a contract as severable for the purpose of quasi-contract, so that default in the performance of one covenant will not prevent the adversary party from recovering compensation for his performance of other covenants,<sup>13</sup> than in cases in which the discharge of the party who is not in default, from his executory covenants, is involved.<sup>14</sup> To justify recovery in quasi-contract, the breach must apparently be of a more extreme character than would suffice to discharge the party not in default from the performance of his executory contract.<sup>15</sup> Requesting that an employe work for unreasonable hours is not such a breach as to justify him in abandoning his contract and seeking to recover reasonable compensation.<sup>16</sup> On the other hand, if A employs B's minor son X under contract with B, and requires X to work on Sunday, B may bring an action for wages without any set-off for damages caused by B's compelling X to abandon A's employment.<sup>17</sup> The wrongful declaration by the vendor that a land contract will be forfeited unless the purchaser pays the residue of the purchase price before it is due by the terms of the contract, does not of itself justify the purchaser in abandoning the contract and seeking to recover payments which he has made thereunder.<sup>18</sup>

**§ 3239. What amounts to breach for recovery in quasi-contract.** The question of the facts which amount to such a breach that recovery may be had in quasi-contract is determined, for most purposes, by the same principles as those which determine what facts amount to such a breach that the executory covenants to be

<sup>12</sup> See §§ 2904 et seq.

<sup>13</sup> *Keel v. East Carolina Stone & Construction Co.*, 143 N. Car. 429, 55 S. E. 826; *Jackson v. Cleveland*, 15 Wis. 107; *Arndt v. Keller*, 96 Wis. 274, 71 N. W. 651.

See also, *Peck-Hammond & Co. v. Miller*, 164 Ky. 206, 175 S. W. 347

<sup>14</sup> See §§ 2904 et seq.

<sup>15</sup> *Newell v. E. B. & A. L. Stone Co.*, — Cal. —, 9 A. L. R. 993, 184 Pac. 659;

*Koplitz v. Powell*, 56 Wis. 671, 14 N. W. 831.

<sup>16</sup> *Koplitz v. Powell*, 56 Wis. 671, 14 N. W. 831.

<sup>17</sup> *Hunt v. Adams*, 81 Me. 356, 3 L. R. A. 608, 17 Atl. 298.

<sup>18</sup> *Newell v. E. B. & A. L. Stone Co.*, — Cal. —, 9 A. L. R. 993, 184 Pac. 659.

Refusal to accept tender is such a breach, however. *Stanley v. Pilker*, 40 S. D. 403, 167 N. W. 393.

performed by the party who is not in default, may be treated by him as discharged at his election.<sup>1</sup> Breach of an independent covenant,<sup>2</sup> or a partial failure of consideration, if of a minor term of a contract,<sup>3</sup> do not discharge the executory covenants to be performed by the party who is not in default; and accordingly they do not discharge the contract so that either party thereto may recover on the theory of quasi-contract.

On the other hand, a total failure of consideration,<sup>4</sup> a partial failure of a vital term,<sup>5</sup> or the breach of a material precedent covenant,<sup>6</sup> or a concurrent covenant,<sup>7</sup> will operate as a discharge of the contract. If one of the parties has made performance on the part of the adversary party impracticable, the adversary party may treat the party as discharged and recover on the theory of quasi-contract.<sup>8</sup> If one of the parties refuses performance the adversary party may treat the contract as discharged for the purpose of recovering on quasi-contract.

**§ 3240. Distinction between renunciation and other forms of breach.** As far as the question of the discharge of executory covenants is concerned, it seems to make no practical difference, in the United States at least, whether the party who is in default refuses to perform, or whether he performs in so defective a manner as to justify the adversary party in treating the contract as discharged.<sup>1</sup> In some jurisdictions, however, where the right to bring an action on the theory of quasi-contract is involved, a distinction is made between these two forms of discharge, especially in contracts of employment. While an employe who refuses performance is not allowed to recover in quasi-contract in some jurisdictions,<sup>2</sup> recovery in quasi-contract is allowed if the employe has not refused performance, although he has acted in such a way that his employer is justified in discharging him.<sup>3</sup> In other jurisdictions, however,

<sup>1</sup> See §§ 2878 et seq.

<sup>2</sup> See §§ 2791 et seq.

<sup>3</sup> See §§ 2982 et seq.

<sup>4</sup> See § 2980.

<sup>5</sup> See § 2986.

<sup>6</sup> See §§ 2951 et seq.

<sup>7</sup> See §§ 2961 et seq.

<sup>8</sup> *E. I. Du Pont de Nemours Powder Co. v. Schlottman*, 218 Fed. 353, 134 C. C. A. 161 [affirming, *Schlottman v. E. I. Du Pont de Nemours Powder Co.*,

210 Fed. 356]; *Degnan v. Nowlin*, 5 Ind. Terr. 312, 82 S. W. 758; *Baltimore & Ohio Ry. v. Carter*, 133 Md. 551, 105 Atl. 760.

See §§ 2918 et seq.

<sup>1</sup> See §§ 2927 et seq.

<sup>2</sup> See §§ 2881 et seq. and 2926 et seq.

<sup>3</sup> *Fuqua v. Massie*, 95 Ky. 387, 25 S. W. 875; *Lawrence v. Gullifer*, 38 Me. 532; *Bvrd v. Boyd*, 4 McCord (S. Car.) 246, 17 Am. Dec. 740 (obiter); *Hilde-*

this distinction is ignored; and an employee who is discharged for a cause can not recover in quasi-contract.<sup>4</sup> In some jurisdictions it is held, if the vendor elects to treat a contract for the sale of realty as discharged by reason of the purchaser's breach, the purchaser may recover the amount of the purchase price which he has paid in, at law, or he may have an accounting therefor.<sup>5</sup>

**§ 3241. Use of term "rescission" in quasi-contract.** As in the case of discharge of a contract by breach,<sup>1</sup> some confusion has been caused by the use of ambiguous terms, such as "rescission," to indicate both discharge by a subsequent contract and discharge by breach on the part of one of the parties which the other party elects to treat as discharge.<sup>2</sup> The election of the promisee to treat the breach of the promisor as a discharge is spoken of as "rescission."<sup>3</sup> On the other hand, the term "rescission" is sometimes used as equivalent to a new contract for terminating the original contract as distinguished from the recognition of the breach thereof.<sup>4</sup> In accordance with this meaning of the term it is said that recovery of payments made, and the like, may be had if the contract is rescinded or abandoned by mutual consent;<sup>5</sup> while if

brand v. American Fine Art Co., 109 Wis. 171, 53 L. R. A. 826, 85 N. W. 268.

See also, as to right to back pay as bonus, Kowalski v. McAdoo, 93 N. J. L. 340, 107 Atl. 477.

<sup>4</sup>Ridway v. Hungerford Market Co., 3 A. & E. 171; Von Heyne v. Tompkins, 89 Minn. 77, 5 L. R. A. (N.S.) 524, 93 N. W. 901; Lane v. Phillips, 51 N. Car. 455.

<sup>5</sup>Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; Waters v. Pearson, 163 Ia. 391, 144 N. W. 1026; Hurley v. Anicker, 51 Okla. 97, L. R. A. 1918B, 538, 151 Pac. 593.

<sup>1</sup>See §§ 2459 and 3027.

<sup>2</sup>The act of one of the parties in recognizing breach on the part of the other party on discharge of the other contract should not be confused with a new contract. See § 2459.

<sup>3</sup>National Pacific Oil Co. v. Watson, — Cal. —, 193 Pac. 133; Johnson v. Herbst, 140 Minn. 147, 167 N. W. 356;

J. L. Owens Co. v. O'Keefe, 141 Minn. 275, 170 N. W. 204, 174 N. W. 224; American Life Insurance Co. v. McAden, 109 Pa. St. 399, 1 Atl. 256; Jackson v. White, 104 Wash. 643, 177 Pac. 667.

<sup>4</sup>Murphy v. Dalton, 130 Mich. 79, 102 N. W. 277; Hurley v. Anicker, 51 Okla. 97, L. R. A. 1918B, 538, 151 Pac. 593.

<sup>5</sup>California. Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep. 257, 25 Pac. 749; Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713.

Michigan. Murphy v. Dalton, 130 Mich. 79, 102 N. W. 277.

Oklahoma. Hurley v. Anicker, 51 Okla. 97, L. R. A. 1918B, 538, 151 Pac. 593.

Oregon. Cornely v. Campbell, 95 Or. 345, 186 Pac. 563.

Washington. Jackson v. White, 104 Wash. 643, 177 Pac. 667.

the contract is broken by one of the parties and not rescinded by mutual consent, the party in default can not recover the value of his performance up to such breach.<sup>6</sup> As this theory is set forth in a number of jurisdictions, it seems to mean that a party who refuses to perform can not recover on the theory of quasi-contract for the value of his performance; but that if he breaks the contract without actually refusing performance, and the adversary party elects to treat such breach as a discharge, the party who is in default may recover on the theory of quasi-contract for the value of his performance.<sup>7</sup> While no consideration exists for the renunciation by the party who is not in default, of his right to treat the contract as discharged, and while there is no consideration for his obligation to repay the purchase price,<sup>8</sup> this may be explained as a case of election between inconsistent rights, for which consideration is not necessary.<sup>9</sup> Such election is regarded as giving to the party who is in default the right to recover the value of his performance,<sup>10</sup> although it does not discharge him from his liability for damages.<sup>11</sup> The use of the word "rescission" by the party who is not in default seems to be regarded as material in determining whether he is rescinding or whether he is treating the breach as a discharge.<sup>12</sup>

<sup>6</sup> *Murphy v. Dalton*, 139 Mich. 79, 102 N. W. 277; *Hurley v. Anicker*, 51 Okla. 97, L. R. A. 1918B, 538, 151 Pac. 593.

<sup>7</sup> *Von Dorn v. Mengedoht*, 41 Neb. 525, 59 N. W. 800.

<sup>8</sup> *Pedley v. Freeman*, 132 Ia. 356, 119 Am. St. Rep. 557, 109 N. W. 890; *Hurley v. Anicker*, 51 Okla. 97, L. R. A. 1918B, 538, 151 Pac. 593.

<sup>9</sup> See §§ 2023 et seq.

<sup>10</sup> See note, ante.

<sup>11</sup> *Hurley v. Anicker*, 51 Okla. 97, L. R. A. 1918B, 538, 151 Pac. 593.

<sup>12</sup> *Pedley v. Freeman*, 132 Ia. 356, 119 Am. St. Rep. 557, 109 N. W. 890.

"Whether good and sufficient cause did or did not exist for either party to rescind and abandon the contract, we are of the opinion that the trial court was clearly right in holding that it was in fact rescinded or abandoned

by both, and that defendant is in no condition to now insist upon an enforcement of the agreement according to its terms. As we have already stated, the defendant resumed possession of the land and asserted his right thereto in a written declaration that he 'elected to rescind and did rescind' the contract of sale. This is something more than a mere declaration of forfeiture by which a seller seeks to eliminate the rights of a delinquent purchaser and retain advance payments received. It is a rescission, and a rescission implies the entire abrogation of the contract and a restoration of the benefits received from the other party. This is elementary, and requires no citation of authorities." *Pedley v. Freeman*, 132 Ia. 356, 119 Am. St. Rep. 557, 109 N. W. 890.

"Rescission" is also used of the election of the party who is not in default to treat the breach of the adversary party as a discharge, and to recover in quasi-contract.<sup>13</sup>

**§ 3242. Election of remedies—Nature and effect.** The right to enforce the contract by an action for damages or for specific performance, and the right to ignore the contract and to recover the reasonable value of the performance, are alternative, inconsistent, remedial rights which the law gives upon breach. The party who is not in default may elect between them.<sup>1</sup> The party who is in default has no such election, even in jurisdictions in which he is allowed such quasi-contractual right.<sup>2</sup> Since these rights are inconsistent, the party who is not in default may elect between them, but he can not have both. On the one hand, an action to enforce the quasi-contractual right, operates as a waiver of a right of action for damages.<sup>3</sup> In this connection, however, it must be remembered that in some cases a restitution of the amount which has been paid in is a necessary part of the measure of damages.<sup>4</sup> On the other hand, plaintiff who has avoided a declaration in special assumpsit in which he has set forth in the contract, the breach thereof on the part of the defendant and the facts which establish the amount of damages, can not recover damages under a pleading which is based on the theory of his quasi-contractual right, and which merely sets out some or all of the common counts.<sup>5</sup> If he elects to treat the contract as discharged and to seek to recover what he has paid in thereunder, he can not add a claim for special damages.<sup>6</sup> Since this quasi-contractual right necessarily presupposes performance on the part of plaintiff, the value of which he seeks to recover, a plaintiff can not maintain an action on this theory if the contract has been broken before he has performed, in whole or in part, and before such performance has been accepted

<sup>13</sup> *National Pacific Oil Co. v. Watson*, — Cal. —, 193 Pac. 133; *Valente v. Weinberg*, 80 Conn. 134, 13 L. R. A. (N.S.) 448, 67 Atl. 369; *Johnson v. Herbst*, 140 Minn. 147, 167 N. W. 356.

<sup>1</sup> See § 3174.

<sup>2</sup> See § 3024 and §§ 3261 et seq.

<sup>3</sup> *Harrison v. Hancock*, 2 Neb. Rep. (unofficial) 522, 89 N. W. 374.

<sup>4</sup> See §§ 3183 et seq.

<sup>5</sup> *Timmerman v. Stanley*, 123 Ga. 850, 1 L. R. A. (N.S.) 379, 51 S. E. 760; *North v. Mallory*, 94 Md. 305, 51 Atl. 89; *Anderson Forge & Machine Co. v. Sterling Motor Co.*, 261 Mich. 429, 167 N. W. 988; *Stewart Mfg. Co. v. Iron Clad Mfg. Co.*, 67 N. J. L. 577, 52 Atl. 391.

<sup>6</sup> *Timmerman v. Stanley*, 123 Ga. 850, 1 L. R. A. (N.S.) 379, 51 S. E. 760.

by the defendant.<sup>7</sup> An action in general assumpsit for work and labor, for labor and materials, and the like, can not be made the means for recovering damages for a breach of an executory contract.<sup>8</sup> This action can not be made a means for recovering damages for the breach of an express contract of sale.<sup>9</sup> An action for labor and materials,<sup>10</sup> or an action for goods sold and delivered,<sup>11</sup> will not lie where goods have not been delivered, and where the title thereto has not passed to the defendant against whom the action is maintained. A placed a piano in B's house for trial, while B and his family were away, A getting the key to the house from a neighbor. A claimed that B's wife had authorized them to do this. In moving the piano in, B's house was somewhat damaged. B declined to take the piano, and demanded that A pay him the damage done before he surrendered it. It was held that B was not liable for the value of the piano.<sup>12</sup> The common counts can not be used to recover damages for breach of a contract to sell a certain number of patented articles and to pay royalties thereon.<sup>13</sup> Occasionally, however, an action which is brought on this theory is stretched so as to enable the plaintiff to recover what appears to be damages caused by the breach of the contract,<sup>14</sup> although such additional amount of recovery is explained on the theory of restitution. A purchaser who has advanced freight and who subsequently exercises his right to reject the goods because they do not conform to the terms of the contract has been allowed

<sup>7</sup> *Anderson Forge & Machine Co. v. Sterling Motor Co.*, 201 Mich. 429, 167 N. W. 988; *Stewart Mfg. Co. v. Iron Clad Mfg. Co.*, 67 N. J. L. 577, 52 Atl. 391; *Leach v. Koch*, 161 Wis. 236, 152 N. W. 453, 154 N. W. 381.

<sup>8</sup> *North v. Mallory*, 94 Md. 305, 51 Atl. 89; *Anderson Forge & Machine Co. v. Sterling Motor Co.*, 201 Mich. 429, 167 N. W. 988.

<sup>9</sup> *Baltimore & Ohio Ry. Co. v. Carter*, 133 Md. 551, 105 Atl. 760; *Anderson Forge & Machine Co. v. Sterling Motor Co.*, 201 Mich. 429, 167 N. W. 988; *Leach v. Koch*, 161 Wis. 236, 152 N. W. 453, 154 N. W. 381 (goods not accepted and not in conformity to contract).

<sup>10</sup> *Anderson Forge & Machine Co. v. Sterling Motor Co.*, 201 Mich. 429, 167 N. W. 988.

<sup>11</sup> *McCormick Harvesting Machine Co. v. Cusack*, 116 Mich. 647, 74 N. W. 1005; *Leach v. Koch*, 161 Wis. 236, 152 N. W. 453, 154 N. W. 381. (In this case the goods do not seem to have been made in accordance with the terms of the contract.)

<sup>12</sup> *Grinnell v. Anderson*, 122 Mich. 533, 81 N. W. 329.

<sup>13</sup> *Stewart Mfg. Co. v. Iron Clad Mfg. Co.*, 67 N. J. L. 577, 52 Atl. 391.

<sup>14</sup> *J. L. Owens Co. v. O'Keefe*, 141 Minn. 275, 170 N. W. 204, 174 N. W. 224.

to recover the amount of freight thus advanced on the theory that it is a part of the purchase price.<sup>15</sup>

While the plaintiff may ignore the terms of the contract and recover on a fictitious promise, he can do so only if he makes use of a common count which alleges the performance, the value of which he seeks to recover.<sup>16</sup> Under a count for work and labor alone, the value of materials furnished can not be recovered.<sup>17</sup>

The fiction of a promise to pay the reasonable value of the performance is intended as a convenient remedy to enforce a right which is recognized and protected by the law. It is not intended as a means of imposing a liability which did not arise out of the operative facts, even though a liability would have arisen upon such facts if they had been a genuine express contract to pay the value of such performance.<sup>18</sup> If a contract has been discharged by breach a party can not recover the value of performance, if, by the terms of the contract, no recovery could have been had therefor in an action upon the contract.<sup>19</sup> If the purchaser of an automobile under a contract of conditional sale has induced a third person to repair such automobile, such third person can not recover under this theory against the vendor who retakes such automobile for breach of condition.<sup>20</sup> If goods have been sold under an express contract, which the vendee has performed, the vendor can not ignore such contract and sue in *assumpsit*.<sup>21</sup> A bought goods of B under a contract by which as A claimed, B was bound to insure such goods during the transit. The goods were not insured, and were lost. Subsequently, A agreed with B's agent, X, to take certain goods in settlement of this claim. The goods were delivered, and A waived his claim. It was held that B could not recover from A for such goods in an action for goods sold and delivered.<sup>22</sup>

<sup>15</sup> *J. L. Owens Co. v. O'Keeffe*, 141 Minn. 275, 170 N. W. 204, 174 N. W. 224.

<sup>16</sup> *Heath v. Freeland*, 1 M. & W. 543.

<sup>17</sup> *Heath v. Freeland*, 1 M. & W. 543.

<sup>18</sup> *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496; *Foss v. Richardson*, 81 Mass. (15 Gray) 303; *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510; *Priest v. Captain*, — Mo. —, 197 S. W. 83; *Clarke v. Johnson*, 43 Nev. 359, 187 Pac. 510.

<sup>19</sup> *Wood v. Finson*, 89 Me. 459, 36 Atl. 911; *Foss v. Richardson*, 81 Mass.

(15 Gray) 303; *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397, 55 L. R. A. 77, 61 N. E. 37; *Douglas v. Lowell*, 194 Mass. 268, 80 N. E. 510; *Priest v. Captain*, — Mo. —, 197 S. W. 83; *Clarke v. Johnson*, 43 Nev. 359, 187 Pac. 510.

<sup>20</sup> *Clarke v. Johnson*, 43 Nev. 359, 187 Pac. 510.

<sup>21</sup> *Wood v. Finson*, 89 Me. 459, 36 Atl. 911.

<sup>22</sup> *Wood v. Finson*, 89 Me. 459, 36 Atl. 911.

If the seller has performed and the risk is upon the buyer, the buyer can not invoke this theory to recover the purchase price because of total failure of consideration to such risk.<sup>23</sup> If there is no express or implied warranty, as to the validity of bonds which are sold, the buyer can not recover in quasi-contract because of the fact that such bonds are subsequently held to be invalid.<sup>24</sup> If under the contract a real estate broker may be dismissed at any time before he finds a customer, he can not on such dismissal maintain a quantum meruit for the time that he has spent in trying to find a customer.<sup>25</sup>

The consequences that are attached to the making of a written contract can not be evaded by resorting to this theory of recovery.<sup>26</sup> If money has been paid in performance of a written contract, such payment can not be recovered by showing a breach of oral terms which were not set forth in the contract unless such fraud is shown as to enable the plaintiff to repudiate the written contract.<sup>27</sup> If a contract contains a provision for the certificate of an architect or engineer as a condition precedent to recovery, such provision can not be evaded by bringing an action to recover the contract price on the theory of quasi-contract.<sup>28</sup> One who has bought the titles of adverse claimants with full knowledge of the facts can not recover the price thus paid.<sup>29</sup> However, an express condition upon which a contract may be avoided does not prevent recovery in quasi-contract on such further breach as amounts to a failure of consideration.<sup>30</sup>

The quasi-contractual right of recovering the value of the performance lies only in favor of the party by whom such performance was furnished.<sup>31</sup> A contractor can not recover on this theory

<sup>23</sup> *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496.

<sup>24</sup> *Otis v. Cullum*, 92 U. S. 447, 23 L. ed. 496. [Such bonds where held to be invalid in *Loan Association v. Topoka*, 87 U. S. (20 Wall.) 655].

<sup>25</sup> *Cadigan v. Crabtree*, 179 Mass. 474, 88 Am. St. Rep. 397, 55 L. R. A. 77, 61 N. E. 37.

<sup>26</sup> *Expanded Metal Fireproofing Co. v. Boyce*, 233 Ill. 284, 84 N. E. 275; *Foss v. Richardson*, 81 Mass. (15 Gray) 303; *Priest v. Captain*, — Mo. —, 197 S. W. 83.

<sup>27</sup> *Foss v. Richardson*, 81 Mass. (15 Gray) 303.

<sup>28</sup> *Expanded Metal Fireproofing Co. v. Boyce*, 233 Ill. 284, 84 N. E. 275.

For the effect of breach as discharging such a condition, see §§ 2652 et seq.

<sup>29</sup> *Priest v. Captain*, — Mo. —, 197 S. W. 83 (no relief can be had in equity).

<sup>30</sup> *Martin v. Cunningham*, 231 Mass. 280, 1 A. L. R. 1511, 121 N. E. 21.

<sup>31</sup> *Fernald Woodward Co. v. Conway Co.*, 229 Fed. 819; *Loe v. State*, 82 O. S. 73, 91 N. E. 982 [overruled on the question of the party who furnished the funds, in *State v. Baker*, 88 O. S. 165, 102 N. E. 732].

for work done by a sub-contractor to whom compensation must be made for such work.<sup>32</sup> In the absence of specific statutory authority, a county can not recover a payment made to a public contractor out of funds raised by assessment, even though such contractor has made default in performance.<sup>33</sup>

If the party who is in default is, in effect, a trustee, quasi-contract can not be used as a means for compelling him to make restitution out of a fund in which third persons have rights which will be impaired if such payment is compelled.<sup>34</sup> If the funds of a mutual insurance company are levied by assessments to pay losses, a member can not recover assessments which he has paid in, since the only source of payment is the fund to meet losses.<sup>35</sup>

**§ 3243. Right of party who has performed to recover on common counts—Compensation in money.** In determining whether the plaintiff may ignore the special contract, and avoid setting forth such contract in his declaration, by resorting to the common counts and seeking to recover the value of the performance which he has furnished under such contract, the first question to be determined is, whether the party who seeks to maintain such action has performed the contract on his part without default, or whether he has been excused from complete performance by the act or default of the defendant, or whether the plaintiff himself is in default and is seeking to recover the value of a partial performance of a contract which he has not performed substantially.<sup>1</sup> If the plaintiff has performed a special contract, substantially at least, there would not appear to be any logical basis of distinction between the different kinds of subject-matter on the contract and the different forms of compensation which were to be made. For historical reasons, however, we find that, in many jurisdictions, this logical view has not prevailed in the past and does not prevail now. As is the case when we considered the right to ignore a tort, and to make use of the common counts in assumpsit on the theory of a

<sup>32</sup> Fernald Woodward Co. v. Conway Co., 229 Fed. 819.

<sup>33</sup> Loe v. State, 82 O. S. 73, 91 N. E. 982 [overruled on the question of the effect of the statute as making such fund public moneys. State v. Baker, 88 O. S. 165, 102 N. E. 732].

<sup>34</sup> Barlow v. Ancient Order of United Workmen, 179 Ia. 1149, L. R. A. 1917E, 1032, 162 N. W. 757.

<sup>35</sup> Barlow v. Ancient Order of United Workmen, 179 Ia. 1149, L. R. A. 1917E, 1032, 162 N. W. 757.

<sup>1</sup> See §§ 2778 et seq.

so-called implied contract,<sup>2</sup> the courts have been quite willing to extend the money counts to cases in which the plaintiff's right to recover is based on a special contract which he has performed, substantially at least, and for which he was, by the terms of the contract, to receive a compensation in money, or in something, the value of which has been measured in money; but they have been far less ready to extend the other counts, such as the counts for goods sold and delivered, work and labor, and the like, to cases in which the plaintiff had performed, if, by the terms of the contract, the compensation of the plaintiff was to have been in something other than money;<sup>3</sup> and they are generally unwilling to permit the money counts to be used if the contract which is introduced as evidence shows a compensation in something other than money.<sup>4</sup> If the plaintiff has performed fully or substantially and the only thing which remains to be done on the part of defendant is the payment of money under the terms of the contract, the plaintiff may resort to general assumpsit, and he may recover upon the common counts for money.<sup>5</sup> The right of a party who has performed the contract fully or substantially to make use of the common counts in general assumpsit, and to base his cause of action upon a fictitious promise to make compensation for the consideration which he has received, is not a quasi-contractual right, but a contract right. It is merely a rule of pleading and procedure and

<sup>2</sup> See §§ 1504 et seq.

<sup>3</sup> See §§ 1504 et seq. and 3247.

<sup>4</sup> See § 3247.

<sup>5</sup> **England.** *Bianchi v. Nash*, 1 M. & W. 545; *Leeds v. Burrows*, 12 East 1. **United States.** *Perkins v. Hart*, 24 U. S. (11 Wheat.) 237, 6 L. ed. 463.

**Alabama.** *Mass v. Montgomery Iron Works*, 88 Ala. 323, 6 So. 701; *Ezell v. King*, 93 Ala. 470, 9 So. 534; *Eldorado Coal Co. v. Rust*, 202 Ala. 625, 81 So. 567.

**Illinois.** *Union Elevated Ry. v. Nixon*, 199 Ill. 235, 65 N. E. 314; *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854; *Reitz v. Seibold*, 92 Ill. App. 147.

**Maryland.** *Young v. Boyd*, 107 Md. 449, 69 Atl. 33.

**Michigan.** *Miner v. O'Harrow*, 60 Mich. 91, 26 N. W. 843.

**Montana.** *De Young v. Benepe*, 55 Mont. 306, 176 Pac. 609.

**New York.** *Farron v. Sherwood*, 17 N. Y. 227.

**Rhode Island.** *McDermott v. Aid Society*, 24 R. I. 527, 54 Atl. 58; *Freese v. Povloski*, 39 R. I. 512, 99 Atl. 13.

**Virginia.** *Carpenter v. Smithey*, 118 Va. 533, 88 S. E. 321.

"While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms and nothing remains to be done but the payment of the price, he may sue on the contract or in indebitatus assumpsit and rely upon the common counts. In either case the contract will determine the rights of the parties." *Dermott v. Jones*, 69 U. S. (2 Wall.) 1, 9, 17 L. ed. 762, 764.

not a rule which affects the rights of the parties. In cases of this sort the rights of the plaintiff arise out of the contract and are measured by the contract;<sup>6</sup> while a quasi-contractual right which arises out of a contract is not measured thereby.<sup>7</sup>

**§ 3244. Compensation in money—Specific illustrations.** The common counts for money may be used to recover upon negotiable instruments against a party thereto who received the consideration therefor,<sup>1</sup> although the common counts can not be used against a party, such as an accommodation maker or indorser who did not receive the consideration, and who is liable, if at all, only on his special promise.<sup>2</sup> If a contract for the sale of personal property, for a consideration in money, has been performed by the seller, either fully or substantially, and the only executory covenant is that of the buyer to pay the purchase price, the seller may ignore the contract, and he may bring an action in general assumpsit for goods sold and delivered.<sup>3</sup> The common count for goods sold will lie on a contract of bailment by the terms of which the bailee is to keep the goods if they are damaged and pay a certain sum therefor, if the goods are, in fact, damaged.<sup>4</sup> Assumpsit will lie to recover the unpaid purchase price of an interest in a partnership.<sup>5</sup> One who has performed, either literally or substantially, a con-

<sup>6</sup> See this and the following sections.

<sup>7</sup> See §§ 1493 et seq.

<sup>1</sup> **England.** *Story v. Atkins*, Strange 719.

**United States.** *Riggs v. Lindsay*, 11 U. S. (7 Cr.) 500, 3 L. ed. 419.

**Illinois.** *Brewer & Hofmann Brewing Co. v. Hermann*, 187 Ill. 40, 58 N. E. 397; *Wilson v. St. John's Hospital*, 92 Ill. App. 413.

**Massachusetts.** *Tebbetts v. Pickering*, 59 Mass. (5 Cush.) 83, 51 Am. Dec. 48.

**New York.** *Cruger v. Armstrong*, 3 Johns. Cas. (N. Y.) 5, 528.

**Ohio.** *Hart v. Ayres*, 9 Ohio 5.

**Vermont.** *Austin v. Burlington*, 34 Vt. 506.

<sup>2</sup> *Wells v. Girling*, 8 Taunt. 737; *Page v. Bank of Alexandria*, 20 U. S. (7 Wheat.) 35, 5 L. ed. 390; *Merchants'*

*& Mechanic's Bank v. Evans*, 9 W. Va. 373.

<sup>3</sup> **England.** *Leeds v. Burrows*, 12 East 1.

**United States.** *Moline Malleable Iron Co. v. York Iron Co.*, 83 Fed. 66, 27 C. C. A. 442.

**Alabama.** *Vinegar Bend Lumber Co. v. Soule Steam Feed Works*, 182 Ala. 146, 62 So. 279.

**Michigan.** *Yeiter v. Campau*, 174 Mich. 94, 140 N. W. 479.

**Missouri.** *Moore v. Gaus & Sons Mfg. Co.*, 113 Mo. 98, 20 S. W. 975.

See also, *Curtis v. Deepwater Ry.*, 68 W. Va. 762, 70 S. E. 776, where assumpsit for timber sold, was allowed although the title to the land from which it was cut was in dispute.

<sup>4</sup> *Bianchi v. Nash*, 1 M. & W. 545.

<sup>5</sup> *Draucker v. Arick*, 161 Pa. St. 357, 29 Atl. 32.

tract for work and labor,<sup>6</sup> as a building contract,<sup>7</sup> or a contract to repair a building,<sup>8</sup> or one who performs services as agent,<sup>9</sup> or attorney at law,<sup>10</sup> or one who has performed a contract to furnish advertising,<sup>11</sup> can recover thereon in quantum meruit. Under a contract by A to pay B's expenses while attending school, B may recover expenses for which B has paid, under the common counts.<sup>12</sup> Assumpsit will lie against a member of an association to recover unpaid dues. Action need not be brought upon the written contract.<sup>13</sup> General assumpsit will lie for contribution by one co-debtor, co-indorser, and the like, against another,<sup>14</sup> even if the parties have entered into an express contract for contribution.<sup>15</sup>

Whether indebitatus assumpsit will lie for land sold and delivered is a question upon which there is a conflict of authority. While the existence of a debt would seem to justify assumpsit, and while some courts permit this form of pleading,<sup>16</sup> the unwillingness of the common law to permit general assumpsit to be used in cases involving realty,<sup>17</sup> has led to the denial of this form of pleading.<sup>18</sup>

<sup>6</sup>Alabama. *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324.

Maryland. *Fairfax Co. v. Chambers*, 75 Md. 604, 23 Atl. 1024.

Missouri. *Cunningham v. Elvins*, — Mo. —, 194 S. W. 515.

Montana. *De Young v. Benepe*, 55 Mont. 306, 176 Pac. 609.

New York. *Farron v. Sherwood*, 17 N. Y. 227.

Oregon. *Toy v. Gong*, 87 Or. 454, 170 Pac. 936.

Virginia. *Virginia Talc & Soapstone Co. v. Hurkamp*, 124 Va. 721, 98 S. E. 681.

Wyoming. *Evans v. Cheyenne Cement, Stone & Brick Co.*, 21 Wyom. 184, 130 Pac. 849.

<sup>7</sup>*Evans v. Howell*, 211 Ill. 85, 71 N. E. 854; *Board of Commissioners Fulton County v. Gibson*, 158 Ind. 471, 63 N. E. 982; *Farron v. Sherwood*, 17 N. Y. 227.

<sup>8</sup>*Whatley v. Reese*, 128 Ala. 500, 29 So. 606.

<sup>9</sup>As under a contract to sell property as agent. *Perkins v. Hart*, 24 U. S. (11 Wheat.) 237, 6 L. ed. 463; *El-dorado Coal Co. v. Rust*, 202 Ala. 625, 81 So. 567.

<sup>10</sup>*Carpenter v. Smithey*, 118 Va. 533, 83 S. E. 321.

<sup>11</sup>*Freese v. Povloski*, 39 R. I. 512, 99 Atl. 13 (even if such advertising is to be paid for on a sliding scale, depending on the amount furnished).

<sup>12</sup>*Young v. Boyd*, 107 Md. 449, 69 Atl. 33.

<sup>13</sup>*Elm City Club v. Howes*, 92 Me. 211, 42 Atl. 392.

<sup>14</sup>*Chipman v. Morril*, 20 Cal. 130; *Camp v. Bostwick*, 20 O. S. 337, 5 Am. Rep. 669; *Marron v. Stieren*, 252 Pa. St. 185, 97 Atl. 181.

<sup>15</sup>*Weeks v. Parsons*, 176 Mass. 570, 58 N. E. 157.

<sup>16</sup>*Ayers v. Slifer*, 89 Ind. 433.

<sup>17</sup>See § 1512 et seq. See, however, §§ 1510 and 1511.

<sup>18</sup>*Hoskins v. Wright*, 11 Va. (1 Hen. & M.) 377.

Recovery on this theory may be had, although the plaintiff has not performed in full if he has not been guilty of breach. In case the adversary party has waived performance of the unperformed terms, the party who has performed all the remaining terms may recover the value of his performance on the common counts.<sup>19</sup> Since the right to sue on the common counts is an election of such remedy and a waiver of the right to sue on the contract, it follows that one who pleads and proves a special contract is precluded by such election from recovering on the common counts.<sup>20</sup>

Since this is not a true quasi-contractual right, but only a convenient means of enforcing a contract, the plaintiff's right of recovery in an action on the common counts is limited by the amount fixed by the contract.<sup>21</sup> If the compensation is fixed by contract, no greater compensation can be recovered by resorting to general assumpsit instead of special assumpsit.<sup>22</sup> On the other hand, the special contract under which the work was done or property sold may be put in evidence to show the amount due.<sup>23</sup>

**§ 3245. Compensation in money—Effect of express condition.** Whether general assumpsit will lie in cases in which the plaintiff has performed the covenants of his contract fully or substantially, but in which he has not performed all the conditions precedent, is a question upon which there appears to be some conflict of authority. It has been said that if a contract contains an express provision for the certificate of an engineer or architect, as a condition precedent to recovery by the contractor or builder, the con-

<sup>19</sup> *Columbus Safe-Deposit Co. v. Burke*, 88 Fed. 630.

<sup>20</sup> *Burton v. Rosemary Mfg. Co.*, 132 N. Car. 17, 43 S. E. 480. (Though under the common law procedure he can join general and special assumpsit.)

<sup>21</sup> *Columbia Bank v. Patterson*, 11 U. S. (7 Cr.) 290, 3 L. ed. 351; *Chesapeake & Ohio Canal Co. v. Knapp*, 34 U. S. (9 Pet.) 541, 9 L. ed. 222; *Holloway v. White-Dunham Shoe Co.*, 151 Fed. 216, 10 L. R. A. (N.S.) 704; *Ehrlich v. Aetna Life Ins. Co.*, 88 Mo. 249; *Harrison v. Hancock*, 2 Neb. Rep. (Unofficial) 522, 89 N. W. 374; *Coos Bay Times Publishing Co. v. Coos County*, 81 Or. 626, 160 Pac. 532.

<sup>22</sup> *Coos Bay Times Publishing Co. v. Coos County*, 81 Or. 626, 160 Pac. 532. (Cost of advertising fixed by statute.)

<sup>23</sup> *Alabama*. *Stafford v. Sibley*, 106 Ala. 189, 17 So. 324.

*California*. *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640.

*Indiana*. *Jenney Electric Co. v. Branham*, 145 Ind. 314, 33 L. R. A. 395, 41 N. E. 448.

*Michigan*. *Rhea v. Meyers*, 111 Mich. 140, 69 N. W. 239.

*Ohio*. *Kugler v. Wiseman*, 20 Ohio 361.

*Oregon*. *Toy v. Gong*, 87 Or. 454, 170 Pac. 936.

tractor or builder can not ignore the contract and recover on the common counts if such certificate has not been issued.<sup>1</sup> The opposite view of the question has been taken however;<sup>2</sup> and it has been held that the builder or contractor may resort to the common counts, although the certificate of the architect or engineer has not been given; and in such action the builder or contractor may show that the architect or engineer refused such certificate through fraud, gross mistake, and the like.<sup>3</sup> As has already been said,<sup>4</sup> this is not a question of the nature or extent of the plaintiff's right, but a mere question of procedure. The plaintiff's right arises on the contract and is measured thereby; and the question whether he can use the common counts where he seeks to excuse a failure to perform a precedent condition is to be solved by questions of practical convenience, since the substantive rights of the parties are not in the least affected. In view of the fact that the common counts may be used where the plaintiff's right is quasi-contractual, and not based on the contract at all,<sup>5</sup> as, for example, where the plaintiff seeks to recover the value of his performance from a defendant who is in default,<sup>6</sup> or even, in some jurisdictions, where a plaintiff who is in default recovers the value of his performance, less the amount of damages caused by such default, from a defendant who is not himself in default,<sup>7</sup> it would seem that, by analogy, a plaintiff who has conferred upon the defendant all the performance which the terms of the contract require, and who is ready to justify and excuse his failure to perform an express condition which is merely incidental or subsidiary to such performance, should be allowed to make use of the common counts. If the defendant can be prejudiced seriously by permitting the plaintiff to plead a cause of action in this way, it probably means that the common counts should never be used; and that, instead, the plaintiff should, in all cases except genuine implied contracts in which a consideration has been agreed upon, set up in considerable detail, the facts upon which he relies, and that he should not be permitted to resort to the fictitious promise as a convenient, though inaccurate, method of stating his case.

<sup>1</sup> *Hart v. Carsley Mfg. Co.*, 221 Ill. 444, 77 N. E. 897; *Expanded Metal Fireproofing Co. v. Boyce*, 233 Ill. 284, 84 N. E. 275.

<sup>2</sup> *Williams v. Chicago, Santa Fe & California Ry.*, 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631.

<sup>3</sup> *Williams v. Chicago, Santa Fe & California Ry.*, 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631.

<sup>4</sup> See §§ 1493 et seq. and 3236 et seq.

<sup>5</sup> See §§ 1493 et seq. and 3236 et seq.

<sup>6</sup> See §§ 3250 et seq.

<sup>7</sup> See §§ 3261 et seq.

**§ 3246. Compensation in money—Failure to fix price in contract.** If the parties have entered into an express contract for goods, work and labor and the like, and the price therefor has not been agreed upon by the parties, the contract is not invalid because of its uncertainty, since it would be understood that the parties have agreed upon a reasonable compensation.<sup>1</sup> In cases of this sort the common counts may undoubtedly be used.<sup>2</sup> Indeed, a declaration in special assumpsit could hardly be used, unless the parties alleged as a special term the promise to pay a reasonable price, which is what the law implies and what the parties intended.

**§ 3247. Compensation in something other than money.** Since the courts have been far more ready to extend the money counts, than to extend the other common counts for goods sold and delivered, work and labor, and the like, and since they are unwilling to use the money counts where compensation is not measured in money, a question of greater difficulty than those which we have been considering,<sup>1</sup> is presented in cases in which the plaintiff has performed fully or substantially, and the covenant on the part of defendant, which has not been performed, is a covenant to do something other than to pay money. In cases of this sort, even the most liberal courts are not willing to allow the use of the money counts where the evidence does not disclose a covenant to pay money.<sup>2</sup> The plaintiff has a better chance of success in making use of the common counts, if he employs one whose subject-matter conforms to the subject-matter of the defendant's covenant; that is, if he uses a common count for work and labor, where the defendant's covenant was to perform labor for the plaintiff and the like.

Whether the plaintiff can succeed in employing the common counts in cases of this sort is a matter upon which there is a considerable conflict of authority. No logical reason prevents the use of the common counts in all cases of this sort; but, historically, the courts became accustomed to the use of the money counts before they began using the other counts, such as goods sold, or work and labor, and the like, for this purpose. Without regard to logic, or analogy, many of the courts have insisted that the common

<sup>1</sup> See § 92.

<sup>2</sup> *Patchen v. Delohery Hat Co.*, 82 Conn. 592 [sub nomine, *Cunningham v. Delohery Hat Co.*, 74 Atl. 881]; *Anderson v. Caldwell*, 242 Mo. 201, 146

S. W. 444; *Mecartney v. Guardian Trust Co.*, 274 Mo. 224, 202 S. W. 1131.

<sup>1</sup> See §§ 3243 et seq.

<sup>2</sup> See notes 3 et seq., this section.

counts can not be used where the defendant's covenant is to do anything other than to pay money.<sup>3</sup> Accordingly, the use of the common counts has been denied upon such contracts as a contract for exchanging goods which defendant failed to perform after

<sup>3</sup> **England.** *Harrison v. Luke*, 14 M. & W. 139.

**Alabama.** *Sprague v. Morgan*, 7 Ala. 952; *Snedicor v. Leachman*, 10 Ala. 330; *Aikin v. Bloodgood*, 12 Ala. 221; *Oswald v. Godbold*, 20 Ala. 811; *Eastland v. Sparks*, 22 Ala. 607.

**Illinois.** *Meyers v. Schemp*, 67 Ill. 469.

**Kentucky.** *Spratt v. McKinney*, 4 Ky. (1 Bibb.) 595; *Cochran v. Tatum*, 19 Ky. (3 T. B. Mon.) 404.

**Maine.** *Slayton v. McDonald*, 73 Me. 50.

**Massachusetts.** *Shearer v. Jewett*, 31 Mass. (14 Pick.) 232.

**Michigan.** *Butterfield v. Seligman*, 17 Mich. 95; *Cook v. Dade*, 191 Mich. 561, 158 N. W. 175.

**Missouri.** *Williams v. Chicago, Santa Fe & California Ry.*, 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631.

**New York.** *Burrall v. Jacot*, 1 Barb. (N. Y.) 165.

**Tennessee.** *Thompson v. French*, 18 Tenn. (10 Yerg.) 452; *Capps v. Groseclose*, 95 Tenn. 329, 32 S. W. 199.

**Virginia.** *Brookes v. Scott*, 16 Va. (2 Munf.) 344.

"Where there is a special agreement to pay in specific articles, and the contract itself does not fix their value, or furnish a rule by which it may be ascertained by a mere calculation, no recovery can be had on the common counts in assumpsit." *Eastland v. Sparks*, 22 Ala. 607.

"Indebitatus assumpsit will not lie where the agreement is not for the payment of money, but for the doing of some other thing. The action, in such case, must be special." *Meyers v. Schemp*, 67 Ill. 469.

"Where the consideration is stated to be a certain thing, something else can not be implied. An expressed promise to pay a particular consideration leaves no room for an implied one. Under plaintiff's evidence, his right of action arises out of an express agreement between the parties which involved no money consideration on either side and suggested no money value of the consideration promised by each. The wrong done plaintiff, as he claims it, was defendant's failure to keep his express promise, or a breach of his contract. While pleadings in justice's court are treated with liberality, the rule remains unmodified that the common counts will not support an action arising from violation of a special contract of this nature involving other than a money consideration, but the declaration must be for damages arising from the breach of such contract. The distinction yet recognized in this state is clearly pointed out in the early case of *Thompson v. French*, 18 Tenn. (10 Yerg.) 452, where it is stated as the established principle: 'That in all cases where the consideration has been executed and where there is an express or implied promise to pay in money the value thereof, indebitatus assumpsit or debt is the proper remedy. But that in all those cases, where the consideration is not executed, or if it be, and the promise to be performed in consideration thereof, is not to pay money, but to do some other thing, that neither indebitatus assumpsit or debt will lie, and that the remedy is by a special action on the case.'" *Cook v. Dade*, 191 Mich. 561, 158 N. W. 175.

plaintiff had delivered his property under such contract;<sup>4</sup> a contract to sell goods for a value to be paid in something other than money;<sup>5</sup> a covenant to pay rent by delivering a certain portion of the crops;<sup>6</sup> and the sale of a building to be paid for in brick taken from such building at a certain price per thousand.<sup>7</sup> Even where this theory prevails, the money counts may be used where a tenant who was to deliver a certain portion of the crops as rent, has sold such crops and has received the money therefor.<sup>8</sup> A worked for B under an agreement whereby B was to deliver certain property to him when he reached the age of twenty-one. On B's refusal to deliver such property it was held that A could recover damages but that he could not recover the reasonable value of his services.<sup>9</sup> The common count for work and labor can not be used by one who rendered services in breaking horses in consideration of the promise of the owner that he might use such horses for a certain length of time after he had broken them.<sup>10</sup>

An attempt to justify the refusal of the courts to permit the use of the common counts where the covenant of the defendant was to do something other than to pay money, is found in the theory that to permit the use of the common counts in cases of this sort would be to permit the recovery of damages under the common counts.<sup>11</sup> The resemblance, however, between recovering the value of property or services of the defendant, and recovering damages, is superficial rather than real. In each case the plaintiff is attempting to recover the contract price, as near as this can be estimated in money. If the money counts can be used, the parties have themselves agreed upon the amount of money to be paid; and if the jury finds the remaining facts in favor of the plaintiff, the amount of compensation will give the jury no trouble, since it has been fixed by the parties. If the covenant of the defendant is to do something other than to pay money, the jury has the addi-

<sup>4</sup> *Harrison v. Luke*, 14 M. & W. 130.

<sup>5</sup> *Rees v. Manners*, 3 Smith K. B. 119; *Slayton v. McDonald*, 73 Me. 50; *Baylies v. Fettyplace*, 7 Mass. 325; *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351.

<sup>6</sup> *Eastland v. Sparks*, 22 Ala. 607; *Shearer v. Jewett*, 31 Mass. (14 Pick.) 232.

<sup>7</sup> *Meyers v. Schemp*, 67 Ill. 469.

<sup>8</sup> *Shearer v. Jewett*, 31 Mass. (14 Pick.) 232.

<sup>9</sup> *Capps v. Groseclose*, 95 Tenn. 329, 32 S. W. 190.

<sup>10</sup> *Cook v. Dade*, 191 Mich. 561, 158 N. W. 175.

<sup>11</sup> "Damages for the breach of a special contract unexecuted are not recoverable under the common counts." *Mankin v. Jones*, 68 W. Va. 422, 69 S. E. 981.

tional task of finding the value of such performance in money, since the common law can grant no relief other than judgment for the payment of money, in actions of this sort. The difficulty of the jury is, however, no greater in cases of this sort than it is in cases in which the parties have sold goods or performed services under contract in which the exact amount of compensation was not agreed upon;<sup>12</sup> or in cases in which the plaintiff has delivered goods, performed services, and the like, under a contract which has been discharged by the defendant's breach thereof.<sup>13</sup> In these cases the difficulties which prevent the use of the counts for goods sold, work and labor, and the like, have not been found insuperable; and, if the use of the common counts is desirable in cases in which the plaintiff has not performed in full, because of the defendant's breach, it should be permitted in cases in which the plaintiff has performed in full and the defendant has refused to make compensation therefor.

Accordingly, some courts have refused to be bound by arbitrary rules, based on historical reasons; and they have allowed a plaintiff who has performed in full, to make use of the common counts, although the performance of the defendant was, by the terms of the contract, to consist in the delivery of something of value other than money.<sup>14</sup> In some jurisdictions a promise of the defendant to pay in property may be enforced by the common counts if the plaintiff has performed in full.<sup>15</sup> In almost all jurisdictions, one who has furnished support under a special contract providing for

<sup>12</sup> See §§ 1434 et seq.

<sup>13</sup> See §§ 3250 et seq.

<sup>14</sup> **Georgia.** *Hudson v. Hudson*, 87 Ga. 678, 27 Am. St. Rep. 270, 13 S. E. 583 (s.c., 90 Ga. 581, 16 S. E. 349).

**Indiana.** *Schoonover v. Vachon*, 121 Ind. 3, 22 N. E. 777.

**Iowa.** *Payne v. Couch*, 1 Greene (Ia.) 64, 46 Am. Dec. 497.

**Massachusetts.** *Canada v. Canada*, 60 Mass. (6 Cush.) 15.

**Minnesota.** *Proctor v. C. E. Stevens Land Co.*, 94 Minn. 181, 102 N. W. 395.

**Missouri.** *St. Louis Floating Dock Insurance Co. v. Soulard*, 8 Mo. 665.

**New Jersey.** *Schmetzer v. Broegler*, 92 N. J. L. 88, 105 Atl. 450.

**New York.** *Smith v. Smith*, 2 Johns.

(N. Y.) 235, 3 Am. Dec. 410; *Collier v. Rutledge*, 136 N. Y. 621, 32 N. E. 626.

**Pennsylvania.** *Moorehead v. Fry*, 24 Pa. St. 37.

**Vermont.** *Kent v. Bowker*, 38 Vt. 148.

**Wisconsin.** *Slater v. Cook*, 93 Wis. 104, 67 N. W. 15.

<sup>15</sup> **Iowa.** *Payne v. Couch*, 1 Greene (Ia.) 64, 46 Am. Dec. 497.

**Minnesota.** *Proctor v. C. E. Stevens Land Co.*, 94 Minn. 181, 102 N. W. 395.

**Missouri.** *St. Louis Floating Dock Insurance Co. v. Soulard*, 8 Mo. 665.

**New York.** *Smith v. Smith*, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410.

**Vermont.** *Kent v. Bowker*, 38 Vt. 148.

his compensation by devise of specific property, may, in case of breach, ignore such contract and recover for work done by him under the contract in quantum meruit.<sup>16</sup> If A erects a building on B's land, in consideration of B's promise to grant an interest therein, and B refuses to grant such interest, A may have reasonable compensation for such labor, materials, and the like.<sup>17</sup> Reasonable compensation for the value of land may be recovered, although by the terms of the contract payment was to be made in something other than money paid to the grantor.<sup>18</sup>

**§ 3248. Compensation in money, together with compensation in something other than money.** The same difficulties which make some courts unwilling to use the common counts for goods sold, work and labor, and the like, where the plaintiff has performed in full and the defendant's covenant is to furnish something of value other than money,<sup>1</sup> appear where the defendant's covenant is to pay money and to furnish something of value other than money in consideration of plaintiff's performance; and the same division of authority appears in the latter case as in the former. According to what appears to be the weight of authority, the common counts can not be used on behalf of plaintiff who has performed in full and against a defendant who has agreed to pay money, and in addition thereto, to furnish something of value other than money.<sup>2</sup>

<sup>16</sup> *Georgia.* *Hudson v. Hudson*, 87 Ga. 678, 27 Am. St. Rep. 270, 13 S. E. 583 (s. c., 90 Ga. 581, 16 S. E. 349).

*Indiana.* *Schoonover v. Vachon*, 121 Ind. 3, 22 N. E. 777.

*Massachusetts.* *Canada v. Canada*, 60 Mass. (6 Cush.) 15.

*New Jersey.* *Schmetzer v. Broegler*, 92 N. J. L. 88, 105 Atl. 450.

*New York.* *Collier v. Rutledge*, 136 N. Y. 621, 32 N. E. 626.

*Pennsylvania.* *Moorehead v. Fry*, 24 Pa. St. 37.

*Wisconsin.* *Slater v. Cook*, 93 Wis. 104, 67 N. W. 15.

<sup>17</sup> *Todd v. Leach*, 100 Ga. 227, 28 S. E. 43; *Underhill v. Rutland Ry.* 90 Vt. 462, 98 Atl. 1017.

<sup>18</sup> Payment was to have been made by the payment of a mortgage or reconveyance. The contract was oral

and was unenforceable under the statute of frauds. *Peabody v. Fellows*, 181 Mass. 26, 62 N. E. 1053.

A grantor may recover reasonable compensation for the value of land, on refusal by the grantor to perform an oral contract to reconvey. *Cromwell v. Norton*, 193 Mass. 291, 118 Am. St. Rep. 499, 79 N. E. 433.

Payment was to have been made by the release of a mortgage which the grantee was thought to hold, encumbering other realty of the grantor; but which had, in fact, been satisfied some time before. *Child v. Pierce*, 37 Mich. 155.

<sup>1</sup> See § 3247.

<sup>2</sup> *Pierson v. Spaulding*, 61 Mich. 90, 27 N. W. 865; *Thomas v. Mott*, 78 W. Va. 113, 88 S. E. 651; *Bradley v. Levy*, 5 Wis. 400.

Under a contract by which plaintiff acted as defendant's agent for a compensation to be made in money and in shares of stock,<sup>3</sup> or under a contract by which plaintiff built a railroad for defendant, to be paid for part in money and part in railroad stock,<sup>4</sup> or a contract by which a stock of goods was sold at an estimated price to be paid for part in money and part in a specific form at an agreed price,<sup>5</sup> the plaintiff can not make use of the common counts although he has performed in full. The courts which deny the right of the plaintiff to make use of the common counts in cases of this sort, do not seem to distinguish between the cases in which a money value is fixed upon each covenant of the defendant, including the covenants to be performed by something other than the payment of money,<sup>6</sup> and the cases in which no value in money was fixed for the performance of such other covenants.<sup>7</sup>

As in the cases in which the courts deny the right of plaintiff to make use of the common counts for goods sold, work and labor, and the like, where the covenant of the defendant is something other than the payment of money,<sup>8</sup> no logical justification exists for the refusal of the courts to permit the plaintiff to use the common counts, which does not apply equally to all other cases in which the plaintiff is attempting to use the common counts as a means of recovering the contract price for the performance of a special contract; and occasionally the courts have refused to persist in so illogical a distinction, whatever its historical origin may have been. There is, accordingly, some authority for resorting to the common counts in cases of this sort.<sup>9</sup> If the plaintiff has performed a contract by which he has agreed to deliver certain goods to be paid for, part in money and part in land,<sup>10</sup> or if he has performed a contract by which he is to convey a certain tract of land in consideration, he is to receive a certain sum of money and another tract of land,<sup>11</sup> the plaintiff is not bound to resort to an action on the special contract; but he may bring an action for the

<sup>3</sup> Thomas v. Mott, 78 W. Va. 113, 88 S. E. 651.

<sup>4</sup> Bradley v. Levy, 5 Wis. 400.

<sup>5</sup> Pierson v. Spaulding, 61 Mich. 90, 27 N. W. 865.

<sup>6</sup> Pierson v. Spaulding, 61 Mich. 90, 27 N. W. 865; Bradley v. Levy, 5 Wis. 400.

<sup>7</sup> Thomas v. Mott, 78 W. Va. 113, 88 S. E. 651.

<sup>8</sup> See § 3247.

<sup>9</sup> Booker v. Wolf, 195 Ill. 365, 63 N. E. 265; Nugent v. Teachout, 67 Mich. 571, 35 N. W. 254.

<sup>10</sup> Booker v. Wolf, 195 Ill. 365, 63 N. E. 265.

<sup>11</sup> Nugent v. Teachout, 67 Mich. 571, 35 N. W. 254.

reasonable value of such goods or land, as the case may be. While the Statute of Frauds would have prevented the enforcement of oral contracts of this sort, in the first instance, if the plaintiff had refused performance, and while it would prevent the enforcement of an oral contract if the consideration which the defendant was to furnish was real property, even if the plaintiff had performed the contract on his part, the reasoning of the courts does not indicate that the result which was reached in these cases was based on the theory that it was impossible to enforce the special contract.

**§ 3249. Right of party excused from complete performance to recover value of performance—Rescission by consent.** If a party who seeks to recover has not performed in full the covenants upon his part to be performed, the question then arises whether he is not discharged or excused in any way from complete performance. If he has performed a part of the contract, and some fact has arisen which discharges or excuses him from further performance, he may recover reasonable compensation for what he has done under the contract. Thus if a contract contains a term reserving a right of cancellation to one party, and such right is exercised, the adversary party may recover a reasonable compensation for the value of his performance.<sup>1</sup> The common count for money had and received will lie where money has been paid under a contract of sale, which the buyer had the right to avoid for dissatisfaction of a third party.<sup>2</sup> If the contract provides for the exercise of the right of cancellation, the party who exercises it in a fair and reasonable manner before he has fully performed the contract, may recover a reasonable compensation for what he has done.<sup>3</sup> If one party has the express or implied privilege of canceling the contract during performance, and he exercises such right, he may recover what he has parted with thereunder to the adversary party in excess of what such adversary party is entitled to retain.<sup>4</sup> B, a guardian, deposited with A money, the funds of B's ward, to be applied by A to the education and care of the ward. B subse-

<sup>1</sup> *Towers v. Barrett*, 1 T. R. 133; *Russell v. Bush*, 196 Ala. 309, 71 So. 397; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531.

<sup>2</sup> *Towers v. Barrett*, 1 T. R. 133. (In this case the third party was the wife of the purchaser, and the sale was subject to her approval.)

<sup>3</sup> *J. L. Owens Co. v. O'Keeffe*, 141 Minn. 275, 170 N. W. 204, 174 N. W. 221; *Booth v. Ratcliffe*, 107 N. Car. 6, 12 S. E. 112.

<sup>4</sup> *Thweatt v. McCullough*, 84 Ala. 517, 5 Am. St. Rep. 391, 4 So. 399.

quently countermanded such order, and demanded that A pay to him the balance of the funds in his hands. If A refuses to do so, he is liable to B in an action for money had and received.<sup>5</sup> If goods are sold under a contract by which the buyer may avoid the contract in case of breach of warranty, and by which the buyer is obliged to pay the freight upon the goods, he may recover the amount of such freight, on avoiding the contract for breach of such warranty, on the theory that the freight is a part of the contract price.<sup>6</sup>

If the parties to a contract terminate it by mutual agreement, the question of the existence of the quasi-contractual right to recover for the value of the performance under the original contract depends upon the intention of the parties as manifest in the new contract. If they agree that such quasi-contractual right shall persist, or if they agree that such quasi-contractual right shall be discharged, as a part of the consideration for entering into the new contract, full effect will be given to such intention in either case.<sup>7</sup> If the terms of the new contract do not show that the parties thereto either agree that a quasi-contractual right arising under the first contract should persist or that it should terminate, there is a conflict of authority as to the inference which the law will draw as to the intention of the parties, or as to the rule of law which will apply if the intention of the parties were not regarded as material. In many jurisdictions it is held or assumed that the quasi-contractual right which arose out of the first contract persists under the second contract in the absence of any reference to such rights in such second contract.<sup>8</sup> If the owner of a building who has employed an architect to prepare plans for a certain building subsequently determines to construct the building differently, and ac-

<sup>5</sup> *Thweatt v. McCullough*, 84 Ala. 517, 5 Am. St. Rep. 391, 4 So. 399.

<sup>6</sup> *J. L. Owens Co. v. O'Keeffe*, 141 Minn. 275, 170 N. W. 204, 174 N. W. 224.

<sup>7</sup> See § 2495.

<sup>8</sup> *United States. Charleston Ice Mfr. Co. v. Joyce*, 63 Fed. 916, 11 C. C. A. 406.

*Alabama. Russell v. Bush*, 196 Ala. 309, 71 So. 397.

*Massachusetts. Sherman v. Buffinton*, 228 Mass. 139, 117 N. E. 33.

*Michigan. Murphy v. Dalton*, 139 Mich. 79, 102 N. W. 277.

*New Jersey. Atlantic Coast Brewing Co. v. Donnelly*, 59 N. J. L. 48, 35 Atl. 647.

*Oklahoma. Hurley v. Anicker*, 51 Okla. 97, L. R. A. 1918B, 538, 151 Pac. 593.

*Oregon. Cornely v. Campbell*, 95 Or. 345, 186 Pac. 563.

*Washington. Bebb v. Jordan*, 111 Wash. 73, 9 A. L. R. 1635, 189 Pac. 553.

For the ambiguous use of "rescission," see § 3027.

cordingly instructs the architect to prepare new plans, the architect is entitled to recover reasonable compensation for the services which he rendered in preparing the first set of plans.<sup>9</sup> If the vendor and vendee agree by mutual consent to end a contract for the sale of land, the vendee may recover the payments which he has made under such contract.<sup>10</sup> In other jurisdictions it seems to be assumed that a new contract discharges all rights arising under the first contract, in the absence of some specific provision in the new contract with reference thereto.<sup>11</sup>

**§ 3250. Breach amounting to discharge—Right of party not in default to recover in quasi-contract—General principles.** If the defendant has committed a breach and the plaintiff thereupon attempts to treat the contract as discharged so that he can recover on the theory of quasi-contract, the case is free from the complications which arise where the plaintiff is the party who is in default and where the plaintiff is attempting to take advantage of his own breach of contract to enforce an obligation against the defendant to which the defendant did not assent, and which is not imposed upon him through any fault or misconduct of his own.<sup>1</sup> There are, however, a number of problems growing out of the character of the breach: the relation of the broken covenant or covenants to the remainder of the contract; the extent to which the defendant has performed the contract, and the plaintiff has retained the benefits of such performance; and the subject-matter of the covenant which the plaintiff has performed and for which he seeks recovery. Subject to the limitations already indicated, which will be discussed later,<sup>2</sup> and taking each of these questions separately, it may be said to be a general rule that if the character of the breach is such that it would not amount to a discharge of the contract in an action for damages,<sup>3</sup> the party who is not in default can not recover on the theory of quasi-contract, since the contract is to be regarded as still in effect, the rights thereunder are measured by such contract, and recovery, if any, must be upon the contract itself.<sup>4</sup> If, on the other hand, the breach is one which

<sup>9</sup> *Bebb v. Jordan*, 111 Wash. 73, 9 A. L. R. 1035, 189 Pac. 553.

<sup>10</sup> *Cornely v. Campbell*, 95 Or. 345, 186 Pac. 563.

<sup>11</sup> See § 2495.

<sup>1</sup> See §§ 3261 et seq.

<sup>2</sup> See §§ 3255 et seq.

<sup>3</sup> See §§ 2878 et seq.

<sup>4</sup> *United States v. Perkins v. Hart*, 24 U. S. (11 Wheat) 237, 6 L. ed. 222.

*Alabama.* *Austin v. Beall*, 167 Ala. 426, 52 So. 657.

*Maryland.* *Waddell v. Phillips*, 133 Md. 497, 105 Atl. 771.

will operate as a discharge of the contract, the party who is not in default may waive a right of action for damages and exercise his right of election to recover the value of his performance which he has furnished under the contract.<sup>5</sup> This right of recovery in

**Michigan.** *Cook v. Dade*, 191 Mich. 561, 158 N. W. 175.

**New Jersey.** *Osterling v. Cape May Hotel Co.*, 82 N. J. L. 650, 83 Atl. 887.

**New York.** *Jennings v. Camp*, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367.

**West Virginia.** *Thomas v. Mott*, 78 W. Va. 113, 88 S. E. 651.

**Wisconsin.** *Maynard v. Tidball*, 2 Wis. 34; *Tietz v. Tietz*, 90 Wis. 66, 62 N. W. 930.

**United States.** Supreme Council American Legion of Honor v. Daix, 130 Fed. 101, 64 C. C. A. 435; *Blakely v. Fidelity Mutual Life Insurance Co.*, 143 Fed. 619; *E. I. Du Pont de Nemours Powder Co. v. Schlottman*, 218 Fed. 353, 134 C. C. A. 161 [affirming *Schlottman v. E. I. Du Pont de Nemours Powder Co.*, 210 Fed. 356]; *Fernald Woodward Co. v. Conway Co.*, 229 Fed. 819.

**Alabama.** *Danforth v. Tennessee & Coosa Ry. Co.*, 93 Ala. 614, 11 So. 60; *Carbon Hill Coal Co. v. Cunningham*, 153 Ala. 573, 44 So. 1016.

**California.** *Davidson v. Laughlin*, 138 Cal. 320, 5 L. R. A. (N.S.) 579, 71 Pac. 345; *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 Pac. 325.

**Connecticut.** *Valente v. Weinberg*, 80 Conn. 134, 13 L. R. A. (N.S.) 448, 67 Atl. 369.

**Georgia.** Supreme Council American Legion of Honor v. Jordan, 117 Ga. 808, 45 S. E. 33; *Timmerman v. Stanley*, 123 Ga. 850, 1 L. R. A. (N.S.) 379, 51 S. E. 760.

**Idaho.** *Storey v. Nampa & Meridian Irrigation District*, 32 Ida. 713, 187 Pac. 946.

**Indian Territory.** *Degnan v. Nowlin*, 5 Ind. Terr. 312, 82 S. W. 758.

**Kansas.** *Williams v. Bricker*, 83

Kan. 53, 30 L. R. A. (N.S.) 343, 109 Pac. 998.

**Maryland.** *Baltimore & Ohio Ry. Co. v. Carter*, 133 Md. 551, 105 Atl. 760.

**Massachusetts.** *Martin v. James Cunningham Son & Co.*, 231 Mass. 280, 121 N. E. 21; *Dalton v. American Ammonia Co.*, — Mass. —, 127 N. E. 504.

**Michigan.** *Brooks v. Bellows*, 192 Mich. 109, 158 N. W. 152.

**Minnesota.** *Johnson v. Herbst*, 140 Minn. 147, 167 N. W. 356; *Brown v. California & Western Land Co.*, 145 Minn. 432, 177 N. W. 774.

**Nebraska.** *Justice v. Button*, 89 Neb. 367, 38 L. R. A. (N.S.) 1, 131 N. W. 736.

**New Hampshire.** *Snow v. Prescott*, 12 N. H. 535; *Clark v. Manchester*, 51 N. H. 594; *Theobald v. Burleigh*, 66 N. H. 574, 23 Atl. 367.

**New York.** *Moore v. Williams*, 115 N. Y. 586, 22 N. E. 233.

**North Carolina.** *Keel v. East Carolina Stone & Construction Co.*, 143 N. Car. 420, 55 S. E. 826; *Harvell v. Haynes Auto Co.*, 177 N. Car. 29, 98 S. E. 377.

**Oklahoma.** *Elwood Oil & Gas Co. v. McCoy*, — Okla. —, 179 Pac. 2; *Kokomo Oil Co. v. Bell*, — Okla. —, 198 Pac. 326.

**Oregon.** *Franconi v. Graham*, 89 Or. 619, 174 Pac. 548; *Cornely v. Campbell*, 95 Or. 345, 186 Pac. 563.

**Rhode Island.** *Boston Floor Machine Co. v. Loeff*, — R. I. —, 103 Atl. 626.

**South Dakota.** *Stanley v. Pilker*, 40 S. D. 403, 167 N. W. 393.

**Washington.** *Jahn v. Wright*, 109 Wash. 164, 186 Pac. 262; *Hausken v. Hodson-Feenaughty Co.*, 109 Wash. 606, 187 Pac. 319.

quasi-contract is especially clear where the adversary party has renounced the contract, or has made performance impracticable on the part of the plaintiff.<sup>6</sup> One who has paid money under a contract may recover such money in assumpsit in case of breach by the adversary party, which may amount to a discharge and is so treated.<sup>7</sup> The right to recover a payment made on an executory consideration which failed thereafter is not affected by the fact that such payment was made voluntarily.<sup>8</sup>

As has been said before, this general statement which deals only with the character of the breach, must be qualified, in some jurisdictions at least, by restrictions which grow out of the extent of the performance on the part of the defendant and of the benefits which the plaintiff has received by virtue of such performance, on the one hand, and on the other hand, by the nature of the subject-matter of the covenant which the plaintiff has performed and for the performance of which he seeks recovery.<sup>9</sup>

**West Virginia.** *Hix v. Scott*, 80 W. Va. 727, 94 S. E. 399.

**Wisconsin.** *Conway v. Grand Chute*, 162 Wis. 172, 155 N. W. 953; *Ambler v. Sinaiko*, 168 Wis. 286, 170 N. W. 270.

See also, *Flye v. Hall*, 224 Mass. 528, 113 N. E. 366; *Martin v. Cunningham*, 231 Mass. 280, 1 A. L. R. 1511, 121 N. E. 21.

**United States.** *Cass County v. Gibson*, 107 Fed. 363, 46 C. C. A. 341; *The Avenger*, 251 Fed. 19, 163 C. C. A. 269.

**California.** *Joyce v. White*, 95 Cal. 236, 30 Pac. 524.

**Connecticut.** *Hoyt v. Pomeroy*, 87 Conn. 41, 86 Atl. 755.

**Georgia.** *Beck v. Thompson & Taylor Spice Co.*, 108 Ga. 242, 33 S. E. 894.

**Idaho.** *Spaulding v. Navigation Co.*, 5 Ida. 528, 51 Pac. 408.

**Illinois.** *Southern Pacific Co. v. American Wells Works*, 172 Ill. 9, 49 N. E. 575 [affirming, 67 Ill. App. 512].

**Kansas.** *Draper v. Miller*, 92 Kan. 695, 141 Pac. 1014 [denying rehearing, 92 Kan. 275, 140 Pac. 890].

**Maryland.** *Baltimore & Ohio Ry. v. Carter*, 133 Md. 551, 105 Atl. 760.

**Michigan.** *Cadman v. Markle*, 76 Mich. 448, 5 L. R. A. 707, 43 N. W. 315; *Mooney v. York Iron Co.*, 82 Mich. 263, 46 N. W. 376; *Eakright v. Torrent*, 105 Mich. 294, 63 N. W. 293; *Brooks v. Bellows*, 192 Mich. 109, 158 N. W. 152.

**Montana.** *Keyser v. Rehberg*, 16 Mont. 331, 41 Pac. 74.

**New York.** *Merrill v. Ithaca & Owego Ry. Co.*, 16 Wend. (N. Y.) 586, 30 Am. Dec. 130.

**Rhode Island.** *Boston Floor Machine Co. v. Loeff*, — R. I. —, 103 Atl. 626.

**Vermont.** *Rioux v. Ryegate Brick Co.*, 72 Vt. 148, 47 Atl. 406; *Boville v. Dalton Paper Mills*, 86 Vt. 305, 85 Atl. 623.

**Wisconsin.** *Merriman v. McCormick Harvesting Machine Co.*, 96 Wis. 600, 71 N. W. 1050.

<sup>1</sup> *San Diego Construction Co. v. Man-nix*, 175 Cal. 548, 166 Pac. 325; *Bacon v. Green*, 36 Fla. 325, 18 So. 870; *Snow v. Prescott*, 12 N. H. 525.

<sup>8</sup> Payment for goods. *Glasscock v. Rosengrant*, 55 Ark. 376, 18 S. W. 379.

Payment of wages. *Farrell v. Burbank*, 57 Minn. 395, 59 N. W. 485.

<sup>9</sup> See §§ 3251 et seq.

**§ 3251. Specific illustrations—Contracts for services.** One who has, in part, performed a contract of employment, or for furnishing services, and is prevented by the default of the adversary party from performing such contract completely or substantially, may ignore such contract and recover the reasonable value of the services rendered thereunder.<sup>1</sup> In a leading case A was to contribute a number of articles to a work which B agreed to publish in installments. After certain installments had been published, B discontinued publication. It was held that A could recover a reasonable compensation for work done.<sup>2</sup> By statute it has been provided in some jurisdictions that an employe who quits for good cause shall recover such proportion of compensation agreed upon in case of full performance as the work done by him bears to the work required by the contract.<sup>3</sup> In some of the cases which allow reasonable compensation for the value of services in cases of this sort, special emphasis is laid upon the fact that plaintiff was to be compensated in such a way that the amount of his compensation can not be determined until the contract has been performed.<sup>4</sup> The difficulty in proving the amount of damages seems to be regarded as an additional ground for allowing recovery on the theory of quasi-contract.<sup>5</sup> On the other hand, an employer or principal, who has paid in advance for services to be rendered under a contract, may recover such payment if the employe fails or refuses to render such services.<sup>6</sup>

**§ 3252. Building and construction contracts.** If a contractor has performed a building or construction contract in part, and such contract is discharged by the failure or refusal of the adversary party to continue performance, such contractor may

<sup>1</sup> **Alabama.** Carbon Hill Coal Co. v. Cunningham, 153 Ala. 573, 44 So. 1016.

**California.** Davidson v. Laughlin, 138 Cal. 320, 5 L. R. A. (N.S.) 579, 71 Pac. 345.

**Georgia.** Beck v. Thompson & Taylor Spice Co., 108 Ga. 242, 33 S. E. 894.

**Massachusetts.** Dalton v. American Ammonia Co., — Mass. —, 127 N. E. 504.

**New Hampshire.** Clark v. Manchester, 51 N. H. 594.

**Oklahoma.** Elwood Oil & Gas Co. v. McCoy, — Okla. —, 179 Pac. 2.

**Oregon.** Franconi v. Graham, 89 Or. 619, 174 Pac. 548.

<sup>2</sup> *Planche v. Colburn*, 8 Bing. 14.

<sup>3</sup> Such a statute applies to a contract to remove a schoolhouse. *Burkhardt v. School Township*, 9 S. D. 315, 69 N. W. 16.

<sup>4</sup> *The Avenger*, 251 Fed. 19, 163 C. C. A. 269.

<sup>5</sup> *The Avenger*, 251 Fed. 19, 163 C. C. A. 269.

<sup>6</sup> *Sanborn v. United States*, 135 U. S. 271, 34 L. ed. 112; *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873.

recover reasonable compensation for what he has done under the contract.<sup>1</sup> The refusal of the owner to pay an estimate in accordance with the terms of the contract, is such a discharge as to enable the contractor to ignore the contract and to recover for the reasonable value of work and labor and materials.<sup>2</sup> On the other hand, a contractor who has been paid in advance must repay such advance if he fails or refuses to perform the contract.<sup>3</sup>

**§ 3253. Sale of personal property.** If the seller has delivered personal property under a contract, and the purchaser fails or refuses to perform the contract on his part, the seller may ignore the contract and recover reasonable compensation for the goods which he has furnished thereunder.<sup>1</sup> Under a contract whereby A is to sell a set of forty volumes to B, the title to be in A until all are paid for, if B, after twenty-four have been delivered, sells them to X, A can treat such sale as a conversion and bring action against B at once without tendering the remaining eighteen.<sup>2</sup> If the buyer has paid in advance, in whole or in part, and the seller fails to perform, the buyer may ignore the contract and recover the payment thus made.<sup>3</sup> A buyer who has paid in advance may

<sup>1</sup> **England.** *Lodder v. Slowey* [1904], A. C. 442.

**United States.** *Knotts v. Clark Construction Co.*, 249 Fed. 181, 161 C. C. A. 217.

**California.** *Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640; *San Francisco Bridge Co. v. Dumbarton Land & Improvement Co.*, 110 Cal. 272, 51 Pac. 335.

**Connecticut.** *Valente v. Weinberg*, 80 Conn. 134, 13 L. R. A. (N.S.) 448, 67 Atl. 369.

**Idaho.** *Storey v. Nampa & Meridian Irrigation District*, 32 Ida. 713, 187 Pac. 946.

**Missouri.** *Johnston v. Star Bucket Pump Co.*, 274 Mo. 414, 202 S. W. 1143.

**New York.** *Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 379.

**Wisconsin.** *George M. Newhall Engineering Co. v. Daly*, 110 Wis. 256, 93 N. W. 12.

<sup>2</sup> *Storey v. Nampa & Meridian Irrigation District*, 32 Ida. 713, 187 Pac. 946.

<sup>3</sup> *United States v. United States Fidelity & Guaranty Co.*, 236 U. S. 512, 59 L. ed. 696; *Keel v. East Carolina Stone & Construction Co.*, 143 N. Car. 429, 55 S. E. 826.

<sup>1</sup> *Hartlove v. Durham*, 86 Md. 689, 39 Atl. 617; *Baltimore & Ohio Ry. v. Carter*, 133 Md. 551, 105 Atl. 760; *Putnam v. MacLeod*, 23 R. I. 373, 50 Atl. 646.

<sup>2</sup> *Putnam v. MacLeod*, 23 R. I. 373, 50 Atl. 646.

<sup>3</sup> *Martin v. James Cunningham Son & Co.*, 231 Mass. 280, 121 N. E. 21; *Harvell v. Haynes Auto Co.*, 177 N. Car. 29, 98 S. E. 377; *Jahn v. Wright*, 109 Wash. 164, 186 Pac. 262; *Hausken v. Hodson-Feenaughty Co.*, 109 Wash. 606, 187 Pac. 319.

recover in case the seller fails to deliver,<sup>4</sup> or in case he delays delivery for an unreasonable time,<sup>5</sup> or in case title fails,<sup>6</sup> or in case the goods which are delivered are of a quality substantially inferior to that required by the terms of the contract and the buyer tenders such goods to the seller.<sup>7</sup> If the breach of warranty is such that the buyer may avoid the sale, he may recover the purchase price.<sup>8</sup>

**§ 3254. Sale of real property.** If the vendor breaks a contract for the sale of realty in such a way as to discharge it, the purchaser may recover payments which he has made thereunder.<sup>1</sup> Accordingly, the purchaser has a right to recover the purchase price where the vendor is not able to furnish a title as good as that which he has agreed to furnish,<sup>2</sup> as where he has agreed to furnish a perfect title,<sup>3</sup> or a good and indefeasible title,<sup>4</sup> or a marketable title.<sup>5</sup> On the same principle, the purchaser may recover payments which he has made if he elects to treat the contract as discharged, because of the vendor's failure to give possession within a reasonable time.<sup>6</sup>

<sup>4</sup> *Jahn v. Wright*, 109 Wash. 164, 186 Pac. 202.

<sup>5</sup> *Martin v. James Cunningham Son & Co.*, 231 Mass. 280, 121 N. E. 21.

<sup>6</sup> *Barnett v. Brown*, 140 Ark. 636, 216 S. W. 1038.

<sup>7</sup> *Hausken v. Hodson-Feenaughty Co.*, 109 Wash. 606, 187 Pac. 319.

<sup>8</sup> *Caswell v. Coare*, 2 Camp. 82; *Barnett v. Brown*, 140 Ark. 636, 216 S. W. 1038; *Jackson v. Mott*, 76 Ia. 263, 41 N. W. 12.

<sup>1</sup> *California*. *San Diego Construction Co. v. Mannix*, 175 Cal. 548, 166 Pac. 325; *National Pacific Oil Co. v. Watson*, — Cal. —, 193 Pac. 133.

*Kansas*. *Williams v. Bricker*, 83 Kan. 53, 30 L. R. A. (N.S.) 343, 109 Pac. 998.

*Massachusetts*. *Fletcher v. Storer*, 220 Mass. 245, 107 N. E. 1000.

*Minnesota*. *Brown v. California & Western Land Co.*, 145 Minn. 432, 177 N. W. 774.

*Nebraska*. *Justice v. Button*, 89 Neb. 367, 38 L. R. A. (N.S.) 1, 131 N. W. 736.

*New York*. *Moore v. Williams*, 115 N. Y. 586, 22 N. E. 233.

*Wisconsin*. *Isaacs v. Bardon*, 114 Wis. 142, 89 N. W. 913.

<sup>2</sup> *Smith v. Price*, 125 Ark. 589, 189 S. W. 167; *Mathers v. Christianson*, — Ia. —, 154 N. W. 455; *Justice v. Button*, 89 Neb. 367, 38 L. R. A. (N.S.) 1, 131 N. W. 736; *Kokomo Oil Co. v. Bell*, — Okla. —, 198 Pac. 326. (Failure of title to realty, recovery of payment for oil lease.)

<sup>3</sup> *Lewis v. White*, 16 O. S. 444.

<sup>4</sup> *Adams v. Henderson*, 168 U. S. 573, 42 L. ed. 584.

<sup>5</sup> *Allen v. Chatfield*, 172 Cal. 60, 156 Pac. 47; *Williams v. Bricker*, 83 Kan. 53, 30 L. R. A. (N.S.) 343, 109 Pac. 998; *Moore v. Williams*, 115 N. Y. 586, 22 N. E. 233.

<sup>6</sup> *National Pacific Oil Co. v. Watson*, — Cal. —, 193 Pac. 133.

**§ 3255. Compensation in something other than money.** The same question which arises in connection with the rights of a plaintiff who has performed in full his contract for which he is to receive a compensation in something other than money, to recover on the common counts,<sup>1</sup> arises in cases in which the plaintiff has performed in part, and he has been discharged from further performance by the breach of the defendant. In the cases heretofore discussed the compensation of the defendant was measured in money by the terms of the contract.<sup>2</sup> If the contract provides for the compensation of plaintiff in something other than money, the same historical reasons which induced some courts to deny to the plaintiff the rights to resort to the common counts, where he had performed in full,<sup>3</sup> has induced some courts to deny the right to resort to the common counts where the plaintiff has performed in part and has been discharged by breach on the part of the defendant.<sup>4</sup> If A has rendered services for B in reliance on B's promise to marry A, it is held that A can not recover reasonable compensation for such services in case of B's breach of promise.<sup>5</sup>

As has been said before,<sup>6</sup> the only basis for this rule is the historical fact that the courts began to employ the money counts in quasi-contractual rights before they began to employ the other counts. There is no logical justification for this distinction; and some courts have refused to recognize it.<sup>7</sup> If A agreed to work on a ranch in consideration of his receiving the products of the ranch above a specified amount, he may recover a reasonable compensation for his labor if discharged without cause.<sup>8</sup> If A has agreed to

<sup>1</sup> See § 3247.

<sup>2</sup> See §§ 3250 et seq.

<sup>3</sup> See § 3247.

<sup>4</sup> **Alabama.** *Anderson v. Rice*, 20 Ala. 239.

**Connecticut.** *Allen v. Jarvis*, 20 Conn. 38.

**Kentucky.** *Cochran v. Tatum*, 19 Ky. (3 T. B. Mon.) 404.

**Maine.** *La Fontain v. Hayhurst*, 89 Me. 388, 36 Atl. 623.

**Tennessee.** *Capps v. Groseclose*, 95 Tenn. 329, 32 S. W. 199.

**Wisconsin.** *Bradley v. Levy*, 5 Wis. 400.

<sup>5</sup> *La Fontain v. Hayhurst*, 89 Me. 388, 36 Atl. 623.

<sup>6</sup> See §§ 1504 et seq. and 3247.

<sup>7</sup> **Georgia.** *Todd v. Leach*, 100 Ga. 227, 28 S. E. 43.

**Kansas.** *Underwood v. Viles*, 106 Kan. 287, 187 Pac. 881.

**Massachusetts.** *Hill v. Rewee*, 52 Mass. (11 Met.) 268.

**Minnesota.** *Brown v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 36 Minn. 236, 31 N. W. 941; *Proctor v. C. E. Stevens Land Co.*, 94 Minn. 181, 102 N. W. 395.

**Montana.** *Keyser v. Rehberg*, 16 Mont. 331, 41 Pac. 74.

**Vermont.** *Underhill v. Rutland Ry.*, 90 Vt. 462, 98 Atl. 1017.

<sup>8</sup> *Keyser v. Rehberg*, 16 Mont. 331, 41 Pac. 74.

plant and cultivate the land of B for a certain percentage of the profits and B excludes A from such land and prevents him from performing, A may recover reasonable compensation for his services without regard to the existence or amount of profits.<sup>9</sup>

**§ 3256. Contingent compensation.** If the compensation is measured in money by the terms of the contract, but if the amount thereof, or the duty to make such payment, is contingent on the happening of future events, there is some authority for holding that the party who is not in default can not ignore the contract and recover reasonable compensation upon the default of the defendant.<sup>1</sup>

A did literary work under an alleged contract that B should publish it and divide the profits with A. It was held that if B broke such contract A could recover only damages and not the value of his labor.<sup>2</sup>

In other jurisdictions reasonable compensation for the value of the performance of the contract is allowed, although the compensation therefor would have been contingent as to payment or amount, if the contract had been performed.<sup>3</sup> If a contract of employment to make sales upon commission,<sup>4</sup> or to work for a share of the profits,<sup>5</sup> or to organize a corporation,<sup>6</sup> is broken by the discharge of the employe without cause, he may recover a reasonable compensation for the work already done.

If the contract contemplates payment in property contingent on the success of a given venture, the plaintiff can not recover in case the venture has proved unsuccessful by the device of suing on the common counts and omitting the terms of the special contract, which, if set forth, would show that he could not recover, since the defendant had performed in full, although such performance had not proved beneficial to the plaintiff.<sup>7</sup>

<sup>9</sup> Underwood v. Viles, 106 Kan. 287, 187 Pac. 881.

<sup>1</sup> Keyser's Appeal, 124 Pa. St. 80, 2 L. R. A. 159, 16 Atl. 577.

<sup>2</sup> Keyser's Appeal, 124 Pa. St. 80, 2 L. R. A. 159, 16 Atl. 577.

<sup>3</sup> Underwood v. Viles, 106 Kan. 287, 187 Pac. 881; Cadman v. Markle, 76 Mich. 448, 5 L. R. A. 707, 43 N. W. 315; Merriman v. McCormick Harvest-

ing Machine Co., 96 Wis. 600, 71 N. W. 1050.

<sup>4</sup> Merriman v. McCormick Harvesting Machine Co., 96 Wis. 600, 71 N. W. 1050.

<sup>5</sup> Underwood v. Viles, 106 Kan. 287, 187 Pac. 881.

<sup>6</sup> Cadman v. Markle, 76 Mich. 448, 5 L. R. A. 707, 43 N. W. 315.

<sup>7</sup> Palmer v. Guillo, 224 Mass. 1, 112 N. E. 493.

**§ 3257. Defendant in default—Total or virtual failure of consideration.** If the plaintiff seeks to recover in quasi-contract, for the value of his performance, upon a breach by the defendant which operates as a discharge of the contract, the question of the degree of performance on the part of the defendant and of the benefits which the plaintiff has received from such performance is material in determining the amount of plaintiff's recovery; and frequently, in determining the question of the right of the plaintiff to recover at all on the theory of quasi-contract. If the defendant has not performed a contract at all, or if the performance has been so slight that there is a virtual failure of consideration, the plaintiff may ignore the contract and recover the value of his performance thereunder,<sup>1</sup> subject to the qualifications which have already been discussed.<sup>2</sup> Payment made in advance for support,<sup>3</sup> for irrigation,<sup>4</sup> for corporate stock to be delivered,<sup>5</sup> for the release of a lien,<sup>6</sup> or for a saloon license,<sup>7</sup> may be recovered if the con-

<sup>1</sup> **United States.** Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; Pope v. Allis, 115 U. S. 363, 29 L. ed. 303.

**California.** Richter v. Union Land & Stock Co., 129 Cal. 367, 62 Pac. 39.

**Louisiana.** Pugh v. Moore, 44 La. Ann. 209, 10 So. 710; Herwig v. Richardson, 44 La. Ann. 703, 11 So. 135.

**Maine.** Furgerson v. Staples, 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158; Frye Pulpwood Co. v. Ray, 114 Me. 272, 95 Atl. 1029.

**Massachusetts.** Moore v. Curry, 112 Mass. 13; Martin v. Cunningham, 231 Mass. 280, 1 A. L. R. 1511, 121 N. E. 21.

**Minnesota.** Dennis v. Pabst Brewing Co., 80 Minn. 15, 82 N. W. 978; Slater v. Olson, 83 Minn. 35, 85 N. W. 825.

**New York.** Moore v. Williams, 115 N. Y. 586, 5 L. R. A. 654, 22 N. E. 233.

**Oklahoma.** Kokomo Oil Co. v. Bell, — Okla. —, 198 Pac. 326.

**Rhode Island.** Anthony v. Household Sewing Machine Co., 16 R. I. 571, 5 L. R. A. 575, 18 Atl. 176.

**Vermont.** Williamson v. Johnson, 62 Vt. 378, 22 Am. St. Rep. 117, 9 L. R. A. 277, 20 Atl. 279.

**West Virginia.** Hughes v. Frum, 41 W. Va. 445, 23 S. E. 604.

"When money is paid or a promise made by one party in contemplation of some act to be done by the other which is the sole consideration of the payment or promise, and the thing stipulated to be done is not performed, the money may be recovered back, or the promise founded on such consideration may be avoided between the parties to the contract." Griggs v. Austin, 20 Mass. (3 Pick.) 20, 22, 15 Am. Dec. 175 [quoted, Hudson v. Archer, 9 S. D. 240, 245, 68 N. W. 541].

<sup>2</sup> See §§ 3250 et seq.

<sup>3</sup> Lathrop v. Mayer, 86 Mo. App. 355.

<sup>4</sup> Richter v. Union Land & Stock Co., 129 Cal. 367, 62 Pac. 39.

<sup>5</sup> Anthony v. Household Sewing Machine Co., 16 R. I. 571, 5 L. R. A. 575, 18 Atl. 176.

<sup>6</sup> Slater v. Olson, 83 Minn. 35, 85 N. W. 825.

<sup>7</sup> Dennis v. Pabst Brewing Co., 80 Minn. 15, 82 N. W. 978.

sideration for which such payments were made fails totally. A man who has paid money to a woman to enable her to prepare for her marriage with him under her contract, may recover such payments if she refuses to marry him.<sup>8</sup> If A pays premiums on B's policy of life insurance under a contract whereby B has assigned such policy to A, and it is subsequently held that such assignment is invalid, A may recover such premiums from B's estate.<sup>9</sup> If an entire contract is made to transport freight,<sup>10</sup> or passengers,<sup>11</sup> and through some accident the carrier, after having effected transportation for part of the distance, is unable to complete the contract, payments made in advance under such contract may be recovered. Failure to execute and deliver a mortgage which a builder had agreed to take in payment for his work does not entitle him to take possession of the building, of which the owner has already gone into peaceable possession, and to exclude the owner therefrom.<sup>12</sup> The assignee of a worthless instrument,<sup>13</sup> as of an instrument purporting to be a state bond which is not in fact a valid obligation,<sup>14</sup> or of an instrument purporting to be a valid town order, which is thereafter held void,<sup>15</sup> may in each case recover what he has paid therefor.

**§ 3258. Defendant in default—Performance enuring to benefit of plaintiff.** A more difficult question arises in cases in which the defendant has performed a material part of his contract before he has made default; and upon the default of the defendant the plaintiff seeks to ignore the contract and to recover on the theory of quasi-contract. If there is a so-called partial failure of consideration, the right of the party not in default to recover what he has paid under the contract depends in the first instance on whether the consideration is by the terms of the contract so apportioned as to fix the amount paid for that part of the consideration which has failed, or not. If the consideration is so apportioned, recovery of the consideration for the covenant which has failed,

<sup>8</sup> *Williamson v. Johnson*, 62 Vt. 378, 22 Am. St. Rep. 117, 9 L. R. A. 277, 20 Atl. 279.

<sup>9</sup> *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924.

<sup>10</sup> *Griggs v. Austin*, 20 Mass. (3 Pick.) 20, 15 Am. Dec. 175.

<sup>11</sup> *Brown v. Harris*, 68 Mass. (2 Gray) 359.

<sup>12</sup> *Keystone Surgical Mfg. Co. v. Bate*, 187 Pa. St. 460, 41 Atl. 299.

<sup>13</sup> *Hughes v. Frum*, 41 W. Va. 445, 23 S. E. 604.

<sup>14</sup> *Pugh v. Moore*, 44 La. Ann. 209, 10 So. 710; *Herwig v. Richardson*, 44 La. Ann. 703, 11 So. 135.

<sup>15</sup> *Ferguson v. Staples*, 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158.

can be had;<sup>1</sup> since a contract, the consideration of which is apportioned to each of the respective covenants, is a several contract; that is, it is, in effect, a number of distinct contracts, the breach of one of which does not affect the rights of the parties under the remaining covenants. If different articles of personal property are valued separately and are exchanged at such valuation, the value of one of such articles may be recovered if the article is so defective as not to be a performance of the contract, although the remaining articles are retained by the respective parties.<sup>2</sup>

If the contract is entire, and the breach on the part of the defendant is a breach of a minor covenant, this breach does not discharge the contract so as to relieve the plaintiff from his obligation to perform further;<sup>3</sup> and accordingly such breach should not give him the right to ignore the contract and recover on the theory of quasi-contract, since, to give him such right of election would be to enable him to relieve himself in this way from the obligation to continue performance of the contract on his part. His duty to continue performance and his right to ignore the contract and to recover in quasi-contract are inconsistent and mutually exclusive.

The difficult question which arises in this connection is found where the breach of the defendant is of a vital term; where the performance on the part of the defendant has been of a substantial character which inures to the benefit of plaintiff. In cases of this sort the court can not permit the plaintiff to recover the value of his performance in quasi-contract and at the same time deny compensation to the defendant for the value of his performance without enforcing what is, in effect, a forfeiture. The courts are unwilling to permit forfeitures,<sup>4</sup> although they occasionally recognize their validity; but the courts are very unwilling to lend active aid to a plaintiff to enable him to enforce a forfeiture. Accordingly, the courts generally refuse to permit the plaintiff to bring an action in quasi-contract, and, at the same time, to deny to the defendant the right to set off the reasonable value of the performance on his part.<sup>5</sup>

If the courts would permit the plaintiff to recover reasonable compensation for the value of his performance and allow the de-

<sup>1</sup> *Taylor v. Belton*, 188 Mich. 302, 154 N. W. 149.

<sup>2</sup> See §§ 2083 et seq.

<sup>3</sup> *Taylor v. Belton*, 188 Mich. 302, 154 N. W. 149.

<sup>4</sup> See §§ 2977 et seq.

<sup>5</sup> See §§ 2113 et seq.

<sup>6</sup> See cases cited in this and the following sections.

defendant to set off reasonable compensation for the value of the performance on his part, exact justice, on the theory of quasi-contract, would be done. While the defendant might waive his claim for damages for seeking relief upon such theory, his waiver of damages would be his voluntary act. Since the defendant is the party who is in default, he is not entitled to damages by reason of the plaintiff's election to treat the contract as a discharge. The only question is as to the practicability of giving relief of this sort and of determining, in one action, the value of the performance on the part of each of the parties and of rendering judgment for the difference. At a time at which the courts were unwilling to allow a set-off or counter-claim in an action on contract, they were naturally adverse to allowing relief of this sort in quasi-contract. The original dislike for the courts felt toward permitting an award of compensation to each party, and rendering judgment for the difference, has persisted in some jurisdictions; and it is held that, if the contract is entire, and the defendant has performed a substantial amount thereof which has enured to the benefit of the plaintiff, the plaintiff can not recover on the theory of quasi-contract, but he must bring an action upon the contract and recover damages for the breach thereof.<sup>6</sup> In an action for damages, the extent of performance on the part of the defendant must be considered in determining the amount of damages which the plaintiff has sustained; but this seems to these courts to be easier than to permit the performance on the part of the defendant to be considered, if the plaintiff brings his action on the theory of quasi-contract. If a student has entered an institution of learning in reliance on a statement of the expenses of the course, and he discovers after he has received a part of the instruction that the necessary expenses will be much greater, he can not ignore the contract and recover the tuition paid in advance.<sup>7</sup> If A has

<sup>6</sup> **United States.** *Michaelsen v. Security Mutual Life Insurance Co.*, 150 Fed. 224.

**Indiana.** *Continental Life Insurance Co. v. Houser*, 89 Ind. 258; *Standley v. Northwestern Mutual Life Insurance Co.*, 95 Ind. 254; *Indiana Business College v. Cline*, 187 Ind. 416, L. R. A. 1918E, 779, 119 N. E. 712.

**Montana.** *Degenhart v. Cartier*, — Mont. —, 192 Pac. 259.

**New Hampshire.** *Smart v. Gale*, 62 N. H. 62.

**New York.** *Thomas W. Finucane Co. v. Board of Education*, 190 N. Y. 76, 82 N. E. 737.

**North Carolina.** *Edwards v. Goldsboro*, 141 N. Car. 60, 4 L. R. A. (N.S.) 589, 8 Ann. Cas. 479, 53 S. E. 652.

<sup>7</sup> *Indiana Business College v. Cline*, 187 Ind. 416, L. R. A. 1918E, 779, 119 N. E. 712.

paid a certain amount of money into the treasury of a municipal corporation in consideration of its promise to locate certain public buildings near his property, and such public corporation performs in part by locating certain public buildings near A's property, A can not ignore the contract and recover the amount which he paid in because of the fact that the public corporation does not thus locate all of the buildings which it had agreed so to do.<sup>8</sup> If an insurance policy has gone into effect and the insured has received the benefit of a protection against loss which might have occurred, but which did not, it is held in some jurisdictions that the insured can not recover the premiums which he has paid in, in case the insurance company repudiates its obligation under the contract; but that the only remedy of the insured is an action for damages, or a tender of the premiums so as to keep the policy alive and enforce it in case of loss, or a suit in equity to compel the insured to recognize the existence of the contract.<sup>9</sup> A case of this sort furnishes an excellent example of the extreme operation of this principle, since the experience tables afford as exact a means as can be devised of ascertaining in money, the value of the protection which the insured has received; if it is to be assumed that, on repudiation of the policy by the insurance company, the insured must make compensation for his protection against losses which might have occurred, but which did not occur. While the insured may resort to equity for a declaration of his rights under the policy,<sup>10</sup> relief at law is not ordinarily denied on the ground that the plaintiff has a better remedy in equity. The right of the insured to tender the premiums and to enforce the policy in case of loss may be a sufficient remedy in legal theory; but an insurance policy which is repudiated by the insurance company affords little protection from a practical or from a business standpoint. The insured may undoubtedly bring an action to recover damages; but unless the entire doctrine of the right to bring an action in quasi-contract in case of breach by the defendant is to be abandoned, it is difficult to say why this right of action for damages should exclude the rights of the insured to ignore the contract and to recover the amount of premiums which he has paid in, less,

<sup>8</sup> *Edwards v. Goldsboro*, 141 N. Car. 60, 4 L. R. A. (N.S.) 589, 8 Ann. Cas. 479, 53 S. E. 652 [affected by the question of the validity of such contract].

<sup>9</sup> *Michaelsen v. Security Mutual Life*

*Insurance Co.*, 150 Fed. 224; *Continental Life Insurance Co. v. Houser*, 89 Ind. 258; *Standley v. Northwestern Mutual Life Insurance Co.*, 95 Ind. 254.

<sup>10</sup> See § 3344.

perhaps, the value of the insurance which he has received.<sup>11</sup> If a contract for the sale of land has been performed by delivering a deed, so that some interest has passed thereunder, the purchaser can not recover the purchase price on the theory of quasi-contract, because of defects of title, and the like.<sup>12</sup> If a contract for the sale of land has been performed by the execution of a deed which passes a part thereof, and by giving possession to the purchaser for a considerable period of time, the purchaser can not avoid the contract because of the default of the vendor, and recover the purchase price which he has paid in.<sup>13</sup> The fact that the purchaser or lessee has enjoyed possession for a substantial period of time, seems to be held, in some jurisdictions, to confer a benefit on him which prevents him from avoiding the contract and recovering the purchase price or the rent, and the like, which he has paid in.<sup>14</sup> If the lessee under an invalid lease has been in possession a considerable period of time, and the lessor then evicts him wrongfully, it has been held that the lessee can not recover the amount which he has paid in, less reasonable compensation for the use of the premises, but that he must bring his action upon the contract.<sup>15</sup> Under a sale of a stock of goods in a store, together with furniture and fixtures for a gross sum, no recovery can be had for money had and received on the theory of failure of consideration, if the title to the fixtures fails.<sup>16</sup> If a contractor fails to perform

<sup>11</sup> This is the solution which is adopted by a number of the courts.

See § 3260.

<sup>12</sup> *Harrison v. Palo Alto County*, 104 Ia. 383, 73 N. W. 872; *Brown v. Manning*, 3 Minn. 35, 74 Am. Dec. 736; *Land Co. v. Hill*, 87 Tenn. 589, 11 S. W. 797.

*Contra*, *Colburn v. Northern Pacific Ry.*, 13 Mont. 476, 34 Pac. 1017.

<sup>13</sup> *Fay v. Oliver*, 20 Vt. 118, 49 Am. Dec. 764.

<sup>14</sup> *Hunt v. Silk*, 5 East 449; *De Montague v. Bacharach*, 181 Mass. 256, 63 N. E. 435.

<sup>15</sup> *De Montague v. Bacharach*, 181 Mass. 256, 63 N. E. 435.

The ultimate outcome of this case shows that justice might have been done, in the first instance, by allowing

the plaintiff to recover the rent which he had paid in, less compensation for the use of the premises. After the judgment was reversed in *De Montague v. Bacharach*, 181 Mass. 256, 63 N. E. 435, the plaintiff sought to recover damages for the lessor's breach of the contract. The lessor then set up the statute of frauds and defeated plaintiff's plan. Plaintiff then reverted to his theory of quasi-contract and finally recovered the amount which he had paid in, less reasonable compensation for the use of the premises. *De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938.

<sup>16</sup> *Smart v. Gale*, 62 N. H. 62.

See also, *Mizell v. Watson*, 57 Fla. 111, 49 So. 149.

the contract in accordance with its terms, and he thus effects a saving to himself, it is held that the adversary party can not recover the amount of this saving if the actual performance was as beneficial as that provided for by the terms of the contract would have been.<sup>17</sup>

Compensation for delay which causes an increase in the cost of performance has been awarded in the form of reasonable compensation for the increased cost.<sup>18</sup> A similar measure of recovery has been adopted as a measure of damages.<sup>19</sup>

**§ 3259. Defendant on default—Restitution on part of plaintiff necessary.** The objection of the courts to permitting the plaintiff to recover in quasi-contract where the defendant has performed in part, and the plaintiff has received the benefit of such performance, sometimes takes the form of the rule that the plaintiff can not recover in quasi-contract on the default of the defendant, unless he has made restitution of what he has received under the contract.<sup>1</sup> A purchaser of goods who seeks to recover payments which he has made must show either that the goods are absolutely worthless, or that he has tendered them to the seller.<sup>2</sup> If A has purchased two or more chattels from B for a gross sum under an entire contract, and one of such chattels is so defective that it is not a performance of the contract, A can not retain the other chattels and recover the reasonable value of the defective chattels under the common counts.<sup>3</sup> A purchaser of realty can not recover the purchase price which he has paid in because of the vendor's delay in conveying the realty, unless the purchaser transfers to the vendor the equitable rights which the purchaser has acquired by virtue of the contract for the sale of land;<sup>4</sup> and apparently such surrender must be made before the action is brought.<sup>5</sup> If, however, the seller of personalty announces that he will not perform,

<sup>17</sup> *Thomas W. Finucane Co. v. Board of Education*, 190 N. Y. 76, 82 N. E. 737.

<sup>18</sup> *Hayden v. Astoria*, 84 Or. 205, 164 Pac. 729.

<sup>19</sup> See § 3209.

<sup>1</sup> *Ferguson v. Edgar*, 178 Cal. 17, 171 Pac. 1061; *Mizell v. Watson*, 57 Fla. 111, 49 So. 149; *Phelps v. Mineral Springs Heights Co.*, 123 Wis. 253, 101 N. W. 364.

<sup>2</sup> *Steele v. Sanchez*, 80 Ia. 507; *Moyer v. Schoemaker*, 5 Barb. (N. Y.) 319; *Crooks v. Eldridge*, 64 O. S. 195, 60 N. E. 203; *Lawton v. Howe*, 14 Wis. 241.

<sup>3</sup> *Mizell v. Watson*, 57 Fla. 111, 49 So. 149.

<sup>4</sup> *Phelps v. Mineral Springs Heights Co.*, 123 Wis. 253, 101 N. W. 364.

<sup>5</sup> *Phelps v. Mineral Springs Heights Co.*, 123 Wis. 253, 101 N. W. 364.

the buyer may recover payments already made, without offering before the commencement of the action, to surrender the contract under which such payments were made.<sup>6</sup>

**§ 3260. Material performance by defendant before default—Quasi-contract allowed to plaintiff.** In other jurisdictions the courts have recognized the right of the plaintiff to bring an action on the theory of quasi-contract wherever the defendant is in default, even if the defendant has performed a material part of the contract prior to such default.<sup>1</sup> The means by which this result is reached is not the same, however, in all the cases on this point. In some cases the thing which is received under the contract can not from its nature be restored specifically;<sup>2</sup> and it is said that in such cases restitution will not be regarded as precedent to the right of the party who is not in default to treat the contract as discharged by reason of the breach of the defendant, and to recover reasonable compensation for what he has furnished there-

<sup>6</sup> *McDonald v. Pacific Debenture Co.*, 146 Cal. 667, 80 Pac. 1090.

<sup>1</sup> *United States*. *Black v. Supreme Council American Legion of Honor*, 120 Fed. 580; *Supreme Council American Legion of Honor v. Daix*, 130 Fed. 101; *Blakely v. Fidelity Mutual Life Insurance Co.*, 143 Fed. 619.

*California*. *Kirtley v. Perham*, 176 Cal. 333, 168 Pac. 351.

*Colorado*. *Campbell Printing Press & Mfg. Co. v. Marsh*, 20 Colo. 22, 36 Pac. 799.

*Connecticut*. *Nothe v. Nomer*, 54 Conn. 326, 8 Atl. 134.

*Georgia*. *Supreme Council American Legion of Honor v. Jordan*, 117 Ga. 808, 45 S. E. 33; *Timmerman v. Stanley*, 123 Ga. 850, 1 L. R. A. (N.S.) 379, 51 S. E. 760.

*Kansas*. *Missouri, Kansas & Texas Ry. Co. v. Ft. Scott*, 15 Kan. 435.

*Massachusetts*. *Hill v. Rewee*, 52 Mass. (11 Met.) 268; *Kares v. Covell*, 180 Mass. 206, 91 Am. St. Rep. 271, 62 N. E. 244; *Brown v. Woodbury*, 183

Mass. 279, 67 N. E. 327; *Putnam v. Bolster*, 216 Mass. 367, 103 N. E. 216.

*Minnesota*. *Reynolds v. Lynch*, 98 Minn. 58, 107 N. W. 145.

*North Carolina*. *Hughes v. Crooker*, 148 N. Car. 318, 125 Am. St. Rep. 606, 62 S. E. 429.

*New Jersey*. *Reutler v. Ramson*, 91 N. J. L. 262, 102 Atl. 351.

*Oregon*. *Thompson v. New York Life Insurance Co.*, 21 Or. 466, 28 Pac. 623.

*Pennsylvania*. *American Life Insurance Co. v. McAden*, 109 Pa. St. 359, 1 Atl. 256; *Titlow v. Reliance Life Insurance Co.*, 246 Pa. St. 503, 92 Atl. 747.

*Tennessee*. *Newman v. Maclin*, 8 Tenn. (5 Hay.) 241.

*Vermont*. *Underhill v. Rutland Railroad Co.*, 90 Vt. 462, 98 Atl. 1017.

*Wisconsin*. *Neff v. Rubin*, 161 Wis. 511, 154 N. W. 976.

<sup>2</sup> *Timmerman v. Stanley*, 123 Ga. 850, 1 L. R. A. (N.S.) 379, 51 S. E. 760 (as instruction).

under.<sup>3</sup> As long as a contract for the sale of land remains executory, partial failure of title, if of a material part of the property in question, gives to the purchaser the right to ignore the contract and to recover payments which he has made thereunder.<sup>4</sup> In many jurisdictions the use of the property of which the purchaser or lessee has had possession, is not regarded as such performance on the part of the vendor, lessor or seller as to prevent the purchaser or lessee from ignoring the contract and recovering payments made by him thereunder.<sup>5</sup> If A has made certain improvements upon the property of a railroad company, in consideration of its agreement to give a lease to him for twenty years, he may, on refusal of the railroad to give a lease for more than ten years, recover the value of such improvements.<sup>6</sup> If A has constructed a building on B's land under contract by which A is to have the use of such land for life in consideration of constructing such building, and B breaks such contract by evicting A, A may have reasonable

<sup>3</sup> "It is contended, in the brief of counsel for the defendant in error, that there can be no recovery of the amount paid, because, in order to rescind the contract, the plaintiff must restore the status, and must tender back to defendant what he has received from him, and that this can not be done in the present case. Civil Code 1895, § 3712. This is a general rule where one party to the contract has received goods, money, or other thing of value, which is capable of being returned to the other party. But in a contract like that involved in the present case, where a person agrees to teach another a certain thing, to qualify him for a certain position, if he gives the student some instruction and then refuses to complete his contract, there would be no possible way by which such instruction as he had given could be returned or tendered back to him; nor is the other party required to estimate value for what has been done and tender such amount. He can not hold on to the amount paid, refuse to proceed with the contract, and defend against an action to recover the price

paid on the ground that the plaintiff had not tendered back to him his instruction, and could not restore him to the status quo. He can not by his own conduct place himself in a situation where restoration is impossible, repudiate the contract, and set up this situation as a defense to a suit for the amount paid. If he abandons the contract, he should not complain that the other party is willing to treat it as rescinded." *Timmerman v. Stanley*, 123 Ga. 850, 1 L. R. A. (N.S.) 379, 51 S. E. 760.

<sup>4</sup> *Kares v. Covell*, 180 Mass. 206, 91 Am. St. Rep. 271, 62 N. E. 244; *Reutler v. Ramsen*, 91 N. J. L. 262, 102 Atl. 351; *Newman v. Maclin*, 8 Tenn. (5 Hay.) 241; *Neff v. Rubin*, 161 Wis. 511, 154 N. W. 976.

<sup>5</sup> *Barnett v. Brown*, 140 Ark. 636, 216 S. W. 1038; *Campbell Printing Press & Mfg. Co. v. Marsh*, 20 Colo. 22, 36 Pac. 799; *Nothe v. Nomer*, 54 Conn. 326, 8 Atl. 134; *Underhill v. Rutland Railroad Co.*, 90 Vt. 462, 98 Atl. 1017.

<sup>6</sup> *Underhill v. Rutland Railroad Co.*, 90 Vt. 462, 98 Atl. 1017.

compensation for money expended, labor, etc.; but B may set off a value of the use and occupation of such realty while A was in possession.<sup>7</sup> If A has paid a certain sum of money to be in advance for tuition, and B wrongfully refuses to complete the agreed course of instruction after furnishing a part thereof, it is said that A may ignore the contract and recover the amount which he has paid in.<sup>8</sup> If A gives a negotiable note to B in consideration of B's transfer to A of certain patent rights and of B's agreement to instruct A's son in selling the articles covered by such patent, and B negotiates such notes to innocent purchasers, without instructing A's son, A may recover from B the amount which A is obliged to pay to such innocent purchasers.<sup>9</sup> If A buys a newspaper route, and the publication of such newspaper is discontinued, A may recover the amount which he has paid in, less the profits which he has earned under such contract.<sup>10</sup> If A agrees to work for B in consideration of a certain share of the net profits of B's business, and also in consideration of room and board for A's parents, and B renounces the contract after partial performance on each side, A may ignore the contract and recover reasonable compensation for work and labor under such contract, less reasonable compensation for the board thus furnished.<sup>11</sup> Where a city donated money and subscribed for stock in a railroad on condition that the road should be constructed to the city and that the city should be the end of the division and the place of location of the machine shops, it was said that if the latter conditions were broken and the consideration could not be apportioned, the entire consideration could be recovered.<sup>12</sup> In many jurisdictions the insured may recover the premiums which he has paid in if the insurance company renounces

<sup>7</sup>Todd v. Leach, 100 Ga. 227, 28 S. E. 43. (While a just result is reached in this case, it is at the expense of two theories, more or less dear to the common law. Defendant's right to compensation was set off against plaintiff's right to compensation; and, in addition, defendant was allowed compensation for use and occupation although there was no understanding between the parties, at the outset, that compensation would be paid for the use of the land.)

<sup>8</sup>Timmerman v. Stanley, 123 Ga. 850, 1 L. R. A. (N.S.) 379, 51 S. E. 760.

<sup>9</sup>Hughes v. Crooker, 148 N. Car. 318, 125 Am. St. Rep. 606, 62 S. E. 429.

<sup>10</sup>Kirtley v. Perham, 176 Cal. 333, 168 Pac. 351.

<sup>11</sup>Brown v. Woodbury, 183 Mass. 279, 67 N. E. 327.

<sup>12</sup>Missouri, Kansas & Texas Ry. Co. v. Ft. Scott, 15 Kan. 435.

its contract of insurance.<sup>13</sup> If an insurance company goes out of business, the policy holder may recover the amount of the premiums paid in, less the value of the insurance which he has had.<sup>14</sup> A result thus reached is exactly opposite to that which is reached in other states in which it is held that the insured can not recover the premiums, since the risk has attached and he has had the benefit of protection for part of the time.<sup>15</sup> Where the insured is allowed to recover, his right to do so is placed by some courts on the ground that, since the loss did not actually take place, the policy has not been of any appreciable advantage to the insured or any real disadvantage to the insurer.<sup>16</sup>

**§ 3261. Plaintiff in default—General principles controlling right to recover in quasi-contract.** If the party to the contract who has committed a breach thereof and who has failed to perform, at least substantially, is the plaintiff who seeks to recover in quasi-contract, for the reasonable value of the performance which he has furnished before such breach, a question of greater difficulty arises than is presented in the preceding cases, since the plaintiff, who has not performed the contract substantially, and who could not recover on the contract because of his failure to perform it,<sup>1</sup> is seeking to take advantage of his wrongful act; to treat the contract as discharged because of his own breach; and to force an obligation upon the defendant into which the defendant did not enter by his voluntary agreement, and into which, it may be, he never would have entered if such obligation had been embodied in the original offer. On the other hand, since the plaintiff can not recover on the contract in the absence of substantial performance,<sup>2</sup> the denial to the plaintiff in default, of any right of action in quasi-contract, will result in denying him any recovery for per-

<sup>13</sup> Lovell v. St. Louis Mutual Life Insurance Co., 111 U. S. 264, 28 L. ed. 423; Black v. Supreme Council American Legion of Honor, 120 Fed. 580; Supreme Council American Legion of Honor v. Daix, 130 Fed. 101; Blakely v. Fidelity Mutual Life Insurance Co., 143 Fed. 619; Supreme Council American Legion of Honor v. Jordon, 117 Ga. 808, 45 S. E. 33; Thompson v. New York Life Insurance Co., 21 Or. 466, 28 Pac. 628; American Life Insurance

Co. v. McAden, 109 Pa. St. 399, 1 Atl. 256; Titlow v. Reliance Life Insurance Co., 246 Pa. St. 503, 92 Atl. 747.

<sup>14</sup> Lovell v. St. Louis Mutual Life Insurance Co., 111 U. S. 264, 28 L. ed. 423.

<sup>15</sup> See § 3258.

<sup>16</sup> American Life Insurance Co. v. McAden, 109 Pa. St. 399, 1 Atl. 256.

<sup>1</sup> See §§ 2772 et seq. and §§ 3023 et seq.

<sup>2</sup> See §§ 2772 et seq. and §§ 3023 et seq.

formance, which may have been of great value to the defendant. The dislike which the courts feel toward forfeitures has led many of them to feel that justice can be done more exactly by giving a right of action in quasi-contract to a plaintiff who is in default, in some cases at least.<sup>3</sup>

In determining whether relief in quasi-contract will be given to a plaintiff who is in default, the courts are frequently controlled by two different considerations, which do not always lead to the same practical result. On the one hand, the courts frequently look to the benefit conferred upon the defendant by the partial performance on the part of the plaintiff, and measure plaintiff's right to recover by the benefit which the defendant has received.<sup>4</sup> On the other hand, many courts also consider the character of the breach on the part of the plaintiff; and show a strong tendency to grant relief to a plaintiff whose default is not due to his own wilful or deliberate choice, while they deny relief to a plaintiff who has performed a considerable part of the contract, but whose default is due to his wilful and deliberate choice.<sup>5</sup> As a result of this adoption of a dual test for determining the right of plaintiff to recover, it generally follows that, if the plaintiff's performance has not conferred any benefit upon the defendant, the plaintiff can not recover.<sup>6</sup> If, on the other hand, the plaintiff's performance has conferred some benefit upon the defendant, some of the courts agree in regarding the wilful character of plaintiff's breach as immaterial; but of the courts that take this view, some deny to the plaintiff the right to recover in quasi-contract,<sup>7</sup> while other courts grant this right in all cases, without regard to the character of the breach.<sup>8</sup> The courts which regard the character of plaintiff's breach and his intent in breaking the contract as material, generally agree that plaintiff may recover if his breach is not wilful,<sup>9</sup> and that he can not recover in quasi-contract if his breach is wilful.<sup>10</sup>

**§ 3262. Plaintiff in default—Defendant not enriched by performance.** Since the theory which underlies the right to recover in quasi-contract for the value of the performance of a contract which has been discharged by breach, is that the defendant has been

<sup>3</sup> See §§ 3264 and 3266.

<sup>4</sup> See §§ 3264 and 3272.

<sup>5</sup> See §§ 3264 et seq.

<sup>6</sup> See § 3262.

<sup>7</sup> See § 3263.

<sup>8</sup> See § 3266.

<sup>9</sup> See § 3264.

<sup>10</sup> See § 3265.

enriched by the plaintiff's performance; and that it would be inequitable to allow him to retain the benefits of such performance without making compensation therefor,<sup>1</sup> a plaintiff who is himself in default and who is basing his right of action in quasi-contract on his own wrongful act or default, can not recover in quasi-contract unless the partial performance for which recovery is sought has resulted in the enrichment of the defendant.<sup>2</sup> The fact that performance was prevented by some external fact beyond his control,<sup>3</sup> or that the partial performance was expensive to him,<sup>4</sup> neither of them give him any right to recover more than the amount of the benefits conferred upon the party against whom the recovery is sought, and if no such benefits exist there is no right of recovery. One who agrees to build a house for another, and who constructs such building in whole or in part, can not recover anything if before the building is accepted by the owner it is destroyed by fire,<sup>5</sup> by storm,<sup>6</sup> or other casualty. In such cases no benefit from such part performance has accrued to the owner, and therefore no recovery can be had against him. If, however, one of several buildings to be constructed under an entire contract has been accepted by the owner, the contractor may recover for his work if such building is subsequently destroyed by fire before the rest of the contract is performed.<sup>7</sup> Under a contract to drill a well to produce a certain supply of water, no recovery can be had for work and labor in drilling a hole, where work was stopped by the breaking of the drill rod before water was reached.<sup>8</sup> No recovery

<sup>1</sup> See §§ 3238 et seq.

<sup>2</sup> Connecticut. *Smith v. Scott's Ridge School District*, 20 Conn. 312.

Iowa. *Miller v. Mason City & Fort Dodge Ry.*, 132 Ia. 412, 108 N. W. 302.

Michigan. *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 282.

New York. *Boughton v. Smith*, 142 N. Y. 674, 37 N. E. 470.

Wisconsin. *Genni v. Hahn*, 82 Wis. 90, 51 N. W. 1096; *Houlahan v. Clark*, 110 Wis. 43, 85 N. W. 676.

<sup>3</sup> *Remy v. Olds*, 88 Cal. 537, 21 L. R. A. 645, 26 Pac. 355; *Keel v. East Carolina Stone & Construction Co.*, 143 N. Car. 429, 55 S. E. 826.

<sup>4</sup> *Peacock v. Gleesen*, 117 Ia. 291, 90 N. W. 610.

<sup>5</sup> *Fildew v. Besley*, 42 Mich. 100, 36 Am. Rep. 433, 3 N. W. 278; *Keel v. East Carolina Stone & Construction Co.*, 143 N. Car. 429, 55 S. E. 826 (except for the value of what is left).

<sup>6</sup> *Parker v. Scott*, 82 Ia. 266, 47 N. W. 1073; *Doll v. Young*, 149 Ky. 347, 149 S. W. 854 (no recovery here allowed for the foundation).

<sup>7</sup> *Atlantic & Danville Ry. Co. v. Delaware Construction Co.*, 98 Va. 503, 37 S. E. 13.

<sup>8</sup> *Peacock v. Gleesen*, 117 Ia. 291, 90 N. W. 610. The fact that the driller offered to drill another well, which offer was refused, was immaterial.

can be had where A agreed to plow and set out vines in the fall and keep them in good condition for three years in consideration of a conveyance of other realty to be made to him, but A did not do such work in the fall on account of heavy rains, but did it the following spring, and the vines failed and the owner of the realty ordered him to vacate.<sup>9</sup>

**§ 3263. Plaintiff in default—Defendant enriched—Recovery in quasi-contract denied.** If the partial performance on the part of the plaintiff has enriched the defendant, the question of the plaintiff's right to recover the amount of such enrichment in spite of the fact that plaintiff has not performed the contract, is presented for solution. As has already been indicated,<sup>1</sup> a number of different answers to this question have been given by the courts, based on different theories. In a number of cases it seems to be held that a plaintiff can not recover in quasi-contract if he is himself in default, without regard to the character of the breach, as long as it is such breach as will discharge the contract, and without regard to his intention in breaking such contract.<sup>2</sup> In many of these cases the question of the intention of the plaintiff in breaking the con-

<sup>9</sup> *Remy v. Olds*, 88 Cal. 537, 21 L. R. A. 645, 26 Pac. 355.

<sup>1</sup> See § 3261.

<sup>2</sup> *England. Sprague v. Booth* [1909], A. C. 576.

*Arizona. Cotey v. Greenlee County*, 20 Ariz. 150, 178 Pac. 25.

*Illinois. Phelps v. Hubbard*, 59 Ill. 79; *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

*Kansas. Wensler v. Tilke*, 97 Kan. 567, 155 Pac. 946.

*Maine. Marshall v. Jones*, 11 Me. 54, 25 Am. Dec. 280.

*Maryland. Denmead v. Coburn*, 15 Md. 29.

*Massachusetts. Olmstead v. Beale*, 36 Mass. (19 Pick.) 528; *Donahue v. Parkman*, 161 Mass. 412, 42 Am. St. Rep. 415, 37 N. E. 205; *Douglas v. Lowell*, 194 Mass. 268, 80 N. H. 510; *Fрати v. Jannini*, 226 Mass. 430, 115 N. E. 746.

*Minnesota. Uldrickson v. Sandahl*, 92 Minn. 297, 100 N. W. 5; *Johnson v. Fehsefeldt*, 106 Minn. 202, 20 L. R. A. (N.S.) 1069, 118 N. W. 797.

*Mississippi. Robinson v. De Long*, 118 Miss. 280, 79 So. 95.

*New Jersey. Fry v. Miles*, 71 N. J. L. 233, 59 Atl. 246; *MacPherson v. Mackey*, 91 N. J. L. 473, 103 Atl. 36.

*New York. McMillan v. Vanderlip*, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; *Jennings v. Camp*, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367.

*Pennsylvania. Sanders v. Brock*, 230 Pa. St. 609, 35 L. R. A. (N.S.) 532, 79 Atl. 772.

*Rhode Island. O'Connell v. King*, 26 R. I. 544, 59 Atl. 926.

*South Carolina. Daly v. Jefferson Hotel Co.*, 98 S. Car. 222, 82 S. E. 412.

*Utah. McLean v. Wedell*, 31 Utah 468, 88 Pac. 414.

*Washington. Smart v. Burquoine*, 51 Wash. 274, 98 Pac. 666.

tract does not seem to have been considered; and some of the cases can possibly be explained on the theory that plaintiff was guilty of wilful default.<sup>3</sup>

Under a contract for the performance of work and labor or other services, quasi-contract is denied to a plaintiff who has performed part of the services which he agreed to perform and who has failed to perform his contract substantially.<sup>4</sup> If a purchaser of realty under a contract for the sale of land has paid in part of the purchase money and fails to perform the rest of the contract, it is said that he can not recover the amount which he has thus paid in,<sup>5</sup> even though there is no clause of forfeiture in the contract.<sup>6</sup> The vendee in default can not recover for improvements erected by him upon such realty.<sup>7</sup> The fact that the courts do not discuss the nature of plaintiff's breach, indicates that it is regarded, in these cases, as immaterial; and in many of them it appears that plaintiff attempted in good faith to perform his con-

<sup>3</sup> See § 3265.

<sup>4</sup> *Arizona*. *Cotey v. Greenlee County*, 20 *Ariz.* 150, 178 *Pac.* 25.

*Illinois*. *Ptacek v. Pisa*, 231 *Ill.* 522, 14 *L. R. A. (N.S.)* 537, 83 *N. E.* 221.

*Massachusetts*. *Douglas v. Lowell*, 194 *Mass.* 268, 80 *N. E.* 510; *Fрати v. Jannini*, 226 *Mass.* 430, 115 *N. E.* 746.

*Minnesota*. *Johnson v. Fehsefeldt*, 106 *Minn.* 202, 20 *L. R. A. (N.S.)* 1069, 118 *N. W.* 797.

*New Jersey*. *MacPherson v. Mackey*, 91 *N. J. L.* 473, 103 *Atl.* 36.

*New York*. *McMillan v. Vanderlip*, 12 *Johns. (N. Y.)* 165, 7 *Am. Dec.* 299; *Jennings v. Camp*, 13 *Johns. (N. Y.)* 94, 7 *Am. Dec.* 367.

*Rhode Island*. *O'Connell v. King*, 26 *R. I.* 544, 59 *Atl.* 926.

*South Carolina*. *Daly v. Jefferson Hotel Co.*, 98 *S. Car.* 222, 82 *S. E.* 412.

*Washington*. *Smart v. Burquoin*, 51 *Wash.* 274, 98 *Pac.* 666.

<sup>5</sup> *England*. *Sprague v. Booth* [1909], *A. C.* 576; *Hall v. Burnell* [1911], 2 *Ch.* 551.

*United States*. *Hansbrough v. Peck*, 72 *U. S. (5 Wall.)* 497, 18 *L. ed.* 520.

*Illinois*. *Baston v. Clifford*, 68 *Ill.* 67, 18 *Am. Rep.* 547.

*Iowa*. *Downey v. Riggs*, 102 *Ia.* 88, 70 *N. W.* 1091.

*Kansas*. *Wensler v. Tilke*, 97 *Kan.* 567, 155 *Pac.* 946.

*Kentucky*. *Roach v. Waid*, 18 *Ky.* (2 *T. B. Mon.*) 142.

*Maryland*. *Davis v. Hall*, 52 *Md.* 673.

*Massachusetts*. *Donahue v. Parkman*, 161 *Mass.* 412, 42 *Am. St. Rep.* 415, 37 *N. E.* 205.

*Minnesota*. *McManus v. Blackmarr*, 47 *Minn.* 331, 50 *N. W.* 230.

*New York*. *Lawrence v. Miller*, 86 *N. Y.* 131.

*Pennsylvania*. *Sanders v. Brock*, 230 *Pa. St.* 609, 35 *L. R. A. (N.S.)* 532, 79 *Atl.* 772.

*Utah*. *McLean v. Wedell*, 31 *Utah* 468, 88 *Pac.* 414.

<sup>6</sup> *Downey v. Riggs*, 102 *Ia.* 88, 70 *N. W.* 1091.

<sup>7</sup> *Hansbrough v. Peck*, 72 *U. S. (5 Wall.)* 497, 18 *L. ed.* 520; *Roach v. Waid*, 18 *Ky.* (2 *T. B. Mon.*) 142.

tract, and that his default was not wilful.<sup>8</sup> If the purchaser of realty makes default because of his inability to secure funds,<sup>9</sup> or because of a bona fide, though unfounded, objection to the title,<sup>10</sup> he can not recover the amount which he has paid in under such contract. If a contractor fails to perform a building or construction contract, whether his default is wilful or not,<sup>11</sup> as where there is a bona fide dispute as to the meaning of the contract and as to the work which the contract is obliged to do,<sup>12</sup> he is not allowed to recover compensation for the work which he has done. If A is unable to perform certain services for B because A is unable to raise the funds without which he can not perform such contract, he can not recover reasonable compensation for the value of his services.<sup>13</sup> A female employe who abandons performance because of a physical condition which should have been foreseen, can not recover compensation for work done under such contract.<sup>14</sup> If A, under a contract to buy chattels, pays part of the purchase price in advance, and then wrongfully refuses to receive such chattels under the erroneous belief that they did not correspond to the provisions of the contract, he can not recover the payment thus made,<sup>15</sup> even if the vendor then resells the chattels for more than the amount still due.<sup>16</sup>

**§ 3264. Plaintiff in default—Breach not wilful—Recovery in quasi-contract allowed.** In jurisdictions in which the character of plaintiff's breach is regarded as material, a class of cases intermediate between those in which the plaintiff is discharged from performance and those in which he is guilty of wilful breach, is recognized. This consists of the cases in which the plaintiff has

<sup>8</sup> England. *Sprague v. Booth* [1909], A. C. 576.

Massachusetts. *Douglas v. Dowell*, 194 Mass. 268, 80 N. H. 510.

Mississippi. *Robinson v. De Long*, 118 Miss. 280, 79 So. 95.

New Jersey. *Fry v. Miles*, 41 N. J. L. 293, 59 Atl. 246.

New York. *Steinhardt v. Baker*, 163 N. Y. 410, 57 N. E. 629.

Wisconsin. *Jennings v. Lyon*, 39 Wis. 553, 20 Am. Rep. 57.

<sup>9</sup> *Sprague v. Booth* [1909], A. C. 576.

<sup>10</sup> *Steinhardt v. Baker*, 163 N. Y. 410, 57 N. E. 629.

<sup>11</sup> *Robinson v. De Long*, 118 Miss. 280, 79 So. 95.

<sup>12</sup> *Douglas v. Dowell*, 194 Mass. 268, 80 N. H. 510.

<sup>13</sup> *Fry v. Miles*, 71 N. J. L. 293, 59 Atl. 246 (probably no benefit to defendant).

<sup>14</sup> *Jennings v. Lyon*, 39 Wis. 553, 20 Am. Rep. 57 (pregnancy of married woman).

<sup>15</sup> *Neis v. O'Brien*, 12 Wash. 358, 50 Am. St. Rep. 894, 41 Pac. 59.

<sup>16</sup> *Neis v. O'Brien*, 12 Wash. 358, 50 Am. St. Rep. 894, 41 Pac. 59.

attempted to perform in good faith, but has been prevented from performing by facts which are beyond his control, but which do not amount to impossibility and the like, and do not discharge him from liability for 'damages.'<sup>1</sup> In cases of this sort it is held, in some jurisdictions, that the plaintiff may recover reasonable compensation for the value of his performance, less the amount of damages which the defendant has sustained by reason of such breach.<sup>2</sup> The contract is broken but there is "not a wilful dereliction of duty."<sup>3</sup> Where this theory prevails, one who has performed a contract for work and labor in part may recover reasonable compensation therefor if he has not abandoned his contract wilfully.<sup>4</sup> Recovery can be had for work done under a contract

<sup>1</sup> See §§ 2927 et seq.

<sup>2</sup> England. *Lucas v. Godwin*, 3 Bing. N. C. 737.

United States. *Dermott v. Jones*, 69 U. S. (2 Wall.) 1, 17 L. ed. 762 [s. c., 64 U. S. (23 How.) 220, 16 L. ed. 442]; *Quinn v. United States*, 99 U. S. 30, 25 L. ed. 269.

Alabama. *Catanzano v. Jackson*, 198 Ala. 302, 73 So. 510.

Connecticut. *Pinches v. Swedish Evangelical Lutheran Church*, 55 Conn. 183, 10 Atl. 264.

Indiana. *Scholz v. Schenck*, 174 Ind. 136, 91 N. E. 730 (obiter).

Kentucky. *Morford v. Ambrose*, 26 Ky. (3 J. J. Mar.) 688.

Massachusetts. *Gleason v. Smith*, 63 Mass. (9 Cush.) 484, 57 Am. Dec. 62; *Burke v. Coyne*, 188 Mass. 401, 74 N. E. 942; *Hooper v. Cuneo*, 227 Mass. 37, 116 N. E. 237.

North Dakota. *Horton v. Emerson*, 30 N. D. 258, 152 N. W. 520.

Ohio. *Newman v. McGregor*, 5 Ohio 349, 24 Am. Dec. 293.

Oregon. *Wuchter v. Fitzgerald*, 83 Or. 672, 163 Pac. 819; *Easton v. Quackenbush*, 86 Or. 374, 168 Pac. 691.

Pennsylvania. *Holmes v. Chartiers Oil Co.*, 138 Pa. St. 546, 21 Am. St. Rep. 919, 21 Atl. 231.

Tennessee. *Porter v. Woods*, 22 Tenn. (3 Humph.) 56, 39 Am. Dec. 153.

Vermont. *Viles v. Barre & Montpelier Traction & Power Co.*, 79 Vt. 311, 65 Atl. 104.

Washington. *Jackson v. White*, 104 Wash. 643, 177 Pac. 667.

West Virginia. *Barrett v. Raleigh Coal & Coke Co.*, 51 W. Va. 416, 90 Am. St. Rep. 802, 41 S. E. 220.

Wisconsin. *Walsh v. Fisher*, 102 Wis. 172, 72 Am. St. Rep. 865, 43 L. R. A. 810, 78 N. W. 437; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515 (obiter); *Manthey v. Stock*, 133 Wis. 107, 113 N. W. 443 (obiter).

"Where he has been guilty of fraud or has willfully abandoned the work, leaving it unfinished, he can not recover in any form of action. Where he has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract and the other party has sanctioned or accepted the work, he may recover upon the common counts in *indebitatus assumpsit*." *Dermott v. Jones*, 69 U. S. (2 Wall.) 1, 9, 17 L. ed. 762.

<sup>3</sup> *Barrett v. Raleigh Coal & Coke Co.*, 51 W. Va. 416, 90 Am. St. Rep. 802, 41 S. E. 220.

<sup>4</sup> *Tribou v. Strowbridge*, 7 Or. 156; *West v. McDonald*, 64 Or. 203, 127 Pac. 784, 128 Pac. 818; *Wuchter v. Fitzgerald*, 83 Or. 672, 163 Pac. 819;

for the whole season and abandoned before the season was over because of threats of strikers, subject to a counter-claim for damages for such breach.<sup>5</sup> If a contractor attempts, in good faith, to perform a building or construction contract, but he does not succeed in performing it substantially, he may recover the reasonable value of the work which he has performed,<sup>6</sup> at least if such work is accepted by the property owner.<sup>7</sup> Recovery can be had for such goods as are accepted under a contract to furnish goods to the satisfaction of the vendee's agent if the vendor has in good faith attempted to perform, though the amount accepted was much less than the amount contracted for.<sup>8</sup> If the purchaser under a land contract objects to the title in good faith, and the vendor thereupon sells part of such land to another, the purchaser may recover payments which he has made, whether his objection to the title was well taken or not.<sup>9</sup> Many of these cases could be supported on the theory that defendant must make compensation for benefits which he has accepted or retained voluntarily under the contract.<sup>10</sup>

In some cases an attempt is made to combine the theories of the nature and character of the breach on the one hand, and of the benefits received by the defendant on the other; and it is said that a party who makes a bona fide attempt to perform which results in a benefit to the adversary party, which the adversary party accepts or retains with knowledge of such breach, can recover reasonable compensation therefor.<sup>11</sup> Since quasi-contract can not

**Easton v. Quackenbush**, 86 Or. 374, 168 Pac. 631; **Walsh v. Fisher**, 102 Wis. 172, 72 Am. St. Rep. 865, 43 L. R. A. 810, 78 N. W. 437.

<sup>5</sup> **Walsh v. Fisher**, 102 Wis. 172, 72 Am. St. Rep. 865, 43 L. R. A. 810, 78 N. W. 437.

<sup>6</sup> **England. Lucas v. Godwin**, 3 Bing. N. C. 737.

**United States. Dermott v. Jones**, 69 U. S. (2 Wall.) 1, 17 L. ed. 762 [s. c., 64 U. S. (23 How.) 220, 16 L. ed. 442]; **Quinn v. United States**, 99 U. S. 30, 25 L. ed. 269.

**Alabama. Catanzano v. Jackson**, 108 Ala. 302, 73 So. 510.

**Massachusetts. Burke v. Coyne**, 188 Mass. 401, 74 N. E. 942; **Hooper v. Cuneo**, 227 Mass. 37, 118 N. E. 237.

**North Dakota. Horton v. Emerson**, 30 N. D. 258, 152 N. W. 529.

**Pennsylvania. Holmes v. Chartiers Oil Co.**, 138 Pa. St. 546, 21 Am. St. Rep. 919, 21 Atl. 231.

**Wisconsin. Manthey v. Stock**, 133 Wis. 107, 113 N. W. 443 (obiter).

<sup>7</sup> See § 3267.

<sup>8</sup> **Barrett v. Raleigh Coal & Coke Co.**, 51 W. Va. 416, 90 Am. St. Rep. 802, 41 S. E. 220.

<sup>9</sup> **Jackson v. White**, 104 Wash. 643, 177 Pac. 667.

<sup>10</sup> See § 3267.

<sup>11</sup> **United States. Dermott v. Jones**, 69 U. S. (2 Wall.) 1, 17 L. ed. 762.

**Massachusetts. Wagner v. Allen**, 174 Mass. 563, 55 N. E. 320.

**New Jersey. Feeney v. Bardsley**, 66 N. J. L. 239, 49 Atl. 443.

be used as a basis for recovery unless the defendant has received benefits for which he must make compensation to the plaintiff, this statement of the rule is but another form of saying that a plaintiff who is in default, but who has made a bona fide attempt to perform, and who is not guilty of wilful breach, can recover reasonable compensation for the value of his performance.<sup>12</sup>

**§ 3265. Plaintiff in default—Wilful breach—Quasi-contract not allowed.** If the plaintiff has performed in part and has wilfully refused or omitted to perform the contract substantially in compliance with its terms, the jurisdictions in which the character of the breach and the intention of the party in default are regarded as material, hold that the plaintiff can not recover in quasi-contract for the enrichment of the defendant at the expense of the plaintiff by such performance.<sup>1</sup> Where this view prevails, the

**West Virginia.** *Bateson v. Baldwin Forging & Tool Co.*, 75 W. Va. 574, 84 S. E. 887.

**Wisconsin.** *Trowbridge v. Barrett*, 30 Wis. 661.

<sup>12</sup> *Mail & Times Publishing Co. v. Marks*, 125 Ia. 622, 101 N. W. 458; *Malbon v. Birney*, 11 Wis. 107; *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621; *Hildebrand v. American Fine Art Co.*, 109 Wis. 171, 85 N. W. 268.

<sup>1</sup> **England.** *Forman v. The Liddesdale* [1900], App. Cas. 190; *Appleby v. Myers*, L. R. 2 C. P. 651; *Ridway v. Hungerford Market Co.*, 3 A. & E. 171.

**United States.** *Hansbrough v. Peck*, 72 U. S. (5 Wall.) 497, 18 L. ed. 520.

**Alabama.** *Carbon Hill Coal Co. v. Cunningham*, 153 Ala. 573, 44 So. 1016; *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658; *Ollinger & Bruce Dry Dock Co. v. Gibbon*, 202 Ala. 516, 81 So. 18.

**Arizona.** *Cotey v. Greenlee County*, 20 Ariz. 150, 178 Pac. 25.

**California.** *Hogan v. Titlow*, 14 Cal. 255; *Laidlaw v. Marye*, 133 Cal. 170, 65 Pac. 391.

**Connecticut.** *Coburn v. Hartford*, 38 Conn. 290; *O'Keefe v. St. Francis Church*, 59 Conn. 551, 22 Atl. 326.

**Illinois.** *Thrift v. Payne*, 71 Ill. 408; *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221; *Serber v. McLaughlin*, 97 Ill. App. 104.

**Iowa.** *Mail & Times Publishing Co. v. Marks*, 125 Ia. 622, 101 N. W. 458.

**Kentucky.** *Escott v. White*, 73 Ky. (10 Bush.) 169.

**Massachusetts.** *Phelps v. Sheldon*, 30 Mass. (13 Pick.) 50, 23 Am. Dec. 659; *Thayer v. Wadsworth*, 36 Mass. (19 Pick.) 349; *Siple v. Stickney*, 190 Mass. 43, 112 Am. St. Rep. 309, 5 L. R. A. (N.S.) 469, 5 Ann. Cas. 611, 76 N. E. 226; *Mark v. Stuart-Howland Co.*, 226 Mass. 35, 115 N. E. 42; *Frati v. Jannini*, 226 Mass. 430, 115 N. E. 746.

**Michigan.** *Scheible v. Klein*, 89 Mich. 376, 50 N. W. 857; *Genrow v. Flynn*, 166 Mich. 564, 35 L. R. A. (N.S.) 960, Ann. Cas. 1912D, 638, 131 N. W. 1115.

**Minnesota.** *Weber v. Clark*, 24 Minn. 354; *Nelichka v. Esterly*, 29 Minn. 146, 12 N. W. 457; *Kohn v. Frandel*, 29 Minn. 470, 13 N. W. 904; *Elliott v. Caldwell*, 43 Minn. 357, 9 L. R. A. 52, 45 N. W. 845; *Von Heyne v. Tompkins*, 89 Minn. 77, 5 L. R. A. (N. S.) 524, 93 N. W. 901; *Johnson v.*

abandonment of an entire contract for performing work and labor,<sup>2</sup> as a contract to construct a ditch,<sup>3</sup> or a contract to thresh an entire crop,<sup>4</sup> or a contract to repair a barge,<sup>5</sup> or the abandonment of a building or construction contract,<sup>6</sup> such as a contract to

**Fehsefeldt**, 106 Minn. 202, 20 L. R. A. (N.S.) 1069, 118 N. W. 797.

**Mississippi**. **Butt v. Williams** (Miss.), 15 So. 130; **Robinson v. De Long**, 118 Miss. 280, 79 So. 95.

**Missouri**. **Posey v. Garth**, 7 Mo. 94, 37 Am. Dec. 183.

**New York**. **Smith v. Brady**, 17 N. Y. 173, 72 Am. Dec. 442; **Bonesteel v. New York**, 22 N. Y. 162; **Van Clief v. Van Vechten**, 130 N. Y. 571, 20 N. E. 1017.

**North Carolina**. **Lane v. Phillips**, 51 N. Car. 455.

**Ohio**. **Ginther v. Shultz**, 40 O. S. 104.

**Oregon**. **Pippy v. Winslow**, 62 Or. 219, 125 Pac. 298 (obiter).

**Pennsylvania**. **Hartman v. Meighan**, 171 Pa. St. 46, 33 Atl. 123; **Harris v. Sharpless**, 202 Pa. St. 243, 58 L. R. A. 214, 51 Atl. 965.

**Washington**. **Mortimer v. Dirks**, 57 Wash. 402, 107 Pac. 184.

**Wisconsin**. **Diefenback v. Stark**, 56 Wis. 462, 14 N. W. 621; **Manning v. Ft. Atkinson School District**, 124 Wis. 84, 102 N. W. 356.

<sup>2</sup> **Alabama**. **Wright v. Turner**, 1 Stew. (Ala.) 29, 18 Am. Dec. 35; **Carbon Hill Coal Co. v. Cunningham**, 153 Ala. 573, 44 So. 1016.

**Illinois**. **Eldridge v. Rowe**, 7 Ill. 91, 43 Am. Dec. 41; **Badgley v. Heald**, 9 Ill. 64.

**Maine**. **Miller v. Goddard**, 34 Me. 102, 56 Am. Dec. 638.

**Massachusetts**. **Davis v. Maxwell**, 53 Mass. (12 Met.) 286; **Homer v. Shaw**, 177 Mass. 1, 58 N. E. 160; **Sipley v. Stickney**, 190 Mass. 43, 112 Am. St. Rep. 309, 5 L. R. A. (N.S.) 469, 5 Ann. Cas. 611, 76 N. E. 226; **Fрати v. Jannini**, 226 Mass. 430, 115 N. E. 746.

**Minnesota**. **Johnson v. Fehsefeldt**,

106 Minn. 202, 20 L. R. A. (N.S.) 1069, 118 N. W. 797.

**Mississippi**. **Timberlake v. Thayer**, 71 Miss. 279, 24 L. R. A. 231, 14 So. 446. **New York**. **Lantry v. Parks**, 8 Cow. (N. Y.) 63.

**Ohio**. **Larkin v. Buck**, 11 O. S. 561.

**Vermont**. **St. Albans Steamboat Co. v. Wilkins**, 8 Vt. 54.

**Wisconsin**. **Diefenback v. Stark**, 56 Wis. 462, 14 N. W. 621; **Kopplitz v. Powell**, 56 Wis. 671, 14 N. W. 831.

<sup>3</sup> **Steeple v. Newton**, 7 Or. 110, 33 Am. Rep. 705.

<sup>4</sup> **Johnson v. Fehsefeldt**, 106 Minn. 202, 20 L. R. A. (N.S.) 1069, 118 N. W. 797.

<sup>5</sup> **Ollinger & Bruce Dry Dock Co. v. Gibbony**, 202 Ala. 516, 81 So. 18.

<sup>6</sup> **England**. **Sumpter v. Hedges** [1898], 1 Q. B. 673; **Appleby v. Myers**, L. R. 2 C. P. 651.

**California**. **Laidlaw v. Marye**, 133 Cal. 170, 65 Pac. 391.

**Connecticut**. **O'Keefe v. St. Francis Church**, 59 Conn. 551, 22 Atl. 325.

**Massachusetts**. **Phelps v. Sheldon**, 30 Mass. (13 Pick.) 50, 23 Am. Dec. 659.

**Mississippi**. **Robinson v. De Long**, 118 Miss. 280, 79 So. 95.

**New Jersey**. **Bozarth v. Dudley**, 44 N. J. L. 304, 43 Am. Rep. 373; **Feeney v. Bardsley**, 66 N. J. L. 239, 49 Atl. 443.

**Ohio**. **Allen v. Curles**, 6 O. S. 505.

**Washington**. **Mortimer v. Dirks**, 57 Wash. 402, 107 Pac. 184.

**Wisconsin**. **Malban v. Birney**, 11 Wis. 107; **Moritz v. Larsen**, 70 Wis. 569, 36 N. W. 331; **Manning v. Ft. Atkinson School District**, 124 Wis. 84, 102 N. W. 356; **Whalen v. Eagle Lime Products Co.**, 155 Wis. 26, 143 N. W. 689.

construct a road,<sup>7</sup> or a contract to construct waterworks,<sup>8</sup> prevents the plaintiff from recovering the benefits which he has conferred upon the defendant by such partial performance, if such breach is wilful and unjustifiable. If a contractor wilfully abandons his contracts and leaves the building so unfinished and incomplete that the owner derives no benefit from the labor or materials,<sup>9</sup> or if he uses material of a quality inferior to that specified in the contract,<sup>10</sup> even if the building as constructed is a fair average job,<sup>11</sup> he has not performed substantially and can not recover. No recovery can be had by a contractor who erects a building for a boat-house and violates a provision of the contract that it is to be in line with a certain dock.<sup>12</sup> No recovery can be had by a sewer contractor who fraudulently uses material inferior to that specified in the contract.<sup>13</sup> No recovery for a reasonable compensation can be had for painting a house under a special contract where the work done was not a substantial performance of the contract.<sup>14</sup> If the seller makes wilful default in a contract to furnish a certain quantity of goods,<sup>15</sup> as all the granite needed for a certain building,<sup>16</sup> or one-half the crop of corn in a certain field,<sup>17</sup> he can not recover reasonable compensation for the goods which he has furnished. If A has commenced performance of a contract to support B for life, and breaks such contract wilfully, he can not recover the value of such performance.<sup>18</sup> A can not recover reasonable compensation for board which he has furnished under such contract,<sup>19</sup> nor can he recover money which he has paid under his contract for insurance on the life of B.<sup>20</sup> Wilful abandonment of a contract for support in consideration of a contract to devise

<sup>7</sup> *Cotey v. Greenlee County*, 20 Ariz. 150, 178 Pac. 25.

<sup>8</sup> *Vicksburg Water-Supply Co. v. Gorman*, 70 Miss. 360, 11 So. 680.

<sup>9</sup> *Marchant v. Hayes*, 117 Cal. 669, 49 Pac. 840.

<sup>10</sup> *Golden Gate Lumber Co. v. Sahr-bacher*, 105 Cal. 114, 38 Pac. 635.

<sup>11</sup> *Golden Gate Lumber Co. v. Sahr-bacher*, 105 Cal. 114, 38 Pac. 635.

<sup>12</sup> *Haulahan v. Clark*, 110 Wis. 43, 85 N. W. 676.

<sup>13</sup> *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790.

<sup>14</sup> *Ginther v. Shultz*, 40 O. S. 104.

<sup>15</sup> *Champlin v. Rowley*, 18 Wend. (N.

Y.) 187, [affirming, *Champlin v. Rowley*, 13 Wend. (N. Y.) 258]; *Witherow v. Witherow*, 16 Ohio 238; *Cohn v. Plumer*, 88 Wis. 622, 60 N. W. 1000.

<sup>16</sup> *Cohn v. Plumer*, 88 Wis. 622, 60 N. W. 1000.

<sup>17</sup> *Witherow v. Witherow*, 16 Ohio 238. (Delivery of part only.)

<sup>18</sup> *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221; *Andrews v. Andrews*, 122 N. Car. 352, 29 S. E. 351.

<sup>19</sup> *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

<sup>20</sup> *Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

certain realty, does not entitle the promisor, who had been in possession under such contract, to reimbursement for improvements.<sup>21</sup> A purchaser of realty, who fails to perform and who is deprived of possession by the vendor, can not recover the value of the improvements which he has made on the realty.<sup>22</sup>

One who has paid money in partial performance of a contract which he has refused to perform fully without legal excuse can not recover it.<sup>23</sup> A purchaser of goods who has paid the purchase price in advance can not recover money thus paid in case of his own default.<sup>24</sup> A purchaser of realty who refuses to perform when the vendor is ready and willing to perform can not recover a part of the purchase price which he has paid in advance.<sup>25</sup> A client who has paid an attorney's fee in advance and then insults the attorney in such a way as to justify him from withdrawing from the case, can not recover such fee.<sup>26</sup>

If A has sold goods to B, to be paid for in work and the like, A can not refuse to accept such work and recover the value of such goods.<sup>27</sup> If A has furnished services to B, to be paid for in goods, A can not recover the value of such services on his refusal to accept such goods.<sup>28</sup>

<sup>21</sup> *Andrews v. Andrews*, 122 N. Car. 352, 29 S. E. 351.

<sup>22</sup> *Hannan v. McNickle*, 82 Cal. 122; *Chabat v. Winter Park Co.*, 34 Fla. 258; *Guthrie v. Holt*, 68 Tenn. (9 Baxt.) 527; *First National Bank v. Jackson*, — Tex. —, 40 S. W. 833; *Contra: McCarty v. Moorer*, 50 Tex. 287.

<sup>23</sup> *United States. Hansbrough v. Peck*, 72 U. S. (5 Wall.) 497, 18 L. ed. 520.

*Illinois. Ptacek v. Pisa*, 231 Ill. 522, 14 L. R. A. (N.S.) 537, 83 N. E. 221.

*Iowa. Downey v. Riggs*, 102 Ia. 88, 70 N. W. 1091.

*Massachusetts. Leonard v. Morgan*, 72 Mass. (6 Gray) 412; *Hapgood v. Shaw*, 105 Mass. 276; *Raymond v. General Motorcycle Co.*, 230 Mass. 54, 119 N. E. 359 (obiter).

*Michigan. Genrow v. Flynn*, 166 Mich. 564, 35 L. R. A. (N.S.) 960, Ann. Cas. 1912D, 638, 131 N. W. 1115.

*Mississippi. Pierce v. Jarnagin*, 57 Miss. 107.

*Nebraska. Lexington Mill & Elevator Co. v. Neuens*, 42 Neb. 649, 60 N. W. 893.

*North Carolina. Dula v. Cowles*, 52 N. Car. (7 Jones L.) 290, 75 Am. Dec. 463.

*Washington. Neis v. O'Brien*, 12 Wash. 358, 50 Am. St. Rep. 894, 41 Pac. 59.

<sup>24</sup> *Raymond v. General Motorcycle Co.*, 230 Mass. 54, 119 N. E. 359 (obiter).

<sup>25</sup> *Ketchum v. Evertson*, 13 Johns. (N. Y.) 359, 7 Am. Dec. 384.

<sup>26</sup> *Genrow v. Flynn*, 166 Mich. 564, 35 L. R. A. (N.S.) 960, Ann. Cas. 1912D, 638, 131 N. W. 1115.

<sup>27</sup> *Wilt v. Ogden*, 13 Johns. (N. Y.) 56.

<sup>28</sup> *Mail & Times Publishing Co. v. Marks*, 125 Iowa 622, 101 N. W. 458.

**§ 3266. Plaintiff in default—Wilful breach—Quasi-contract allowed.** A number of the courts which regard the character of the breach and the intention of the party in default as immaterial, have used this principle to justify the result that, even under his wilful and unjustifiable abandonment of a contract, the party who is in default should be permitted to recover the reasonable value of the benefits which the party who is not in default has received under the contract, less the damages occasioned by such breach.<sup>1</sup> This is spoken of as “the more modern rule.”<sup>2</sup> Taking possession of a building which was not constructed in substantial compliance with the terms of the contract, has been held to make the owner liable for a reasonable compensation therefor.<sup>3</sup> Under a contract of employment, recovery can be had for a reasonable compensation for work thereunder, less damages arising from the breach, though the employe has abandoned the contract before the term of employment has expired.<sup>4</sup> If A has agreed to thresh all of B’s crop, and then refuses to complete performance after threshing a part

<sup>1</sup>England. *Oxendale v. Wetherell*, 9 Barn. & C. 386.

United States. *McDonough v. Evans Marble Co.*, 112 Fed. 634, 50 C. C. A. 403; *United States v. Molloy*, 144 Fed. 321, 75 C. C. A. 283.

Alabama. *Gibbony v. Wayne*, 141 Ala. 300, 37 So. 436; *Lowy v. Rosen-grant*, 196 Ala. 337, 71 So. 430.

Florida. *Stephens Lumber Co. v. Cates*, 62 Fla. 382, 56 So. 298.

Illinois. *Richards v. Shaw*, 67 Ill. 222.

Iowa. *Pixler v. Nichols*, 8 Ia. 106, 74 Am. Dec. 298; *McClay v. Hedge*, 18 Ia. 66; *Wolf v. Gerr*, 43 Ia. 339.

Kansas. *Duncan v. Baker*, 21 Kan. 99; *Barnwell v. Kempton*, 22 Kan. 314.

Kentucky. *Buckwalter v. Bradley* (Ky.), 104 S. W. 970, 31 Ky. Law Rep. 117; *Johnson v. Tackitt*, 173 Ky. 406, 191 S. W. 117.

Massachusetts. *Hayward v. Leonard*, 24 Mass. (7 Pick.) 181, 10 Am. Dec. 268; *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276.

Nebraska. *Parcell v. McComber*, 11

Neb. 209, 38 Am. Rep. 366, 35 Am. Rep. 476, 7 N. W. 529.

North Dakota. *Lynn v. Seby*, 29 N. D. 420, L. R. A. 1916E, 788, 151 N. W. 31.

Oklahoma. *Davidson v. Gaskill*, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

South Dakota. *Bedow v. Tonkin*, 5 S. D. 432, 59 N. W. 222.

Tennessee. *Porter v. Woods*, 22 Tenn. (3 Hump.) 56, 39 Am. Dec. 153.

Texas. *Hillyard v. Crabtree*, 11 Tex. 264, 62 Am. Dec. 475.

<sup>2</sup>*McDonough v. Evans Marble Co.*, 112 Fed. 634, 50 C. C. A. 403.

<sup>3</sup>*Davis v. Badders*, 95 Ala. 348, 10 So. 422; *Lyon County School District v. Lund*, 51 Kan. 731, 33 Pac. 595; *Wabaunsee County School District v. Boyer*, 46 Kan. 54, 26 Pac. 484.

<sup>4</sup>*Indiana. Ricks v. Yates*, 5 Ind. 115. *Iowa. Pixler v. Nichols*, 8 Ia. 106, 74 Am. Dec. 298.

Kansas. *Duncan v. Baker*, 21 Kan. 99.

Kentucky. *Johnson v. Tackitt*, 173 Ky. 406, 191 S. W. 117.

thereof, A may recover compensation for the work which he has done, less damages for his breach.<sup>5</sup> An employe who has been discharged for cause may recover reasonable compensation for services rendered under the contract.<sup>6</sup> One who has agreed to sell and deliver personalty and who has delivered only a part thereof, may recover the value of the part which he has delivered, less the damages caused by his failure to deliver the rest thereof.<sup>7</sup> A agreed to furnish twenty-three thousand feet of marble tiling. He furnished less than twenty thousand feet. It was held that he could recover for the amount furnished.<sup>8</sup> Recovery can be had for the reasonable value of cattle delivered under a contract, though the full amount agreed upon was not delivered.<sup>9</sup>

Where this principle is recognized and applied by the court to its fullest extent, it is hard to say what the effect of a contract is, at least as far as it involves the rights of the party who is not in default and who has performed all the covenants to be performed on his part. If the adversary party performs in full, payment in accordance with the terms of the contract is, of course, due. If

**Missouri.** *Lamb v. Brolaski*, 38 Mo. 51.

**Nebraska.** *Parcell v. McComber*, 11 Neb. 209, 38 Am. Rep. 366, 35 Am. Rep. 476, 7 N. W. 529.

**New Hampshire.** *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

**North Dakota.** *Lynn v. Seby*, 29 N. D. 420, L. R. A. 1916E, 788, 161 N. W. 31.

**Oklohoma.** *Davidson v. Gaskill*, 32 Okla. 40, 38 L. R. A. (N.S.) 692, 121 Pac. 649.

**South Dakota.** *Bedow v. Tonkin*, 5 S. D. 432, 59 N. W. 222.

**Texas.** *Riggs v. Horde*, 25 Tex. Supp. 456, 78 Am. Dec. 584. See *Britton v. Turner*, by Clarence D. Ashley, 24 Yale Law Journal 544.

<sup>5</sup> *Lynn v. Seby*, 29 N. D. 420, L. R. A. 1916E, 788, 151 N. W. 31.

<sup>6</sup> **Kentucky.** *Fuqua v. Massie*, 95 Ky. 387, 25 S. W. 875.

**Maine.** *Lawrence v. Gullifer*, 38 Me. 532.

**New Jersey.** *Kowalski v. McAdoo*, 93 N. J. L. 340, 107 Atl. 477.

**South Carolina.** *Byrd v. Boyd*, 4 McCord (S. Car.) 246, 17 Am. Dec. 740.

**Wisconsin.** *Hildebrand v. American Fine Art Co.*, 109 Wis. 171, 53 L. R. A. 826, 85 N. W. 268.

<sup>7</sup> **England.** *Oxendale v. Wetherell*, 9 Barn. & C. 386.

**United States.** *United States v. Molloy*, 144 Fed. 321, 75 C. C. A. 283.

**Alabama.** *Watson v. Kirby*, 112 Ala. 436, 20 So. 624; *Gibbony v. R. W. Wayne & Co.*, 141 Ala. 300, 37 So. 436; *Lowy v. Rosengrant*, 196 Ala. 337, 71 So. 439.

**Florida.** *Stephens Lumber Co. v. Cates*, 62 Fla. 382, 56 So. 298.

**Illinois.** *Richards v. Shaw*, 67 Ill. 222.

**Massachusetts.** *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276.

**Tennessee.** *Porter v. Woods*, 22 Tenn. (3 Hump.) 56, 39 Am. Dec. 153.

<sup>8</sup> *McDonough v. Evans Marble Co.*, 112 Fed. 634, 50 C. C. A. 403.

<sup>9</sup> *Saunders v. Short*, 86 Fed. 225, 30 C. C. A. 462.

the adversary party performs substantially, it may not be unreasonable to require payment in full, less the cost of performing the contract, in accordance with its terms.<sup>10</sup> Where, however, the adversary party has not even performed substantially, and where his default is due to his wilful and deliberate act, the party who is not in default is, nevertheless, required to make compensation for the partial performance of the contract, less, it may be, the damages caused by the breach. The party who is in default can thus, by his wilful act, change the entire nature of the obligation of the party who has performed, or who is ready to perform, in full; and can impose the duty upon him of paying for the performance which he did not agree to pay, and which in all probability he never would have agreed to pay.

**§ 3267. Recovery for benefits received or retained with knowledge of breach.** In many courts, special emphasis is laid on the fact that partial performance on the part of the plaintiff has conferred a benefit upon the defendant, for which the defendant should make compensation in some form. It is said that a party to a contract who knows that the other party has broken the contract, and who accepts benefits thereunder,<sup>1</sup> or who retains, after he knows of such breach, benefits which he received before he knew of such breach, but which he could restore to the party in default,<sup>2</sup> must account for at least a reasonable compensation for

<sup>10</sup> See §§ 2778 et seq.

<sup>1</sup> **Alabama.** *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325; *Montgomery County v. Pruett*, 175 Ala. 391, 57 So. 823; *Parker v. Law*, 194 Ala. 693, 69 So. 879.

**California.** *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523.

**Maryland.** *Walsh v. Jenvey*, 85 Md. 240, 36 Atl. 817, 38 Atl. 938; *Bluthenthal v. May Advertising Co.*, 127 Md. 277, 96 Atl. 434.

**Minnesota.** *Sykes v. St. Cloud*, 60 Minn. 442, 62 N. W. 613.

**Nebraska.** *West v. Van Pelt*, 34 Neb. 63, 51 N. W. 313.

**North Carolina.** *Simpson v. N. Carolina Central Ry. Co.*, 112 N. Car. 703, 16 S. E. 853.

**Virginia.** *Smith v. Packard*, 94 Va. 730, 27 S. E. 586.

**West Virginia.** *Empire Coal & Coke Co. v. Hull Coal & Coke Co.*, 51 W. Va. 474, 41 S. E. 917.

<sup>2</sup> **England.** *Oxendale v. Wetherell*, 9 Barn. & C. 386.

**Alabama.** *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658.

**Iowa.** *Jordan v. Hill*, 172 Ia. 414, 154 N. W. 579.

**Kansas.** *Duncan v. Baker*, 21 Kan. 99.

**Kentucky.** *Johnson v. Tackitt*, 173 Ky. 406, 191 S. W. 117; *White Star Coal Co. v. Pursifull*, 186 Ky. 697, 217 S. W. 1020.

**New Hampshire.** *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

such benefits. While they are usually discussed together as though they form but one case, there are really two distinct cases here. If a party to a contract knows that the other party has broken it or that he will be unable to perform, and with knowledge of such breach, continues to accept performance, such conduct is sometimes explained on the convenient though vague theory of waiver.<sup>3</sup> The party who accepts benefits under such circumstances may be held therefor, but it may be doubted whether his liability is in quasi-contract or not. While the question as to the nature of his liability is rarely presented for decision, it seems as though this is a liability under a genuine implied contract, which is made by the offer of performance after knowledge of the breach, and by acceptance of such performance with knowledge of such facts.<sup>4</sup>

**Oklahoma.** *Limerick v. Lee*, 17 Okla. 165, 87 Pac. 859.

**South Dakota.** *Ball v. Dolan*, 21 S. D. 619, 15 L. R. A. (N.S.) 272, 114 N. W. 998.

**Tennessee.** *Porter v. Woods*, 22 Tenn. (3 Hump.) 56, 39 Am. Dec. 153.

**Wisconsin.** *Taylor v. Williams*, 6 Wis. 363; *Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449, 49 L. R. A. 859, 82 N. W. 299.

<sup>3</sup> See §§ 3037 et seq.

<sup>4</sup> *Presbyterian Church v. Hoopes Co.*, 66 Md. 598; *Walsh v. Jenvey*, 85 Md. 240; *Orem v. Keelty*, 85 Md. 337; *Wagaman v. Nutt*, 88 Md. 265; *North Bros. & Strauss v. Mallory*, 94 Md. 305; *Bluthenthal v. May Advertising Co.*, 127 Md. 277, 96 Atl. 434.

"We take the principle to be, that a person entering into a contract, has a right to insist on the performance of it in all particulars, according to its meaning and spirit; but that if he chooses to waive any of the terms introduced for his own benefit, he has the power to do so. If he contracts for an article of a particular quality or style of workmanship, and he elects to accept in lieu of it one of another kind, he discharges the other party from the obligation of furnishing an

article which complies with the specifications of the contract, and he becomes bound by a new implied contract to pay for the article, which he has accepted, what it is reasonably worth. And so where there is a contract for work of a particular description, and he accepts work of another kind. But he is not obliged to accept anything else in place of that which he has contracted for; and if he does not waive his right, the other party to the contract can not recover against him without performing all the stipulations on his part. The question then in the present case, supposing that the work has not been done according to the contract, is whether the defendant has accepted it. The law on the subject of accepting work done on the land or property of another, has sometimes been declared with great severity against parties doing such work in a manner not conformable to the contracts which they have made. But these harsh judgments go beyond the requirements of justice, and are much modified by the benign and equitable construction of contracts which prevails in this State." *Bluthenthal v. May Advertising Co.*, 127 Md. 277, 96 Atl. 434.

While acceptance of benefits with the knowledge of the breach may be regarded as imposing a liability which arises on a genuine contract, the retention of benefits which were accepted before it was known that the contract would not be performed, and for which the party who accepted them would not expect to make compensation except in compliance with the terms of the contract, can be explained, if at all, only on the theory of quasi-contract, since there is evidently no genuine agreement between the parties to make compensation for the benefit thus conferred. Except in courts which allow recovery for benefits conferred, even in case of wilful breach,<sup>5</sup> and those which deny recovery to a plaintiff who is in default,<sup>6</sup> it is the retention of benefits which could be restored to the other party who has performed in part, rather than the original receipt of such benefits, which imposes the obligation in quasi-contract.<sup>7</sup> The ability to restore benefits received from partial performance of a contract would appear to depend in part on the nature of the subject-matter. Money which has been received in partial performance of a contract is the easiest of all to restore. Goods which have been delivered in partial performance of a contract of sale appears the next easiest. Work and labor, especially

<sup>5</sup> See § 3266.

<sup>6</sup> See § 3263.

<sup>7</sup> *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658.

"The contract was entire, and plaintiff, having failed to perform fully and substantially, could not, without more, recover on the contract, nor the value of the labor he expended in its partial performance. Any other rule would tend to encourage bad faith and lessen the obligation of contracts into which the parties must be presumed to enter with a full understanding of their necessary implications. But while no claim can be founded upon an express contract which has not been fully performed, nor will the mere fact that part performance has been beneficial be considered as sufficient to charge the party benefited on a quantum meruit, still, if the party who has a right to insist on the full performance of such a contract has voluntarily ac-

cepted the benefit of partial performance, the modern doctrine, based upon principles of equity and right, holds him liable to pay for the advantage he has thus voluntarily accepted. Liability in such a case is rested, not upon the original contract, but upon an implied agreement deducible from the delivery and acceptance of a valuable service or thing. The difficulty in cases of this character has been to determine how and by what circumstances a voluntary acceptance may be shown. Where the defendant can reject what has been performed without detriment to himself, he will be required to do so; but it would be requiring too much to compel him to abandon his own property because the plaintiff has incorporated his labor with it in a manner incompatible with the agreement." *Hartsell v. Turner*, 196 Ala. 299, 71 So. 658.

if expended upon the land or personal property of the party from whom compensation is sought, is perhaps the hardest to restore in specie.

**§ 3268. Recovery for benefits received or retained—Specific illustrations.** Under a contract for work and labor, an employe who is in default is allowed to recover reasonable compensation for the benefits which his performance has conferred, less damages, if any.<sup>1</sup> If A has agreed to paint signs for B, and B has assented to the method in which he is performing the contract, although not in compliance with the terms thereof, A may recover the reasonable value of such work.<sup>2</sup> One who has agreed to cut, bale and haul a certain quantity of hay, and who performs his contract as to part of such hay only, may recover reasonable compensation for the value of such performance, less the damages, if any, which he has caused by his breach.<sup>3</sup> A broker who is employed to sell land and who effects an exchange thereof, may recover reasonable compensation for such services, if his principal accepts the benefit thereof.<sup>4</sup> Accepting work done in grading and constructing streets and sidewalks after failure of the contractor to complete the work within the time agreed upon, creates a liability to pay a reasonable compensation for the work done.<sup>5</sup> Accepting books from one who has agreed to clean and bind them for a certain price, makes the owner so receiving them liable for a reasonable compensation if the contract has not been performed fully by the adversary party.<sup>6</sup> In such an action the adversary party can not recover liquidated damages under a clause in the original contract providing therefor.<sup>7</sup>

<sup>1</sup> **Kansas.** *Duncan v. Baker*, 21 Kan. 99.

**Kentucky.** *Johnson v. Tackitt*, 173 Ky. 406, 191 S. W. 117.

**Maryland.** *Bluthenthal v. May Advertising Co.*, 127 Md. 277, 96 Atl. 434.

**New Hampshire.** *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713.

**Oklahoma.** *Limerick v. Lee*, 17 Okla. 165, 87 Pac. 859.

**South Dakota.** *Ball v. Dolan*, 21 S. D. 619, 15 L. R. A. (N.S.) 272, 114 N. W. 998.

<sup>2</sup> *Bluthenthal v. May Advertising Co.*, 127 Md. 277, 96 Atl. 434. (A case of waiver or of genuine implied contract.)

<sup>3</sup> *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069.

<sup>4</sup> *Jordan v. Hill*, 172 Ia. 414, 154 N. W. 579.

<sup>5</sup> *Orem v. Keelty*, 85 Md. 337, 36 Atl. 1030.

<sup>6</sup> *Walsh v. Jenvey*, 85 Md. 240, 36 Atl. 817, 38 Atl. 938.

<sup>7</sup> *Orem v. Keelty*, 85 Md. 337, 36 Atl. 1030.

The acceptance of a building is said to make the owner liable for reasonable compensation therefor.<sup>9</sup> In cases of this sort the contractor may recover without the contractor's certificate.<sup>9</sup> The acceptance and use of a building of which a considerable portion was completed, though with inferior materials and though the owner was obliged to complete it himself, is said to be an admission that the work was of some value and that the builder was entitled to some compensation.<sup>10</sup> What else the owner could have done if he had wished to avoid liability is not suggested. He might have abandoned his realty, it is true, or he might have employed another contractor to remove the house at a considerable expense to the owner and with more or less economic waste. Unless he acts in some such way as this, he seems bound to pay a reasonable compensation for work and materials, under this theory, although such amount might exceed what the contractor could have recovered under the general doctrine of substantial performance,<sup>11</sup> if he had finished the building, namely, the contract price, less the cost of completing it according to the contract, or less the difference between its value if completed according to the contract and its value as it is. Voluntary acceptance of an electric light plant,<sup>12</sup> or of a job of electric wiring,<sup>13</sup> or a water-works,<sup>14</sup> or a heating plant,<sup>15</sup> or a well that is only partially drilled,<sup>16</sup> which does not substantially comply with the contract, renders the party who thus accepts it liable for a reasonable compensation therefor.

Accepting and retaining goods which are delivered under a contract, but which do not amount to a full performance thereof,

<sup>9</sup> Alabama. *Catanzano v. Jackson*, 198 Ala. 302, 73 So. 510.

Kansas. *Lyon County School District v. Lund*, 51 Kan. 731, 33 Pac. 595.

Kentucky. *White Star Coal Co. v. Pursifull*, 186 Ky. 697, 217 S. W. 1020.

North Carolina. *Dixon v. Gravely*, 117 N. Car. 84, 23 S. E. 39.

Wisconsin. *Taylor v. Williams*, 6 Wis. 363.

<sup>9</sup> *Catanzano v. Jackson*, 198 Ala. 302, 73 So. 510.

<sup>10</sup> *Taylor v. Williams*, 6 Wis. 363.

<sup>11</sup> See § 2779.

<sup>12</sup> *Florence Gas, Electric Light & Power Co. v. Hanby*, 101 Ala. 15, 13 So. 343.

<sup>13</sup> *Smith v. Packard*, 94 Va. 730, 27 S. E. 586.

<sup>14</sup> *Sykes v. St. Cloud*, 60 Minn. 442, 62 N. W. 613; *Sherman v. Connor*, 88 Tex. 35, 29 S. W. 1053.

<sup>15</sup> *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325.

<sup>16</sup> *Parker v. Law*, 194 Ala. 693, 69 So. 879; *Hartsell v. Turner*, 196 Ala. 209, 71 So. 658.

renders the purchaser liable for the reasonable value thereof.<sup>17</sup> Accepting and retaining machines not built in compliance with the contract makes the vendee liable for their value as chattels.<sup>18</sup>

**§ 3269. Recovery for benefits not recognized where restoration in specie not practicable.** While in many of the foregoing cases the owner of property, either real or personal, was compelled to pay for the value of work and labor thereon, although he could not have refused to retain the benefits of such work and labor and without renouncing his interest in the property, there are a number of cases in which the courts seem to be willing to recognize quasi-contractual liability, arising out of the retention of benefits which might be restored but in which they do not recognize a quasi-contractual obligation where the restoration of the benefit in specie is not practicable.<sup>1</sup> It has been held that, as the owner of land on which a house has been built, has no real choice in accepting or rejecting it, he is not liable to pay a reasonable compensation therefor if it does not comply with the contract at least substantially.<sup>2</sup> If a subscription is made to a board of trade building, payable if the building is completed by a subsequent time, no recovery can be had if the building is not completed until a later time, even if the value of the subscriber's property is increased

<sup>17</sup> *Oxendale v. Wetherell*, 9 Barn. & C. 386 (less amount delivered than contracted for); *Watson v. Kirby*, 112 Ala. 436, 20 So. 624 (less amount delivered than contracted for); *Barrett v. Raleigh Coke & Coal Co.*, 51 W. Va. 416, 90 Am. St. Rep. 802, 41 S. E. 220.

<sup>18</sup> *Trowbridge v. Barrett*, 30 Wis. 661; *Thompson Mfg. Co. v. Gunder-son*, 106 Wis. 449, 49 L. R. A. 859, 82 N. W. 299.

<sup>1</sup> *England. Sumpter v. Hedges* [1898], 1 Q. B. 673.

*United States. Dermott v. Jones*, 64 U. S. (23 How.) 220, 16 L. ed. 442; *Cincinnati, Sandusky & Cleveland Ry. Co. v. Bensley*, 51 Fed. 738, 19 L. R. A. 796, 2 C. C. A. 480.

*Alabama. Ollinger & Bruce Dry Dock Co. v. Gibbony*, 202 Ala. 516, 81 So. 18.

*Minnesota. Elliott v. Caldwell*, 43 Minn. 357, 9 L. R. A. 52, 45 N. W. 845; *Johnson v. Fehsefeldt*, 106 Minn. 202, 20 L. R. A. (N.S.) 1069, 118 N. W. 797.

*Wisconsin. Malbon v. Birney*, 11 Wis. 107; *Moritz v. Larsen*, 70 Wis. 569, 36 N. W. 331; *Williams v. Thrall*, 101 Wis. 337, 76 N. W. 599; *Manning v. School District*, 124 Wis. 84, 102 N. W. 356.

See, however, *Taylor v. Williams*, 6 Wis. 363.

<sup>2</sup> *Sumpter v. Hedges* [1898], 1 Q. B. 673; *Dermott v. Jones*, 64 U. S. (23 How.) 220, 16 L. ed. 442; *Elliott v. Caldwell*, 43 Minn. 357, 9 L. R. A. 52, 45 N. W. 845; *Malbon v. Birney*, 11 Wis. 107; *Moritz v. Larsen*, 70 Wis. 569, 36 N. W. 331; *Manning v. School District*, 124 Wis. 84, 102 N. W. 356.

See, however, *Taylor v. Williams*, 6 Wis. 363.

thereby.<sup>3</sup> One who has done work on the personal property of another and who refuses to complete the performance of such contract can not recover reasonable compensation for the work which he has thus done.<sup>4</sup>

**§ 3270. Recovery for benefits not recognized where restoration in specie practicable.** The courts which deny recovery in quasi-contract to a defendant who is in default, refuse to permit compensation for benefits which were received, without knowledge of the breach of the contract, even if the party who has received such benefits could make compensation therefor, or could, in some cases, return the benefits in specie if he wished.<sup>1</sup> If delivery of a specified quantity of goods is to be made in installments, and, after partial performance, the seller refuses to deliver the full amount stipulated in the contract, it has been held that no recovery in quantum meruit can be had for the amount delivered.<sup>2</sup> If A has sold and delivered goods to B, to be paid for in work and labor, and A refuses to permit B to perform such work and labor, A can not recover the value of such goods.<sup>3</sup> Another example of the application of the principle last mentioned is found where money has been paid under a contract by one who then refuses full performance, and his right to recover such money is denied.<sup>4</sup>

**§ 3271. Amount of recovery—General principles.** After it has been decided that plaintiff may ignore the contract and recover on the theory of quasi-contract, the question of the amount of such recovery is presented for adjudication; and a determination of this question frequently requires a re-examination of the principles which underlie the theory of recovery in quasi-contract. It will be noted that, in many of the cases, the courts profess to enforce a right to recover reasonable compensation, but, in reality, they are attempting to apply a special rule of damages, thus basing the relief upon the contract itself. If the plaintiff has per-

<sup>3</sup> *Cincinnati, Sandusky & Cleveland Ry. Co. v. Bensley*, 51 Fed. 738, 19 L. R. A. 796, 2 C. C. A. 480.

<sup>4</sup> *Ollinger & Bruce Dry Dock Co. v. Gibbon*, 202 Ala. 516, 81 So. 18; *Johnson v. Fehsefeldt*, 106 Minn. 202, 20 L. R. A. (N.S.) 1069, 118 N. W. 797.

<sup>1</sup> *Witherow v. Witherow*, 16 Ohio 238; *Wilt v. Ogden*, 13 Johns. (N. Y.)

56; *Jennings v. Lyons*, 39 Wis. 553; *Williams v. Thrall*, 101 Wis. 337, 76 N. W. 599.

<sup>2</sup> *Witherow v. Witherow*, 16 Ohio 238.

<sup>3</sup> *Wilt v. Ogden*, 13 Johns. (N. Y.) 56.

<sup>4</sup> See § 3265.

formed in full, he may bring an action in general assumpsit, and he is not restricted to special assumpsit, at least if compensation is, by the terms of the contract, to be made in money.<sup>1</sup> This, however, is not the recognition of a right in quasi-contract. It is merely a rule of pleading which permits the plaintiff to recover on the contract without setting it up in full. The measure of the plaintiff's recovery is, therefore, the contract price, without regard to the reasonable value of the services performed thereunder.<sup>2</sup>

If the contract has been set aside by mutual consent, it has been held that the right of recovery is limited and determined by the contract, and must be a pro rata part of the contract price,<sup>3</sup> at least if the performance is continuous and of substantially uniform value, or if the contract has fixed the value of each stage of performance.

If the contract has been discharged by breach on the part of one of the parties, it would seem that the question of the right to recover reasonable compensation, where the amount thereof would exceed the contract rate, should depend on the question of which party committed the breach which discharged the contract. If the defendant committed the breach which discharged the contract it would seem that the plaintiff ought to be permitted to elect between the recovery of damages for such breach and the recovery of a reasonable compensation for what he has done under the contract, without regard to the rate of compensation fixed by the contract, assuming that the right of recovery in quasi-contract is to be recognized at all. If, on the other hand, the plaintiff is the party whose breach has discharged the contract, good reasons appear for denying the right of recovery in quasi-contract at all; and if he is allowed to recover, he ought not to be permitted to increase the amount of his recovery by resorting to quasi-contract, in case the reasonable value of his performance exceeds the contract rate. Probably the maximum of compensation which would be allowed to him would be either the pro rata amount of the contract price, or reasonable compensation for the value of his performance, or the extent to which the estate of the defendant has been increased in value by the plaintiff's performance, whichever amount might prove the lower; and in either case, the amount of damage which

<sup>1</sup> See §§ 3243 et seq.

<sup>2</sup> See §§ 3243 et seq.

<sup>3</sup> *Younberg v. Lambertson*, 91 Minn. 199, 97 N. W. 571; *Yazoo & Mississippi*

*Valley Ry. Co. v. Monroe*, 110 Miss. 550, 70 So. 689; *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564.

his breach has occasioned should be deducted from the compensation thus extended. The courts, however, have not always distinguished between the cases in which the defendant was in default and those in which the plaintiff was in default; and they have frequently confused the theory of recovery in quasi-contract with rules as to the measure of damages.<sup>4</sup>

**§ 3272. Amount of recovery—Defendant in default.** If the plaintiff is attempting to enforce a right of action in quasi-contract, based on the discharge of the contract by reason of the default of defendant, the amount of his recovery depends, in part, on whether his performance has consisted in the payment of money or in the furnishing of something else of value. If the plaintiff has paid money under such contract, he may recover the amount of such payment.<sup>1</sup> In jurisdictions in which partial performance by the defendant does not prevent the plaintiff from recovering in quasi-contract, and in which the courts do not wish to forfeit the value of the defendant's performance, this rule is qualified by permitting the plaintiff to recover the amount of his payment, less the value of what he has received under the contract.<sup>2</sup> If the plaintiff has enjoyed the use of property under a contract, the value of such use is to be deducted from the amount which he has paid in thereunder.<sup>3</sup> If a contractor has been paid in advance under a building

<sup>4</sup> See §§ 3208 and 3238.

<sup>1</sup> England. *Towers v. Barrett*, 1 T. R. 133.

United States. *Nash v. Towne*, 72 U. S. (5 Wall.) 689, 18 L. ed. 527.

Arkansas. *Hixson v. Cook*, 130 Ark. 401, 197 S. W. 698.

Connecticut. *Manning v. Chesky*, 90 Conn. 647, 98 Atl. 357.

Idaho. *Milner v. Pelham*, 30 Ida. 594, 166 Pac. 574.

Massachusetts. *Martin v. Cunningham*, 231 Mass. 280, 121 N. E. 21.

New Jersey. *Trenton Public School v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373.

New York. *Brokaw v. Duffy*, 165 N. Y. 391, 59 N. E. 196.

Oregon. *Woodard v. Willamette Valley Irrigated Land Co.*, 89 Or. 10, 173 Pac. 262.

Pennsylvania. *Ohio Valley Trust Co. v. Allison*, 243 Pa. St. 201, 89 Atl.

1132; *Rugg v. Midland Realty Co.*, 261 Pa. St. 453, 104 Atl. 685.

West Virginia. *Hix v. Scott*, 80 W. Va. 727, 94 S. E. 399.

<sup>2</sup> California. *Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004.

Illinois. *Collins v. Thayer*, 74 Ill. 138.

Michigan. *Todd v. McLaughlin*, 125 Mich. 268, 84 N. W. 146.

North Carolina. *Keel v. East Carolina Stone & Construction Co.*, 143 N. Car. 429, 55 S. E. 826.

Wisconsin. *Cook v. Berlin Woolen Mills Co.*, 56 Wis. 643, 14 N. W. 808.

<sup>3</sup> *Bray v. Lowery*, 163 Cal. 256, 124 Pac. 1004; *Collins v. Thayer*, 74 Ill. 138; *Todd v. McLaughlin*, 125 Mich. 268, 84 N. W. 146; *Cook v. Berlin Woolen Mills Co.*, 56 Wis. 643, 14 N. W. 808.

Contra, *Barnett v. Brown*, 140 Ark. 636, 216 S. W. 1038.

or construction contract, the owner may recover the amount of such payment, on default of the contractor, less the value of the performance on the part of the contractor.<sup>4</sup>

If the plaintiff has performed in part by furnishing something of value other than money, and the contract is discharged by the breach of the defendant, it is held in a number of jurisdictions that the plaintiff may recover the reasonable value of his performance without regard to the contract rate, if he wishes to base his recovery upon such theory.<sup>5</sup> This is in accordance with the general theory of quasi-contract; and it is difficult to see why a defendant who has discharged the contract by his own default should be permitted to invoke its protection for the purpose of limiting the amount of plaintiff's recovery, unless the courts are ready to deny the right of recovery on the theory of quasi-contract, even where the defendant is in default, and unless they are ready to restrict the plaintiff to a right of action on the contract for damages.

A number of courts, however, have felt that the plaintiff ought not to be allowed to recover more for his performance, even where he is discharged by default of the defendant, than a pro rata amount of what he would have received under the contract, at the contract rate, plus the profit, if any, or other damages, which he has sustained by being prevented from performing the rest of such contract.<sup>6</sup> This is really a special rule of damages and not a rule of quasi-contract at all; and in some of the cases in which this rule is laid down it is referred to as a measure of damages.<sup>7</sup> Under this theory the plaintiff has been allowed to recover the cost of

<sup>4</sup> *Keel v. East Carolina Stone & Construction Co.*, 143 N. Car. 429, 55 S. E. 826.

<sup>5</sup> *England. Lodder v. Slowey* [1904], A. C. 442.

*United States. Knotts v. Clark Construction Co.*, 249 Fed. 181.

*California. Adams v. Burbank*, 103 Cal. 646, 37 Pac. 640.

*Connecticut. Valente v. Weinberg*, 80 Conn. 134, 13 L. R. A. (N.S.) 448, 67 Atl. 369.

*Missouri. Johnston v. Star Bucket Pump Co.*, 274 Mo. 414, 202 S. W. 1143.

*New York. Clark v. New York*, 4 N. Y. 338, 53 Am. Dec. 379.

*Vermont. Chamberlin v. Scott*, 33 Vt. 80.

*Wisconsin. George M. Newhall Engineering Co. v. Daly*, 116 Wis. 256, 93 N. W. 12.

<sup>6</sup> *Farnum v. Kennebec Water District*, 170 Fed. 173; *Dobbins v. Higgins*, 78 Ill. 440; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Kehoe v. Rutherford*, 56 N. J. L. 23, 27 Atl. 912; *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548.

<sup>7</sup> *Kehoe v. Rutherford*, 56 N. J. L. 23, 27 Atl. 912.

See § 3215.

preparation for performance, even if such cost does not enure to the benefit of the defendant.<sup>8</sup>

If the value of a part of the performance is greater than that of the rest of the performance, and by the contract, for purposes of convenience, a uniform rate of compensation has been fixed, it is said that the plaintiff may recover the actual value of his performance, if otherwise he would be the loser by the defendant's breach.<sup>9</sup> This question usually arises where the plaintiff has performed the more expensive part of his performance, and the defendant has discharged the contract by his breach and insists upon paying a pro rata amount of the contract price for such performance. In some of these jurisdictions it is said that the plaintiff can not recover in quasi-contract if he has performed the less expensive portion of the contract, and if the entire costs of performance would exceed the contract rate of compensation.<sup>10</sup> In Ohio the rule is that if A prevents B from performing, and further performance under the contract would have resulted in loss to B, B, since he could recover only nominal damages, can not recover the reasonable value of what he has done under the contract,<sup>11</sup> while if further performance would have resulted in gain to B, B may either sue for damages,<sup>12</sup> or may recover the reasonable value of what he has done under the contract.<sup>13</sup> It is true that, in cases of this sort, the plaintiff gains by the defendant's breach; but while this may be a sufficient answer if the plaintiff elects to bring an action to recover damages by reason of such breach,<sup>14</sup> it does not seem to be a sufficient answer in an action on the theory of quasi-contract, unless, in this case too, quasi-contract is to be regarded as merely a special rule for the measure of damages.

**§ 3273. Amount of recovery—Plaintiff in default.** If the party who is in default, and whose breach has operated as a discharge of the contract, attempts to take advantage of such discharge and to recover reasonable compensation for the value of his performance, he is attempting to take advantage of his own wrongful act;

<sup>8</sup> *Rogers v. Becker-Brainard Machine Co.*, 211 Mass. 559, 98 N. E. 592.

<sup>9</sup> *Davidson v. Laughlin*, 138 Cal. 320, 5 L. R. A. (N.S.) 579, 71 Pac. 345; *Clark v. Manchester*, 51 N. H. 594; *Wellston Coal Co. v. Franklin Paper Co.*, 57 O. S. 182, 48 N. E. 888.

<sup>10</sup> *Doolittle v. McCullough*, 12 O. S. 360.

<sup>11</sup> *Doolittle v. McCullough*, 12 O. S. 360.

<sup>12</sup> See ch. LXXXVII.

<sup>13</sup> *Wellston Coal Co. v. Franklin Paper Co.*, 57 O. S. 182, 48 N. E. 888.

<sup>14</sup> See § 3177.

and a number of courts have held that he can not be permitted to recover in quasi-contract at all.<sup>1</sup>

Where the plaintiff is allowed to recover under such circumstances, the question of the amount of his recovery presents little difficulty if the performance for which the plaintiff seeks to recover, is the payment of money. In such a case the amount of the plaintiff's recovery is the amount of money paid in by him, less the damages, if any, to the defendant, caused by the plaintiff's default.<sup>2</sup> If the performance for which the plaintiff seeks to recover has consisted in something other than the payment of money, such as the delivery of goods, the performance of work and labor, and the like, a difficult question arises wherever there is any substantial difference between the contract rate and the reasonable value of such performance. Much of the confusion in the abstract method of stating the rule, is probably due to the fact that in most of the cases there is but little difference between the contract rate and the reasonable value of such performance. In a number of cases it is said that the amount which the plaintiff is entitled to recover is the proportionate part of the contract price, less the damages, if any, caused by plaintiff's breach.<sup>3</sup> This result, though inconsistent with the theory of quasi-contract, is justified on the theory that the parties had made a reasonable contract, and that the contract, as far as it can be traced, is decisive

<sup>1</sup> See §§ 3261 et seq.

<sup>2</sup> *Sabas v. Gregory*, 91 Conn. 26, 98 Atl. 203; *Lytle v. Scottish-American Mtge. Co.*, 122 Ga. 458, 50 S. E. 402 (under statute forbidding forfeiture); *Waters v. Pearson*, 163 Ia. 391, 144 N. W. 1026.

<sup>3</sup> *England. Oxendale v. Wetherell*, 9 Darn. & C. 386.

*United States. Florida Ry. Co. v. Smith*, 88 U. S. (21 Wall.) 255, 22 L. ed. 513.

*California. Jones & Laughlin Steel Co. v. Abner Doble Co.*, 162 Cal. 497, 123 Pac. 290.

*Illinois. Richards v. Shaw*, 67 Ill. 222.

*Kentucky. Sullivan v. Sullivan*, 122

*Ky.* 707, 7 L. R. A. (N.S.) 156, 13 Ann. Cas. 163, 92 S. W. 966.

*Maine. Viles v. Kennebec Lumber Co.*, 118 Me. 148, 106 Atl. 431.

*Massachusetts. Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455.

*Michigan. Germain v. Stanton Union School District*, 158 Mich. 214, 122 N. W. 524, 123 N. W. 798.

*Nebraska. McMillan v. Malloy*, 10 Neb. 228, 35 Am. Rep. 471, 4 N. W. 1004.

*Oklahoma. Eckles v. Luce*, — Okla. —, 173 Pac. 219.

*Wisconsin. Bishop v. Price*, 24 Wis. 490; *Hildebrand v. American Fine Art Co.*, 109 Wis. 171, 53 L. R. A. 826, 85 N. W. 268.

as to the reasonable value of the work.<sup>4</sup> The amount of recovery, therefore, in those cases, where the original contract has not been entirely abandoned, is the contract price, less whatever damage has been caused by failure to comply with the contract exactly.<sup>5</sup> This is the same amount of recovery as is allowed in cases of substantial performance.<sup>6</sup> The application of the principles discussed in this section, therefore, results in giving the same amount of recovery in case of material deviation from the contract as in cases of substantial performance, and makes the differences between them chiefly one of pleading—a difference which may easily vanish under the code of civil procedure. As a result we find that the rule for the amount of recovery in quasi-contract is spoken of as if it were a measure of damages.<sup>7</sup>

In other cases it is frequently said that the plaintiff who is in default may recover reasonable compensation for the value of his performance, less damages which his default has occasioned.<sup>8</sup> If work is to be done to the satisfaction of the owner's agent, it is held in some jurisdictions that in case of substantial performance the contractor can recover on quantum meruit if such agent withholds his approval.<sup>9</sup> It is said that plaintiff may recover the value of the performance, not to exceed the contract price, less damages, which consist of the difference between the value of the performance according to contract and the contract price.<sup>10</sup> As it is some-

<sup>4</sup> *Dermott v. Jones*, 69 U. S. (2 Wall.) 1, 17 L. ed. 762; *Chicago v. Sexton*, 115 Ill. 230, 2 N. E. 263; *Hayward v. Leonard*, 24 Mass. (7 Pick.) 181, 19 Am. Dec. 268.

<sup>5</sup> *Alabama*. *Walstrom v. Oliver-Watts Construction Co.*, 161 Ala. 608, 50 So. 46; *Catanzano v. Jackson*, 198 Ala. 302, 73 So. 510.

*Arkansas*. *Selig v. Botts*, 128 Ark. 167, 193 S. W. 534.

*Kentucky*. *Escott v. White*, 73 Ky. (10 Bush.) 169.

*Massachusetts*. *Hayward v. Leonard*, 24 Mass. (7 Pick.) 181, 19 Am. Dec. 268.

*Oregon*. *Steeple v. Newton*, 7 Or. 110, 33 Am. Rep. 705.

*Pennsylvania*. *Gallagher v. Sharpless*, 134 Pa. St. 134, 19 Atl. 491.

*Wisconsin*. *Trowbridge v. Barrett*, 30 Wis. 661.

<sup>6</sup> See §§ 2779 et seq.

<sup>7</sup> *Foeller v. Heintz*, 137 Wis. 169, 118 N. W. 543.

<sup>8</sup> *Hayward v. Leonard*, 24 Mass. (7 Pick.) 181, 19 Am. Dec. 268; *Walker v. Orange*, 82 Mass. (16 Gray) 193; *Cardell v. Bridge*, 91 Mass. (9 All.) 355; *Powell v. Howard*, 109 Mass. 192; *Cullen v. Sears*, 112 Mass. 299; *White v. McLaren*, 151 Mass. 553, 24 N. E. 911; *McCue v. Whitwell*, 156 Mass. 205, 30 N. E. 1134; *Pierson v. Smith*, — Mich. —, 178 N. W. 659; *Lynn v. Seby*, 29 N. D. 420, L. R. A. 1916E, 788, 151 N. W. 31; *Woodford v. Kelley*, 18 S. D. 615, 101 N. W. 1069.

<sup>9</sup> *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650.

<sup>10</sup> *Pierson v. Smith*, — Mich. —, 178 N. W. 659.

times said that the reasonable value of plaintiff's performance is to be ascertained by deducting from the contract price the damage which is caused by his failure to perform literally,<sup>11</sup> it appears that many of the courts give substantially the same relief whether they speak of basing the amount of recovery on the contract price or whether they speak of giving reasonable compensation for the value of plaintiff's performance.

If the contract rate is less than the market price, the plaintiff, who is in default, will not be permitted to transfer to himself, by his breach of the contract, the profit which the defendant, who is not in default, would have obtained if the contract had been performed. In cases of this sort the contract rate is the maximum limit of the plaintiff's recovery.<sup>12</sup>

In some cases it has been suggested that the measure of compensation should be the value to the defendant of the performance on the part of the plaintiff.<sup>13</sup> If A has agreed to pump out B's cofferdam, and A does not furnish a pumping outfit of a size sufficient to perform the contract, he can not recover the contract rate;<sup>14</sup> but it is said that he can recover the value of such performance to B.<sup>15</sup> If a contractor constructs a building in a manner substantially different from that contemplated in the contract, it is said that the measure of his recovery is the amount which the building adds to the value of the land, and not the reasonable value of work and materials, less the damages which are shown to have followed from such breach.<sup>16</sup> In this case it is possible that even this measure of recovery imposed an unfair burden on the property owner, forcing him to abandon his land and to sell it to be used for some other purpose, or to rebuild at his own expense; since it appeared that the building, as constructed, whether through the fault of the contractor or not, could not be used for the purpose for which it was designed.<sup>17</sup>

<sup>11</sup> *Norwood v. Lathrop*, 178 Mass. 208, 59 N. E. 650.

<sup>12</sup> *McKinney v. Springer*, 3 Ind. 59, 54 Am. Dec. 470; *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455; *Horton v. Emerson*, 30 N. D. 258, 152 N. W. 529; *Bishop v. Price*, 24 Wis. 480.

<sup>13</sup> *Taft v. Montague*, 14 Mass. 282; *Gillis v. Cobe*, 177 Mass. 584, 59 N. E.

455; *Parkersburg & Marietta Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

<sup>14</sup> *Parkersburg & Marietta Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

<sup>15</sup> *Parkersburg & Marietta Sand Co. v. Smith*, 76 W. Va. 246, 85 S. E. 516.

<sup>16</sup> *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455.

<sup>17</sup> *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455.

A rule which seems more nearly adapted to doing justice in cases of this sort is that the contractor can recover the reasonable value of the building at the time that it was accepted by the property owner, not to exceed the sum of the contract price and the cost of extras, less the cost of completing it in accordance with the terms of the contract.<sup>18</sup> If a plaintiff in default is to be permitted to recover at all, he should not be permitted to make use of his own breach to increase the amount of his recovery, on the one hand; and, on the other hand, he should not be permitted to recover at the contract rate, if advantageous to himself, since he has not performed. If the party in default is to be allowed to recover at all, it is probably better to say that his recovery is to be limited to the one of these four measures of recovery which may prove the lowest in the particular case; the contract price, or a pro rata thereof, less damages due to the breach; the contract price, less the cost of performing the contract literally; the reasonable value of materials furnished, work and labor, and the like; or the actual enrichment of the property or estate of the party who is not in default. Probably the first and the second measures of these recoveries are substantially the same, although in specific cases they might give slightly different results.

Back of the difficulty of determining the measure of recovery in cases of this sort, is the problem whether plaintiff's right to recover in cases in which he is in default is contractual or quasi-contractual. Where the plaintiff is allowed to recover because of the fact that he has performed in part without any reference to defendant's acceptance or voluntary retention of benefits, plaintiff's right is quasi-contractual in character.<sup>19</sup> If the basis of defendant's liability is the fact that he has voluntarily accepted benefits with knowledge of plaintiff's breach, or that he has voluntarily retained benefits with knowledge of plaintiff's breach, plaintiff's right of action is much more like a genuine implied contract. Even if the plaintiff's right of action is explained in the theory of a genuine agreement, the same question, however, arises as to the actual intention of the parties as to the measure of compensation.

<sup>18</sup> *Eaton v. Gladwell*, 121 Mich. 444, 80 N. W. 292; *Germain v. Stanton*, Union School District, 158 Mich. 214, 122 N. W. 524, 123 N. W. 798.

<sup>19</sup> See §§ 31, 1493 et seq., and 3236 et seq.

## CHAPTER LXXXIX

### SPECIFIC PERFORMANCE

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### I

#### HISTORY OF SPECIFIC PERFORMANCE

§ 3274. In the king's courts—Early development. By the time that the common law had taken on its so-called classic form, the theory which underlay its remedies for breach of contract was that compensation in money must be given, so that the party who is not in default would be placed in the position which he would have had if the contract had been performed, as nearly as money would place him;<sup>1</sup> but that he could not be compelled to perform his obligation specifically. This theory of relief was at one time carried back to an early period by the historians of the common law; and we were told that the common-law theory had always been that of compensating and not of specific performance. This, however, was very far from a correct statement of the facts. For a considerable period in the early development of the common law there was no means by which damages for breach of contract could be estimated; and except in an action for the recovery of a

<sup>1</sup> See ch. LXXXVII.

liquidated sum of money, such as the action of debt, compensation for breach of contract was impracticable.<sup>2</sup> Specific relief was not affected by the lack of machinery for determining the amount of damages; and it was frequently given by the king's courts,<sup>3</sup> even before the action of covenant was recognized as a distinct form of action.<sup>4</sup> After the action of covenant appeared it was often used as a means of giving what was in effect specific performance.<sup>5</sup> At a time when the owner of a term of years was not looked upon as having an estate in the land, but only a right under contract, he could recover the land itself in an action at law on the covenant.<sup>6</sup> A feoffor in case of breach of his covenant of warranty is adjudged to give to the feoffee lands of equal value, and not the value thereof in money.<sup>7</sup> A covenant by a lord to acquit his tenant from a claim for suit of court was enforced specifically by the king's courts,<sup>8</sup> apparently by the remedy of distraint.

The most conspicuous example of this original theory of the common law is the fine as a conveyance of realty. This became so thoroughly stereotyped as a fictitious conveyance that we are in danger of overlooking its original significance. An action was brought on an executory covenant to convey specific realty. While in form this action was always compromised by leave of the court, the underlying theory was that the court had power to compel the defendant to perform his executory covenant and convey the realty agreed upon.<sup>9</sup> Thus Glanville tells us<sup>10</sup> that if the concord is established, "then the party who has broken the concord shall be amerced to the king and shall be safely attached, until he find good security that he will from thenceforth keep the concord by

<sup>2</sup> See ch. LXXXVII.

<sup>3</sup> See on this subject, *Early History of Specific Performance of Contract*, by Harold Dexter Hazeltine; *Essays in Legal History* (Early History of English Equity, by Harold Dexter Hazeltine), No. XIII, p. 261.

<sup>4</sup> "For it is a consequence which naturally results from \* \* \* undertaking to do any particular act that the party should be compelled to abide by it or perform it." Glanville, Bk. VIII., C. V., referring to the concord of a fine.

<sup>5</sup> Pollock and Maitland's *History of*

*English Law*, II. 521, 522 (original paging).

<sup>6</sup> Pollock and Maitland's *History of English Law*, II. 106 (original paging), citing a case from A. D. 1226.

<sup>7</sup> Pollock and Maitland's *History of English Law*, II. 522 (original paging).

<sup>8</sup> Bracton's *Note Book*, p. 837.

<sup>9</sup> Pollock and Maitland's *History of English Law*, II. 593 (original paging); *Black. Com.* II. 348; Fry on *Specific Performance* (6th edition), § 17, p. 7; Fitzherbert's *Natura Brevium* (heading), *Covenant to levy a fine*, p. 326.

<sup>10</sup> Bk. VIII., C. V. (Beames's *Translation*).

adhering to its terms, if possible, or will otherwise make his adversary a reasonable recompense."

**§ 3275. Specific performance—In other courts.** The ecclesiastical courts seem to have regarded specific relief as a proper remedy for breach of a contract; and they maintained this jurisdiction successfully for a long period of time in what seems to us a most ultra-personal of all contracts,<sup>1</sup> and that was the contract to intermarry.<sup>2</sup> In the absence of temporal sanction, excommunication was the method of enforcing compliance with the decree; but as imprisonment might result as a part of the sentence for excommunication, spiritual sanctions were not relied upon exclusively. Wherever an oath was taken or the faith of a Christian was pledged, the ecclesiastical courts were ready to enforce the contract,<sup>3</sup> and to give specific relief. The process of distraint is the means by which the party who is in default is compelled to perform.<sup>4</sup>

The fifteenth article of the constitutions of Clarendon is frequently said to have withdrawn temporal contracts from the jurisdiction of the ecclesiastical courts; but as has been said before,<sup>5</sup> the article itself merely refers to debts and not to contracts generally. This was quite likely due to the fact that the debt was the only type of contract which the king's courts were enforcing when the constitutions of Clarendon were drawn up. The ecclesiastical courts seem to have proceeded on the theory that they had jurisdiction to grant specific performance of contract of these types, unless the king's courts issued a writ of prohibition in the specific case. The king's courts seem to have issued writs of prohibition systematically whenever they were asked to grant such relief.<sup>6</sup> In some of the local courts, specific performance seems to have been given as a matter of course, even in contracts for the performance of personal services.<sup>7</sup>

<sup>1</sup> The fact that specific performance can not be granted without compelling continuous personal services is a reason for denying specific performance in modern equity.

See § 3354.

<sup>2</sup> Burn's Ecclesiastical Law (1st edition), Marriage II, 5.

<sup>3</sup> See §§ 13 and 18.

<sup>4</sup> Bracton's Note Book, Pl. 1893.

<sup>5</sup> See § 13.

<sup>6</sup> See Bracton's Note Book, Pl. 152, 162, 550, 810.

See also Brooke's Abridgement, Title, Prohibition.

<sup>7</sup> Select Pleas in Manorial Courts, 2 Selden Society, p. 156; The Court Baron, 4 Selden Society, p. 115; Pollock and Maitland's History of English Law, II. 593 (original paging); Fry on Specific Performance (6th edition), § 31, p. 14.

**§ 3276. Specific performance in the king's courts—Later development.** The reasons which led the king's courts to abandon the original theory of specific relief do not appear clearly from the materials which are at present at our disposal. The development of the jury trial as a means by which the amount of damages could be ascertained made it possible to grant compensatory relief as distinguished from specific relief. It would not follow from this, necessarily, that the king's courts did abandon specific relief, but for some reason they did so. It may be that the habit of permitting general verdicts caused the courts to feel that the merits of a proceeding for specific performance were too complicated to submit to a jury; and it does not seem to have occurred to the courts that special verdicts might be demanded, on which the court could mold the relief which they would grant according to the justice of the particular case. Instead, they seem to have felt that the verdict must be on the issues generally, in favor of plaintiff as against defendant, or in favor of defendant as against plaintiff; and on such a verdict, even modern equity courts would shrink from granting specific performance as a matter of course.<sup>1</sup> Even in the informal bills in Eyre, the complainant usually seeks damages for breach of contract,<sup>2</sup> although occasionally he seems to seek restitution on the theory of quasi-contract,<sup>3</sup> and in one case it seems as though he seeks specific performance or rescission.<sup>4</sup> The opposition of the courts went so far that Coke endeavored to justify the prohibition of a court of equity from granting specific relief, by the theory that the intention of the promisor was to reserve to himself the election to perform or to pay damages; and that specific performance would deny this election to him.<sup>5</sup> This is not the agreement of the parties, of course, but the theory is one that is frequently invoked.<sup>6</sup>

**§ 3277. Specific performance in the king's council and in the chancellor's court.** From the general nature of the relation between common law and equity, it might be expected that, as the common law withdrew its remedy of specific performance, equity would begin to extend it; and this is proved to be the case by the

<sup>1</sup> See §§ 3346 et seq.

<sup>2</sup> Select Bills in Eyre, 30 Selden Society, pl. 36, 38, 69, 71, 76, 91, 92, 142 and 143.

<sup>3</sup> Select Bills in Eyre, 30 Selden Society, pl. 11.

<sup>4</sup> Select Bills in Eyre, 30 Selden Society, pl. 63.

<sup>5</sup> Bromage v. Genning, 1 Rolle's Rep. 368.

<sup>6</sup> See § 3175.

records which are accessible, although there are many questions as to the time at which equity began to give this relief, and as to the sources of this later equity, which can not yet be solved, because of our inability to get the records of the court, except in the most fragmentary shape. The king's council, out of which the court of the chancellor developed, is known to have given specific performance in an early case.<sup>1</sup> This was an action by a married woman, whose husband did not apparently join, to enforce an antenuptial contract; and the relief of specific performance was apparently given under sanction of a heavy judgment by way of penalty, which was to be enforced in case the defendant did not comply with the order of the council. The resemblance of this method of enforcing specific performance to the method used in Pennsylvania four centuries later, is remarkable.<sup>2</sup>

It has been said by one of the most careful writers of an earlier day that bills for the specific performance of contracts "are amongst the earliest that are recorded in the court of chancery."<sup>3</sup> The theory that specific performance was a relatively early remedy was challenged by Professor Ames;<sup>4</sup> and while he admitted that some authorities had recognized specific performance before the middle of the sixteenth century,<sup>5</sup> he pointed out that other authorities have taken the position that the remedy at law was adequate and that equity would not give relief.<sup>6</sup> At the same time he recognized the fact that soon after the middle of the sixteenth century bills for specific performance appeared with great regularity, and specific performance was decreed in proper cases.<sup>7</sup>

With the appearance of Volume 10 of the Selden Society's publication, it was found that specific performance was applied for toward the end of the fourteenth century, although with what success did not appear;<sup>8</sup> and almost about the same time, in a similar case, in the same court, the plaintiff seems to have thought

<sup>1</sup> Calender Close Rolls, 40 ed. III. 237 [1366].

<sup>2</sup> See § 3278.

<sup>3</sup> I Spence on Equitable Jurisdiction, 645 [citing 2 Cal. Ch. 2 (temp. Rich. II)]; Lord Scales v. Felbrigg, 2 Cal. Ch. 26].

<sup>4</sup> Specific Performance of Contracts, by J. B. Ames, 1 Green Bag 26.

<sup>5</sup> Brooke's Abridgment, *accion sur le case*, pl. 72; Carington v. Humphrey, Toth. 14 (1547 A. D.).

<sup>6</sup> Wingfield v. Littleton, Dyer 162a (1557 A. D.).

<sup>7</sup> Pope v. Mason, Toth. 3 (1569 A. D.); Hungerford v. Hutton, Toth. 62 (1569 A. D.); Foster v. Eltonhead, Toth. 4 (1582 A. D.); Kempe v. Palmer, Toth. 14 (1594 A. D.).

<sup>8</sup> William v. Gile, Select Cases in Chancery, 10 Selden Society, No. 83 (1396 to 1403 A. D.).

it necessary to allege the amount of his damages.<sup>9</sup> By the middle of the fifteenth century we find a bill in equity for specific performance upon which specific performance was decreed by the court.<sup>10</sup> While this is spoken of as "solitary reported instance of a decree for the specific performance of a contract,"<sup>11</sup> the bill might serve in modern equity as a bill for specific performance if the spelling were corrected and the offer of the suppliant to pray for the chancellor were eliminated; and the decree, while in a simple form, might serve as a decree today. Until a larger number of early equity cases are printed, we can not be sure of the frequency with which the chancellor granted specific performance in the fourteenth and fifteenth centuries.

Whether the chancellor, in granting specific performance, is to be regarded as taking over the equity powers of which the king's courts were letting go, so that equity can be regarded as practically continuous, although administered by different courts, or whether the chancellor's equity is to be regarded as a new equity, and possibly as an outgrowth of ecclesiastical law rather than as a development from the early equity of the king's courts, is a matter on which those who have given especial attention to this subject, have not agreed.<sup>12</sup> Whatever the source of the equity which the chancellor administered, there is no doubt that with the rise of equity "the want of a more specific remedy than can be obtained in the courts of law,"<sup>13</sup> gave to the chancellors an opportunity to extend their jurisdiction that they were not slow to take advantage of; and it became an established maxim of equity that relief should, if possible, be specific rather than compensatory, which as applied to contracts meant that in cases coming properly within

<sup>9</sup> *Wace v. Brasse*, *Select Cases in Chancery*, 10 *Selden Society*, No. 40 (after 1398 A. D.).

<sup>10</sup> *Cokayn v. Hurst* (alias *Barbour*), *Select Cases in Chancery*, 10 *Selden Society*, No. 142 (1458 A. D.).

<sup>11</sup> *Ames' Cases in Equity Jurisdiction*, Volume I, 38.

<sup>12</sup> On this question see, *The Continuity of English Equity*, by George Burton Adams, 26 *Yale Law Journal* 550; *The Origin of English Equity*, by George Burton Adams, 16 *Columbia Law Review* 87; *The Relation of Equity administered by the common law*

judges to the Equity administered by the chancellor, by W. S. Holdsworth, 26 *Yale Law Journal* 1; *Select Cases before the King's Council*, 35 *Selden Society*, Introduction XXXI et seq.

See also, *Early English Equity*, by Oliver Wendell Holmes, Jr., 1 *Law Quarterly Review* 162; 2 *Select Essays in Anglo-American Legal History* 705; *Common Law and Conscience in the Ancient Court of Chancery*, by Luke Owen Pike, 1 *Law Quarterly Review* 443; 2 *Select Essays in Anglo-American Legal History* 722.

<sup>13</sup> *Black. Com.* III., 438.

the jurisdiction of equity, specific performance would be decreed if the circumstances required it.<sup>14</sup>

**§ 3278. Equity in the United States.** After courts of law, presided over by judges of greater or less technical training, began to appear in the American colonies, and after property and business began to assume a greater degree of complexity than was found on the rough frontier, courts of equity began to appear, paralleling the courts of law.<sup>1</sup> Even where local prejudice prevented the existence of courts of equity as such, we find courts of law giving specific performance by the device of entering judgment for punitive damages, on which execution will be withheld if the defendant performs specifically.<sup>2</sup> While it has been said that specific performances "comes to us from the common law,"<sup>3</sup> the term "common law" in this sense is undoubtedly used of the juristic custom of the English courts as distinct from statute, and not of common law in its more limited sense as distinct from equity.

While in some exceptional cases the remedy at law is made more plastic and plenary than can be given in equity,<sup>4</sup> the great advantage of specific performance, in most cases, is that it can be better adapted to the needs of the party in the particular case than can a judgment at law, giving to the plaintiff, on the one hand, the benefit of the very performance for which he has contracted, and, on the other hand, safeguarding the interest of the defendant so that no intolerable burden can be cast upon him as a consequence of his default.<sup>5</sup> Specific performance is not restricted to the cases for which precedents exist, but is given wherever the broad principles which control the subject make such relief proper.<sup>6</sup>

<sup>14</sup> For specific performance in other systems of law, see *Specific Performance in French Law*, by Sheldon Amos, 17 *Law Quarterly Review* 372, and *Specific Performance and Laesio Fidei*, by Lord Justice Fry, 5 *Law Quarterly Review* 235.

<sup>1</sup> *Courts of Chancery in the American Colonies*, by Solon Dyke Wilson, 18 *American Law Review* 226; 2 *Select Essays in Anglo-American Legal History* 779.

<sup>2</sup> *Administration of Equity through Common Law Forms in Pennsylvania*,

by Sidney George Fisher, 1 *Law Quarterly Review* 455; 2 *Select Essays in Anglo-American Legal History* 810.

<sup>3</sup> *Fidelity Loan Securities Co. v. Moore*, 280 Mo. 315, 217 S. W. 286.

<sup>4</sup> *Carter v. Schrader*, 187 Ia. 1245, 175 N. W. 329.

<sup>5</sup> See §§ 3347 et seq.

<sup>6</sup> "In the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded and no inflexible rule has been permitted to circumscribe them." *Union Pacific Ry. v. Chicago*,

## II

THE CONTRACT OF WHICH SPECIFIC PERFORMANCE MAY  
BE GIVEN

**§ 3279. Validity of contract in general.** In order to entitle the plaintiff to the relief of specific performance the contract sought to be enforced must, as a general rule, have at least all the elements that make a contract enforceable at law.<sup>1</sup> To discuss this branch of the subject in detail would require a repetition of all that has been said of the formation of simple contracts. Some illustrations of this doctrine will be all that will be attempted. It will be observed that in many cases equity requires a higher standard of good faith and fair dealing for specific performance than the law requires for enforcement by money damages.<sup>2</sup> It possibly requires a higher degree of certainty,<sup>3</sup> a greater approximation to adequacy of consideration,<sup>4</sup> and, in some cases, adherence to a higher standard of public policy.<sup>5</sup> On the other hand, in some cases, equity enforces promises which the law would apparently regard as gratuitous.<sup>6</sup>

**§ 3280. Want of offer and acceptance.** If offer and acceptance are lacking, and the parties have entered into a contract which would not be good at law,<sup>1</sup> equity will not give specific performance.<sup>2</sup> Specific performance will not be given of a declaration of

Rock Island & Pacific Ry. Co., 163 U. S. 564, 600, 41 L. ed. 265.

The essential idea underlying specific performance is that the party in default is to be compelled to do the very thing that he was bound to do by his contract. *Guadalupe County Board of Education v. O'Bannon*, — N. M. —, 195 Pac. 801.

Specific performance can not be had at law. *Adamstown Canning & Supply Co. v. Baltimore & Ohio Ry. Co.*, — Md. —, 112 Atl. 286.

<sup>1</sup>*Gronowski v. Jozefowicz*, 291 Ill. 266, 126 N. E. 108; *Buettgenbach v. Gerbig* (Neb.), 90 N. W. 654; *Carns v. Puffett*, — N. D. —, 176 N. W. 93; *Pollak v. Roberts*, — N. D. —, 176 N. W. 957; *Adams v. Hazen*, 123 Va. 304, 96 S. E. 741; *Ludwig v. Ludwig*, 170

Wis. 41, 172 N. W. 726; *Katzer v. Schuenke*, — Wis. —, 177 N. W. 855.

<sup>2</sup>See §§ 346 et seq., § 394, §§ 405 et seq., § 638 and §§ 3286 et seq.

<sup>3</sup>See § 106 and §§ 3281 et seq.

<sup>4</sup>See §§ 638 and 3292 et seq.

<sup>5</sup>See § 3295.

<sup>6</sup>See § 524 and § 3291.

<sup>1</sup>See §§ 70 et seq.

<sup>2</sup>*United States. Rushton v. Thompson*, 35 Fed. 635.

*Alabama. Rushton v. McKee*, 201 Ala. 49, 77 So. 343.

*Illinois. Weir v. Weir*, 287 Ill. 495, 122 N. E. 868.

*Minnesota. Baker v. Polydisky*, 144 Minn. 72, 174 N. W. 526.

*Mississippi. Phelps v. Dana*, 121 Miss. 697, 83 So. 745.

intention as distinct from a promise.<sup>3</sup> If the parties have never come to an agreement, in outward form,<sup>4</sup> as where there is no acceptance,<sup>5</sup> or no acceptance is made until after the offer has lapsed,<sup>6</sup> or until after it has been revoked,<sup>7</sup> or has been ended by rejection on the part of the offeree,<sup>8</sup> or the attempted acceptance is in terms different from the offer,<sup>9</sup> specific performance can not be had. If an offer contemplates acceptance by an act which is to be acceptance, consideration and performance, the performance of part of such act does not impose upon the promisee the duty of performing the remainder thereof.<sup>10</sup>

**New York.** *Levin v. Dietz*, 194 N. Y. 376, 20 L. R. A. (N.S.) 251, 87 N. E. 454.

**North Dakota.** *Pollak v. Roberts*, — N. D. —, 176 N. W. 957; *Carey v. Campbell*, — N. D. —, 177 N. W. 372.

**Ohio.** *Suydam v. Ins. Co.*, 18 Ohio 459.

**Oregon.** *Rose v. Oliver*, 32 Or. 447, 52 Pac. 176.

**Virginia.** *Adams v. Hazen*, 123 Va. 304, 96 S. E. 741.

**West Virginia.** *Pollock v. Brookover*, 60 W. Va. 75, 6 L. R. A. (N.S.) 403, 53 S. E. 795; *Hermann v. Goddard*, 82 W. Va. 520, 96 S. E. 792.

<sup>3</sup>*Katzer v. Schuenke*, 171 Wis. 605, 177 N. W. 855.

See § 77.

<sup>4</sup>**Arkansas.** *Roleson v. Blount*, 307 Ark. 143, 220 S. W. 31.

**California.** *Pacific Rolling Mill Co. v. Riverside & Arlington Ry. Co.*, 90 Cal. 627, 27 Pac. 525.

**Illinois.** *Clipsen v. Villars*, 151 Ill. 165, 37 N. E. 695.

**Michigan.** *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. Rep. 814, 28 N. W. 796.

**Minnesota.** *Baker v. Polydisky*, 144 Minn. 72, 174 N. W. 526.

**Mississippi.** *Nickerson v. Fithian Land Co.*, 118 Miss. 722, 80 So. 1.

**Montana.** *Livingston Waterworks v. Livingston*, 53 Mont. 1, L. R. A. 1917D, 1074, 162 Pac. 381.

**New York.** *Levin v. Dietz*, 194 N. Y. 376, 20 L. R. A. (N.S.) 251, 87 N. E. 454.

**North Dakota.** *Carey v. Campbell*, — N. D. —, 177 N. W. 372.

<sup>5</sup>**Illinois.** *Clipsen v. Villars*, 151 Ill. 165, 37 N. E. 695.

**Kentucky.** *Parker v. Stephens*, 10 Ky. (3 A. K. Mar.) 197.

**Michigan.** *Lau v. McKechnie*, 202 Mich. 284, 168 N. W. 438.

**North Dakota.** *Pollak v. Roberts*, — N. D. —, 176 N. W. 957.

**West Virginia.** *Pollock v. Brookover*, 60 W. Va. 75, 6 L. R. A. (N.S.) 403, 53 S. E. 795.

As where an offer calls for acceptance by the payment of money, and the offeree attempts to accept it by promising to make such payment. *Lau v. McKechnie*, 202 Mich. 284, 168 N. W. 438.

<sup>6</sup>*Childs v. Gillespie*, 147 Pa. St. 173, 23 Atl. 312.

<sup>7</sup>*Levin v. Dietz*, 194 N. Y. 376, 20 L. R. A. (N.S.) 251, 87 N. E. 454; *Carey v. Campbell*, — N. D. —, 177 N. W. 372.

<sup>8</sup>*Roleson v. Blount*, 143 Ark. 307, 220 S. W. 31.

<sup>9</sup>*Bentz v. Eubanks*, 41 Kan. 28, 20 Pac. 505.

<sup>10</sup>*Rose v. Garn*, — Utah —, 191 Pac. 645.

On the other hand, the form which the contract takes is immaterial if the elements of a valid contract are present;<sup>11</sup> and an agreement entered into before a railway commission, may be a binding contract between the parties thereto and enforceable specifically.<sup>12</sup>

**§ 3281. Certainty—General principles.** To be enforceable, either at law or in equity, a contract must be definite and certain.<sup>1</sup> Certainty is especially necessary if specific performance is sought,<sup>2</sup> since the court must necessarily decree performance of the

<sup>11</sup> See §§ 70 et seq.

<sup>12</sup> *Oconto Electric Co. v. Oconto Service Co.*, 168 Wis. 165, 169 N. W. 293.

<sup>1</sup> See §§ 95 et seq.

<sup>2</sup> *United States. Carr v. Duval*, 39 U. S. (14 Pet.) 77, 10 L. ed. 361; *De Sollar v. Hanscome*, 158 U. S. 216, 39 L. ed. 956; *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403, 2 L. R. A. (N.S.) 1172, 71 C. C. A. 207.

**Arkansas.** *Byington v. Little Rock Chamber of Commerce*, 132 Ark. 361, 201 S. W. 122; *Ashcraft v. Tucker*, 136 Ark. 447, 206 S. W. 896; *Stanford v. Sager*, 141 Ark. 458, 217 S. W. 458; *Hotopp v. Adair*, 144 Ark. 629, 223 S. W. 393.

**California.** *Foster v. Maginnis*, 89 Cal. 264, 26 Pac. 828; *Berry v. Moulie*, 180 Cal. 137, 179 Pac. 686.

**Delaware.** *Todd v. Diamond State Iron Co.*, 8 Houst. (Del.) 372 [sub nomine, *Diamond State Iron Co. v. Todd*, 14 Atl. 27].

**Georgia.** *Potts v. Mathis*, 149 Ga. 367, 100 S. E. 110; *Dowling v. Doyle*, 149 Ga. 727, 102 S. E. 27; *Shropshire v. Rainey*, 150 Ga. 566, 104 S. E. 414.

**Illinois.** *Shaw v. Schoonover*, 130 Ill. 448, 22 N. E. 589; *Glos v. Wilson*, 198 Ill. 44, 64 N. E. 734; *Ullsperger v. Meyer*, 217 Ill. 262, 2 L. R. A. (N.S.) 221, 3 Ann. Cas. 1032, 75 N. E. 482; *Cleveland v. Martin*, 218 Ill. 73, 3 L. R. A. (N.S.) 629, 75 N. E. 772 (obiter); *Casstevens v. Casstevens*, 227 Ill. 547,

118 Am. St. Rep. 291, 81 N. E. 709; *Wetmore v. Watson*, 253 Ill. 88, 38 L. R. A. (N.S.) 331, 97 N. E. 237; *Weir v. Weir*, 287 Ill. 495, 122 N. E. 868; *Gronowski v. Jozefowicz*, 291 Ill. 266, 126 N. E. 108; *Bell v. Anderson*, 292, Ill. 605, 127 N. E. 87; *Brach v. Matteson*, — Ill. —, 131 N. E. 804. **Indiana.** *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880.

**Iowa.** *Corliss v. Conable*, 74 Ia. 58, 36 N. W. 891; *Origer v. Kuyper*, 183 Ia. 1395, 168 N. W. 119; *McKenzie v. Whetzel*, — Ia. —, 182 N. W. 388.

**Kentucky.** *Roberts v. Bennett*, 166 Ky. 588, L. R. A. 1916C, 1098, 179 S. W. 605.

**Louisiana.** *Snyder v. Wilder*, 146 La. 811, 84 So. 104.

**Maryland.** *Boggs v. Dundalk Realty Co.*, 132 Md. 476, 104 Atl. 45; *Geise v. Packendorf*, — Md. —, 112 Atl. 3.

**Michigan.** *Blanchard v. Detroit, Lansing & Lake Michigan Ry. Co.*, 31 Mich. 43, 18 Am. Rep. 142.

**Minnesota.** *Burke v. Ray*, 40 Minn. 34, 41 N. W. 240; *Lowe v. Lowe*, 83 Minn. 206, 83 N. W. 11.

**Mississippi.** *Nickerson v. Fithian Land Co.*, 118 Miss. 722, 80 So. 1; *Phelps v. Dana*, 121 Miss. 697, 83 So. 745.

**Missouri.** *Kinney v. Murray*, 170 Mo. 674, 71 S. W. 197.

**Montana.** *Largey v. Leggat*, 30 Mont. 148, 75 Pac. 950; *Livingston*

contract in such terms that the party against whom the decree is entered can ascertain from the decree itself what he is bound to do; and unless the contract itself is definite, the court can not frame a definite decree.<sup>3</sup> The same idea is expressed in other words when it is said that the court can enforce a valid contract by specific performance, but that it can not make a contract for the parties if they have not made one for themselves in sufficiently definite terms.<sup>4</sup> Accordingly, specific performance may be refused because the contract is indefinite and uncertain, although damages may be recovered at law.<sup>5</sup>

**Waterworks v. Livingston**, 53 Mont. 1, L. R. A. 1917D, 1074, 162 Pac. 381.

**Nebraska.** *Clarke v. Koenig*, 36 Neb. 572, 54 N. W. 842.

**New Jersey.** *Myers v. Metzger*, 63 N. J. Eq. 779, 52 Atl. 274; *Moore v. Galupo*, 65 N. J. Eq. 194, 55 Atl. 628; *Neptune Fisheries Co. v. Cape May Real Estate Co.*, 89 N. J. Eq. 552, 105 Atl. 212.

**North Dakota.** *Beebe v. Hanson*, 40 N. D. 559, 169 N. W. 31.

**Oklahoma.** *Ferguson v. Blackwell*, 8 Okla. 489, 58 Pac. 647; *Melton v. Cherokee Oil & Gas Co.*, — Okla. —, 170 Pac. 691 [certiorari denied, *Cherokee Oil & Gas Co. v. Melton*, 38 Sup. Ct. Rep. 427].

**Oregon.** *Knight v. Alexander*, 42 Or. 521, 71 Pac. 657; *Schlusell v. Hays*, 89 Or. 463, 174 Pac. 722; *Feenaughty v. Beall*, 91 Or. 654, 178 Pac. 600.

**Pennsylvania.** *Agnew v. Land Co.*, 204 Pa. St. 192, 53 Atl. 752; *O'Connell v. Cease*, 267 Pa. St. 288, 110 Atl. 266.

**South Carolina.** *Spear v. Long*, 32 S. Car. 528, 11 S. E. 332; *Anthony v. Eve*, 109 S. Car. 255, 95 S. E. 513.

**Tennessee.** *Morrison v. Searight*, 63 Tenn. (4 Baxt.) 476.

**Texas.** *Lone Star Salt Co. v. Texas Short Line Ry.*, 99 Tex. 434, 3 L. R. A. (N.S.) 828, 90 S. W. 863.

**Utah.** *Price v. Lloyd*, 31 Utah 86, 8 L. R. A. (N.S.) 870, 86 Pac. 767.

**Virginia.** *Scott v. Albemarle Horse Show Ass'n*, — Va. —, 104 S. E. 842.

**West Virginia.** *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600; *Ensminger v. Peterson*, 53 W. Va. 324, 44 S. E. 218; *Hermann v. Goddard*, 82 W. Va. 520, 96 S. E. 792.

**Wisconsin.** *Park v. Minneapolis, St. Paul & Sault St. Marie Ry. Co.*, 114 Wis. 347, 89 N. W. 532.

<sup>3</sup>*Feenaughty v. Beall*, 91 Or. 654, 178 Pac. 600.

<sup>4</sup>**California.** *DeKahn v. Chase*, 177 Cal. 281, 170 Pac. 608.

**Iowa.** *Origer v. Kuyper*, 183 Ia. 1395, 168 N. W. 119.

**New Jersey.** *Neptune Fisheries Co. v. Cape May Real Estate Co.*, 89 N. J. Eq. 552, 105 Atl. 212.

**Pennsylvania.** *O'Connell v. Cease*, 267 Pa. St. 288, 110 Atl. 266.

**Virginia.** *Branham v. Artrip*, 115 Va. 314, 79 S. E. 390.

**Wisconsin.** *Winke v. Olson*, 164 Wis. 427, 160 N. W. 164.

<sup>5</sup>**United States.** *Colson v. Thompson*, 15 U. S. (2 Wheat.) 336, 4 L. ed. 253.

**Arkansas.** *Byington v. Little Rock Chamber of Commerce*, 132 Ark. 361, 201 S. W. 122.

**California.** *Stanton v. Singleton*, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146.

**Michigan.** *Schook v. Zimmerman*, 188 Mich. 617, 155 N. W. 526.

**North Carolina.** *Solomon v. Sewerage Co.*, 142 N. Car. 439 [sub nomine,

If the so-called contract leaves certain terms open for future negotiations between the parties it is evidently incomplete, and neither party can be compelled, in such future negotiations, to accept the offer of the adversary party. Specific performance is, accordingly, refused in cases of this sort.<sup>6</sup>

The fact that a covenant for one of two alternative methods of performance is uncertain, is said not to render the contract invalid since the remaining covenants can be performed specifically.<sup>7</sup> The same principle has been applied to covenants all of which are to be performed; an uncertainty as to one of such covenants is held not to render the rest of the contract invalid,<sup>8</sup> at least if the party to whose disadvantage such certainty operates seeks specific performance.<sup>9</sup>

If an option as to the method of performance is given to one party,<sup>10</sup> such as an option to name the grantee to whom the property is to be conveyed,<sup>11</sup> or if one party is given an option as to time, within certain limits,<sup>12</sup> or as to the selection of a certain quantity of the subject-matter out of a larger quantity,<sup>13</sup> the existence of such option and the impracticability of determining in advance how it will be exercised does not render the contract indefinite.

Since specific performance is most frequently sought in contracts for the sale of real estate, or in other contracts within the

**Solomon v. Wilmington Sewerage Co.**,  
6 L. R. A. (N.S.) 391, 55 S. E. 300]  
(obiter).

**Texas.** Lone Star Salt Co. v. Texas  
Short Line Ry. Co., 99 Tex. 434, 3 L.  
R. A. (N.S.) 828, 90 S. W. 863.

<sup>6</sup> **Alabama.** Rushton v. McKee, 201  
Ala. 49, 77 So. 343.

**California.** Fritz v. Mills, 170 Cal.  
449, 150 Pac. 375.

**Illinois.** Weir v. Weir, 287 Ill. 495,  
122 N. E. 868.

**Massachusetts.** Callanan v. Chapin,  
158 Mass. 113, 32 N. E. 941.

**Mississippi.** Nickerson v. Fithian  
Land Co., 118 Miss. 722, 80 So. 1.

**Montana.** Livingston Waterworks v.  
Livingston, 53 Mont. 1, L. R. A. 1917D,  
1074, 162 Pac. 381.

**West Virginia.** Hermann v. Goddard,  
82 W. Va. 520, 96 S. E. 792.

**Wisconsin.** Goldstine v. Tolman,  
157 Wis. 141, 147 N. W. 7.

See § 109.

<sup>7</sup> **Skidmore v. Leavitt**, — Okla. —,  
175 Pac. 503.

<sup>8</sup> **Threlkeld v. Inglett**, 289 Ill. 90,  
124 N. E. 368.

<sup>9</sup> **Threlkeld v. Inglett**, 289 Ill. 90, 124  
N. E. 368.

<sup>10</sup> **Buchhauser v. Yudelason**, 287 Ill.  
138, 122 N. E. 100; **Peckham v. Lane**,  
81 Kan. 489, 25 L. R. A. (N.S.) 967,  
19 Ann. Cas. 369, 106 Pac. 464.

<sup>11</sup> **Buchhauser v. Yudelason**, 287 Ill.  
138, 122 N. E. 100.

<sup>12</sup> **Bushman v. Faltis**, 184 Mich. 172,  
150 N. W. 848.

<sup>13</sup> **Peckham v. Lane**, 81 Kan. 489, 25  
L. R. A. (N.S.) 967, 19 Ann. Cas. 369,  
106 Pac. 464.

Statute of Frauds, the question of the certainty of the contract is generally complicated with the question of the sufficiency of the written memorandum.<sup>14</sup>

**§ 3282. Certainty—Specific applications.** A contract which does not fix the time of performance, and yet shows that a definite time was intended, and not a reasonable time, is too indefinite for specific enforcement.<sup>1</sup> A contract for the purchase of stock in part on credit, without provisions as to the time when the purchase price is to be paid or the stock transferred, or as to the security to be given for deferred payments,<sup>2</sup> or a contract for a ground rent, without specifying the term thereof,<sup>3</sup> is too indefinite for specific performance. Specific performance can not be had unless the subject-matter of the contract is shown with sufficient certainty.<sup>4</sup> A contract not to engage in business so as to interfere

<sup>14</sup> See §§ 1333 et seq.

<sup>1</sup> England. *Oxford v. Crow* [1895], 3 Ch. 535.

Delaware. *Todd v. Diamond State Iron Co.*, 8 Houst. (Del.) 372 [sub nomine, *Diamond State Iron Co. v. Todd*, 14 Atl. 27].

Florida. *Dixie Naval Stores Co. v. German-American Lumber Co.*, 76 Fla. 339, 79 So. 836.

Georgia. *Hill v. Hill*, 140 Ga. 50, 99 S. E. 31.

Illinois. *Wright v. Raftree*, 181 Ill. 464, 54 N. E. 998.

Kentucky. *Tharp University School v. Komus Realty Co.*, 159 Ky. 386, 167 S. W. 136.

Minnesota. *Williams v. Stewart*, 25 Minn. 516.

New Jersey. *Moore v. Galupo*, 65 N. J. Eq. (20 Dick.) 194, 55 Atl. 628.

Wisconsin. *Buck v. Pond*, 126 Wis. 382, 105 N. W. 909.

<sup>2</sup> *Todd v. Diamond State Iron Co.*, 8 Houst. (Del.) 372 [sub nomine, *Diamond State Iron Co. v. Todd*, 14 Atl. 27].

<sup>3</sup> *Ward v. Newbold*, 115 Md. 689, 81 Atl. 793.

<sup>4</sup> Alabama. *Rushton v. McKee*, 201 Ala. 49, 77 So. 343.

Alaska. *Hawkins v. Wells*, 5 Alaska 535.

Arkansas. *Ashcraft v. Tucker*, 136 Ark. 447, 206 S. W. 896; *Stanford v. Sager*, 141 Ark. 458, 217 S. W. 458.

Florida. *Dixie Naval Stores v. German-American Lumber Co.*, 76 Fla. 339, 79 So. 836.

Georgia. *Dowling v. Doyle*, 149 Ga. 727, 102 S. E. 27.

Illinois. *Glos v. Wilson*, 108 Ill. 44, 64 N. E. 734; *Bauer v. Lumaghi Coal Co.*, 209 Ill. 316, 70 N. E. 634; *Cleveland v. Martin*, 218 Ill. 73, 3 L. R. A. (N.S.) 629, 75 N. E. 772 (obiter); *Threlkeld v. Inglett*, 289 Ill. 90, 124 N. E. 368.

Kentucky. *Hanly v. Blackford*, 31 Ky. (1 Dana) 1, 25 Am. Dec. 114; *Hall v. Cotton*, 167 Ky. 464, L. R. A. 1916C, 1124, 180 S. W. 779.

Minnesota. *Nelson v. McElroy*, 140 Minn. 429, 168 N. W. 179 [rehearing denied, 168 N. W. 587].

Mississippi. *Nickerson v. Fithian Land Co.*, 118 Miss. 722, 80 So. 1; *Phelps v. Dana*, 121 Miss. 697, 83 So. 745.

with the interests of a certain corporation,<sup>5</sup> or to deliver secret formulas,<sup>6</sup> or to produce a first-class book,<sup>7</sup> or to exchange land for goods which are to be so selected as to make a well-balanced stock,<sup>8</sup> or to give a warranty deed for oil and the like, containing provisions which are employed for similar property in certain localities, if no standard form is used in such localities,<sup>9</sup> are too uncertain to be enforced specifically. A contract for the sale of realty on credit, which provides for giving a mortgage or mortgages as security, but does not provide for the number of mortgages, the date of payment or the order of payment,<sup>10</sup> or a contract which does not show the agreement of the parties as to the assumption of a mortgage,<sup>11</sup> is each too indefinite to be enforced specifically.

Specific performance can not be given of a contract for the sale of land unless the land is so described that the court can embody sufficient description thereof in its decree.<sup>12</sup> A contract which describes the land by area without giving data from which its bound-

**Oklahoma.** *Bowker v. Linton*, — Okla. —, 172 Pac. 442.

**Pennsylvania.** *Agnew v. Southern Avenue Land Co.*, 204 Pa. St. 192, 53 Atl. 752.

**Texas.** *Lone Star Salt Co. v. Texas Short Line Ry. Co.*, 99 Tex. 434, 3 L. R. A. (N.S.) 828, 90 S. W. 863.

<sup>5</sup> *Feenaughty v. Beall*, 91 Or. 654, 178 Pac. 600.

<sup>6</sup> *Berry v. Moulie*, 180 Cal. 137, 179 Pac. 686.

<sup>7</sup> *Cleveland v. Martin*, 218 Ill. 73, 3 L. R. A. (N.S.) 629, 75 N. E. 772 (obiter).

<sup>8</sup> *Beebe v. Hanson*, 40 N. D. 559, 169 N. W. 31.

<sup>9</sup> *Threlkeld v. Inglett*, 289 Ill. 90, 124 N. E. 368.

<sup>10</sup> *Moore v. Galupo*, 65 N. J. Eq. (20 Dick.) 194, 55 Atl. 628.

<sup>11</sup> *Tryce v. Dittus*, 199 Ill. 189, 65 N. E. 220.

<sup>12</sup> **Alabama.** *Rushton v. McKee*, 201 Ala. 49, 77 So. 343.

**Alaska.** *Hawkins v. Wells*, 5 Alaska 535.

**Arkansas.** *Ashcraft v. Tucker*, 136

Ark. 447, 206 S. W. 896; *Stanford v. Sager*, 141 Ark. 458, 217 S. W. 458.

**Florida.** *Dixie Naval Stores Co. v. German-American Lumber Co.*, 76 Fla. 339, 79 So. 836.

**Illinois.** *Glos v. Wilson*, 198 Ill. 44, 64 N. E. 734; *Bauer v. Lumaghi Coal Co.*, 209 Ill. 316, 70 N. E. 634; *Wetmore v. Watson*, 253 Ill. 88, 38 L. R. A. (N.S.) 331, 97 N. E. 237.

**Kentucky.** *Hanly v. Blackford*, 31 Ky. (1 Dana) 1, 25 Am. Dec. 114; *Roberts v. Bennett*, 166 Ky. 588, L. R. A. 1916C, 1098, 179 S. W. 605; *Hall v. Cotton*, 167 Ky. 464, L. R. A. 1916C, 1124, 180 S. W. 779.

**Minnesota.** *Nelson v. McElroy*, 140 Minn. 429, 168 N. W. 179 [rehearing denied, 168 N. W. 587].

**Mississippi.** *Nickerson v. Fithian Land Co.*, 118 Miss. 722, 80 So. 1; *Phelps v. Dana*, 121 Miss. 697, 83 So. 745.

**Oklahoma.** *Bowker v. Linton*, — Okla. —, 172 Pac. 442.

**Pennsylvania.** *Agnew v. Southern Avenue Land Co.*, 204 Pa. St. 192, 53 Atl. 752.

aries can be located, is too uncertain for specific performance.<sup>13</sup> A contract to convey a certain area near a certain place,<sup>14</sup> or a contract for "four lots 25 feet by 150 feet deep in either section 8 or 9,"<sup>15</sup> or a contract to convey a certain number of acres in one or more specified counties,<sup>16</sup> or to convey one hundred acres of the west end of a tract, either that then owned by the vendor, or to be afterward acquired by him,<sup>17</sup> or a description of land by giving the range alone,<sup>18</sup> or a description of land as "your lot,"<sup>19</sup> or a contract to convey lands described in another contract, the terms of which are not shown,<sup>20</sup> have been held to be too indefinite to be enforced specifically.

In order to be enforced specifically, the contract must also show the estate which is to be conveyed,<sup>21</sup> and the grantee to whom the conveyance is to be made.<sup>22</sup>

**§ 3283. Certainty as aided by construction.** Even where specific performance is sought, the ordinary rules of construction apply,<sup>1</sup> and if the meaning of the contract can be ascertained with the ordinary rules of construction, specific performance will not be refused, although the contract does not set forth all its terms in such detail as to dispense with the necessity of invoking such

<sup>13</sup> *Illinois*. *Rampke v. Buehler*, 203 Ill. 384, 67 N. E. 796; *Wetmore v. Watson*, 253 Ill. 88, 38 L. R. A. (N.S.) 331, 97 N. E. 237.

*Indiana*. *Newman v. Perrill*, 73 Ind. 153.

*Kentucky*. *Roberts v. Bennett*, 166 Ky. 588, L. R. A. 1916C, 1098, 179 S. W. 605; *Hall v. Cotton*, 167 Ky. 464, L. R. A. 1916C, 1124, 180 S. W. 779.

*Minnesota*. *Nelson v. McElroy*, 140 Minn. 429, 168 N. W. 179 [rehearing denied, 168 N. W. 587].

*Mississippi*. *Phelps v. Dana*, 121 Miss. 697, 83 So. 745.

*Oregon*. *Knight v. Alexander*, 42 Or. 521, 71 Pac. 657.

<sup>14</sup> *Nelson v. McElroy*, 140 Minn. 429, 168 N. W. 179 [rehearing denied, 168 N. W. 587].

<sup>15</sup> *Rampke v. Buehler*, 203 Ill. 384, 67 N. E. 796.

<sup>16</sup> *Newman v. Perrill*, 73 Ind. 153; *Phelps v. Dana*, 121 Miss. 697, 83 So. 745.

<sup>17</sup> *Knight v. Alexander*, 42 Or. 521, 71 Pac. 657.

<sup>18</sup> *Rushton v. McKee*, 201 Ala. 49, 77 So. 343.

<sup>19</sup> *Hawkins v. Wells*, 5 Alaska 535.

<sup>20</sup> *Ensminger v. Peterson*, 53 W. Va. 324, 44 S. E. 218.

<sup>21</sup> *De Remer v. Anderson*, 41 Nev. 287, 169 Pac. 737; *Bowker v. Linton*, — Okla. —, 172 Pac. 442.

<sup>22</sup> *Goodwin v. Rosser*, 64 Fla. 299, 60 So. 341; *Stanton v. Miller*, 58 N. Y. 192; *Riggs v. Adkins*, 95 Or. 414, 187 Pac. 303.

<sup>1</sup> *Anderson-Tully Co. v. Gillett Lumber Co.*, 143 Ark. 97, 222 S. W. 362; *Thomas v. Johnson*, — Utah —, 186 Pac. 437.

See §§ 2020 et seq.

ordinary principles of construction.<sup>2</sup> A description of land is sufficiently certain if it can be located by means of such description and of the extrinsic evidence which is admissible to identify the subject-matter.<sup>3</sup> It will be presumed that realty is located at or near the place named in the written contract as the place of execution.<sup>4</sup> A description of land by its area may be sufficient if enough of the sides and angles are given to make it practicable to locate the tract.<sup>5</sup> A description of a tract of land by its popular name,<sup>6</sup> or by its street number,<sup>7</sup> is sufficient if it can be located from such description.

<sup>2</sup> **Alabama.** Penney v. Norton, 202 Ala. 690, 81 So. 666.

**Arkansas.** Kirby v. Malone, — Ark. —, 215 S. W. 592; Anderson-Tully Co. v. Gillett Lumber Co., 143 Ark. 97, 222 S. W. 362.

**Connecticut.** Kilday v. Schancupp, 91 Conn. 29, L. R. A. 1917A, 151, 98 Atl. 335.

**Georgia.** Clark v. Cagle, 141 Ga. 703, L. R. A. 1915A, 317, 82 S. E. 21; McIntosh v. Roane, 148 Ga. 273, 96 S. E. 387; Dowling v. Doyle, 140 Ga. 727, 102 S. E. 27; Bass v. African M. E. Church, 150 Ga. 452, 104 S. E. 437.

**Illinois.** Koch v. Streuter, 218 Ill. 546, 2 L. R. A. (N.S.) 210, 75 N. E. 1049; Buchhauser v. Yudelson, 287 Ill. 138, 122 N. E. 100.

**Iowa.** Waite v. Consigny, 183 Ia. 259, 167 N. W. 200.

**Massachusetts.** Childs v. Boston & Maine Ry., 213 Mass. 91, 48 L. R. A. (N.S.) 378, 99 N. E. 957.

**Michigan.** White Marble Lime Co. v. Consolidated Lumber Co., 205 Mich. 634, 172 N. W. 603; Nickerson v. Nickerson, 209 Mich. 134, 176 N. W. 456.

**New Jersey.** Luczak v. Mariove, — N. J. —, 112 Atl. 494.

**North Carolina.** Goodman v. Robbins, 180 N. Car. 239, 104 S. E. 364.

**Utah.** Thomas v. Johnson, — Utah —, 186 Pac. 437.

**Virginia.** Asberry v. Mitchell, 121 Va. 276, L. R. A. 1918A, 785, 93 S. E. 638.

**Wisconsin.** Dells Paper & Pulp Co. v. Willow River Lumber Co., 170 Wis. 19, 173 N. W. 317.

<sup>3</sup> Koch v. Streuter, 218 Ill. 546, 2 L. R. A. (N.S.) 210, 75 N. E. 1049; Asberry v. Mitchell, 121 Va. 276, L. R. A. 1918A, 785, 93 S. E. 638.

<sup>4</sup> Kilday v. Schancupp, 91 Conn. 29, 98 Atl. 335; Clark v. Cagle, 141 Ga. 703, L. R. A. 1915A, 317, 82 S. E. 21.

<sup>5</sup> Waite v. Consigny, 183 Ia. 259, 167 N. W. 200; Asberry v. Mitchell, 121 Va. 276, L. R. A. 1918A, 785, 93 S. E. 638.

<sup>6</sup> Kirby v. Malone, — Ark. —, 215 S. W. 592; Clarke v. Cagle, 141 Ga. 703, L. R. A. 1915A, 317, 82 S. E. 21; Koch v. Streuter, 218 Ill. 546, 2 L. R. A. (N.S.) 210, 75 N. E. 1049; Harper v. Wallerstein, 122 Va. 274, 94 S. E. 781.

See also, McIntosh v. Roane, 148 Ga. 273, 96 S. E. 387.

<sup>7</sup> Kilday v. Schancupp, 91 Conn. 29, L. R. A. 1917A, 151, 98 Atl. 335; Boney v. Cheshire, 147 Ga. 30, 92 S. E. 636; Murray v. Mayo, 157 Mass. 248, 31 N. E. 1063; Baller v. Spivack, — Mich. —, 182 N. W. 70; Harper v. Wallerstein, 122 Va. 274, L. R. A. 1918C, 516, 94 S. E. 781.

If a term has a technical meaning, such meaning may be shown to make the contract sufficiently certain.<sup>8</sup> The ordinary rules of construction may be used to ascertain the character of the deed or security contemplated by the contract.<sup>9</sup> If a reasonable time of performance is contemplated, failure to fix a definite time does not render the contract indefinite.<sup>10</sup>

If a contract is sufficiently definite in case of performance, and the only uncertainty is as to the effect of breach, such uncertainty will not prevent a decree for specific performance.<sup>11</sup>

A land contract is not rendered uncertain by the omission of the date at which the mortgage securing the purchase price is to become due.<sup>12</sup>

**§ 3284. Certainty as aided by performance.** A contract which is indefinite when it is made and before any performance has taken place, may be rendered sufficiently definite by subsequent performance, in whole or in part.<sup>1</sup> A contract to convey land which does not describe the land,<sup>2</sup> or which describes it as a part of a larger tract,<sup>3</sup> may be rendered sufficiently certain by the subsequent conduct of the parties in selecting such land and in taking possession thereof. If a contract contains terms which may be construed so as to be inconsistent, the subsequent conduct of the parties in construing them as consistent may make the contract sufficiently definite to be enforced specifically.<sup>4</sup> The conduct of

<sup>8</sup> *Anderson-Tully Co. v. Gillett Lumber Co.*, 143 Ark. 97, 222 S. W. 362 (merchantable timber).

<sup>9</sup> *Penney v. Norton*, 202 Ala. 690, 81 So. 666; *Thomas v. Johnson*, — Utah —, 186 Pac. 437.

<sup>10</sup> *Penney v. Norton*, 202 Ala. 690, 81 So. 666; *Ullsperger v. Meyer*, 217 Ill. 262, 2 L. R. A. (N.S.) 221, 3 Ann. Cas. 1032, 75 N. E. 482; *Dingman v. Hilberry*, 159 Wis. 170, 149 N. W. 761.

<sup>11</sup> *Dells Paper & Pulp Co. v. Willow River Lumber Co.*, 170 Wis. 19, 173 N. W. 317.

<sup>12</sup> *Luczak v. Mariove*, — N. J. —, 112 Atl. 494.

<sup>1</sup> *Colorado. Strachan v. Drake*, 61 Colo. 444, 158 Pac. 310.

*Iowa. Ottumwa, Cedar Falls & St.*

*Paul Ry. v. McWilliams*, 71 Ia. 164, 32 N. W. 315.

*Michigan. Gates v. McLaulin*, 199 Mich. 438, 165 N. W. 614.

*Minnesota. Kociemba v. Kociemba*, — Minn. —, 177 N. W. 927.

*Montana. Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.

*New Mexico. Mundy v. Irwin*, 20 N. M. 43, 145 Pac. 1080.

*Washington. Faucett v. Northern Clay Co.*, 84 Wash. 382, 146 Pac. 857.

*Wisconsin. Inglis v. Fohey*, 136 Wis. 28, 116 N. W. 857.

<sup>2</sup> *Kociemba v. Kociemba*, — Minn. —, 177 N. W. 927.

<sup>3</sup> *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.

<sup>4</sup> *Rank v. Garvey*, 66 Neb. 767, 92 N. W. 1025, 99 N. W. 666.

one party in permitting performance of an indefinite contract has been said to estop him from attacking its validity,<sup>5</sup> although, apparently, such performance did not necessarily eliminate the indefinite features of the contract.

A vendor can not object that a modification of a contract, favorable to himself and treated by the vendee in his suit as a valid part of the contract, vitiates the whole contract for uncertainty by reason of a failure to name the vendee therein.<sup>6</sup>

**§ 3285. Mistake in expression—Reformation and specific performance.** If the parties have agreed orally upon the terms of a contract, and, in trying to reduce the contract to writing, they have failed to state the true agreement of the parties, either by mutual mistake, or by mistake on the one side and fraud on the other, equity grants reformation as a relief in spite of the parol evidence rule.<sup>1</sup> Whether reformation can be given in a suit in which specific performance is sought, is a question which is usually complicated with that of the effect of the Statute of Frauds,<sup>2</sup> since it is usually contracts within the statutes of which specific performance is sought. It may be said in advance that where the right to have reformation and specific performance of the contract as reformed is denied, the effect of the statute is not always discussed by the courts.<sup>3</sup>

If the party against whom specific performance is sought seeks reformation as a defense, it is generally held that such relief should be given even if the contract is within the Statute of Frauds, since the defendant is attempting to show that the memorandum imposes upon him a greater obligation than that which he assumed, and since the Statute of Frauds does not attempt to make the written memorandum final, but merely to prevent enforcement of certain contracts which can not be proved by writing.<sup>4</sup> Relief of this sort is given where the parties are not mis-

<sup>5</sup> *Tingue v. Patch*, 93 Minn. 437, 101 N. W. 792.

<sup>6</sup> *Pennsylvania Mining Co. v. Thomas*, 204 Pa. St. 325, 54 Atl. 101.

<sup>1</sup> See §§ 2211 et seq.

<sup>2</sup> See § 2230.

<sup>3</sup> *Woolam v. Hearn*, 7 Ves. Jr. 211. The question was evaded in, *Attorney General v. Sitwell*, 1 Younge & C. Exch. 559, on the theory that the true con-

struction of the written contract, in view of the fact that the crown was a party thereto, conformed to the actual intention of the parties; and that reformation was therefore unnecessary.

<sup>4</sup> *Manser v. Back*, 6 Hare 443; *Joynes v. Statham*, 3 Atk. 388; *Caplan v. Buckner*, 123 Md. 590, 91 Atl. 481.

taken as to the words in which the written contract is stated, but are mistaken as to the legal effect of the language thus used which does not conform to the oral agreement.<sup>5</sup>

If the party who seeks specific performance wishes to have the contract reformed by oral evidence, and to have specific performance of the contract, as thus reformed, there is a division of authority as to the power of a court of equity to grant such relief, in view of the Statute of Frauds. In many jurisdictions it is felt that the defendant is taking an unfair advantage of the mistake, and that the Statute of Frauds was not intended to limit the power of a court of equity to grant reformation if the written contract or memorandum which the statute requires, has been properly executed. Accordingly, specific performance is granted in cases of this sort.<sup>6</sup> In view of the fact that reformation of a deed is given very generally,<sup>7</sup> no reason appears for refusing reformation and specific performance of a contract. The contract is controlled, at most, by the Statute of Frauds. The deed, at modern law, is controlled by the Statute of Frauds and by the Statute of Conveyances; and at common law it was an instrument under seal.

At the same time a number of courts have held that reformation of a contract within the Statute of Frauds can not be granted as a basis for a decree of specific performance of the contract as thus reformed,<sup>8</sup> on the theory that it is practically a repeal of the

<sup>5</sup> *Noecker v. Wallingford*, 133 Ia. 605, 111 N. W. 37; *Berry v. Whitney*, 40 Mich. 65; *Printz v. McLeod*, — Va. —, 104 S. E. 818.

<sup>6</sup> *California*. *Murphy v. Rooney*, 45 Cal. 78.

*Indiana*. *Dutch v. Boyd*, 81 Ind. 146.

*Kentucky*. *Castleman-Blakemore Co. v. Pickrell & Craig Co.*, 163 Ky. 750, 174 S. W. 749.

*Maryland*. *Moale v. Buchanan*, 11 Gill. & J. (Md.) 314.

*New Hampshire*. *Tilton v. Tilton*, 9 N. H. 385; *Smith v. Greeley*, 14 N. H. 378.

*New York*. *DePeyster v. Hasbrouck*, 11 N. Y. 582; *Wiswall v. Hall*, 3 Paige (N. Y.) 313; *Gouverneur v. Titus*, 6 Paige (N. Y.) 347.

*Oklahoma*. *Atwood v. Mikeska*, 29

*Okla.* 69, L. R. A. 1917A, 602, 115 Pac. 1011.

*Pennsylvania*. *Flagler v. Pleiss*, 3 Rawle (Pa.) 345.

*Vermont*. *Blodgett v. Hobart*, 18 Vt. 414.

<sup>7</sup> See §§ 2224 et seq.

<sup>8</sup> *England*. *Woollam v. Hearn*, 7 Ves. Jr. 211; *Attorney General v. Sitwell*, 1 Younge & C. Ex. 559.

*Connecticut*. *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133.

*Idaho*. *Allen v. Kitchen*, 16 Ida. 133, L. R. A. 1917A, 563, 100 Pac. 1052.

*Maine*. *Elder v. Elder*, 10 Me. 80, 25 Am. Dec. 205.

*Massachusetts*. *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418.

*Nevada*. *De Remer v. Anderson*, 41 Nev. 287, 169 Pac. 737.

Statute of Frauds for the court to grant reformation and then to enforce the contract specifically.<sup>9</sup> If the Statute of Frauds is not pleaded and formal reformation is not sought, mistakes in expression have been corrected in suits for specific performance,<sup>10</sup> even in jurisdictions in which reformation and specific performance together are usually denied.

A mistake in expression which can be corrected readily by the ordinary rules of construction, is not a defense against specific performance.<sup>11</sup>

**§ 3286. Hardship and oppression in contract itself.** If the question of granting or denying specific performance is involved, equity frequently demands a higher ethical standard than the law demands, and apparently a higher ethical standard than equity itself demands if rescission of a contract is sought.<sup>1</sup> Equity refuses specific performance in cases where it appears that the law would enforce the contract and in some cases where equity would not rescind the contract.<sup>2</sup> Such relief is refused where it is said

**North Carolina.** *Davis v. Ely*, 104 N. Car. 16, 17 Am. St. Rep. 667, 5 L. R. A. 810, 10 S. E. 138.

**Oregon.** *Whiteaker v. Vanschoiack*, 5 Or. 113.

**Pennsylvania.** *Safe Deposit & Trust Co. v. Diamond Coal & Coke Co.*, 234 Pa. St. 100, L. R. A. 1917A, 596, 83 Atl. 54.

**Rhode Island.** *Macomber v. Peckham*, 16 R. I. 485, 17 Atl. 910.

**Wisconsin.** *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1.

<sup>9</sup> *Attorney General v. Sitwell*, 1 Younge & C. Ex. 559.

<sup>10</sup> *Forgione v. Lewis* [1920], 2 Ch. 326 (correction of house number, in contract for sale of building).

<sup>11</sup> *Skinner v. Stone*, 144 Ark. 353, 222 S. W. 360.

See § 2231.

<sup>1</sup> See §§ 641 et seq. and § 3400.

<sup>2</sup> **Alabama.** *Boylan v. Wilson*, 202 Ala. 26, 79 So. 364.

**Colorado.** *McDermott v. Lingquist*, 66 Colo. 88 [sub nomine, *McDermott v. Lindquist*, 179 Pac. 147].

**Florida.** *Busch v. Baker*, — Fla. —, 83 So. 704.

**Illinois.** *Gronowski v. Jozefowicz*, 291 Ill. 266, 126 N. E. 108; *Keating v. Frint*, 291 Ill. 423, 126 N. E. 136.

**Iowa.** *Wagner v. Allen*, 184 Ia. 894, 169 N. W. 143; *Griffin v. Nash*, — Ia. —, 174 N. W. 233; *Carter v. Schrader*, 187 Ia. 1245, 175 N. W. 329.

**Kentucky.** *Lexington & Eastern Ry. v. Williams*, 183 Ky. 343, 209 S. W. 59.

**Louisiana.** *Snyder v. Wilder*, 146 La. 811, 84 So. 104.

**Massachusetts.** *Banaghan v. Malaney*, 200 Mass. 46, 19 L. R. A. (N.S.) 871, 85 N. E. 839.

**Nebraska.** *Loosing v. Loosing*, 85 Neb. 66, 25 L. R. A. (N.S.) 920, 122 N. W. 707.

**New York.** *Globe Woolen Co. v. Utica Gas & Electric Co.*, 224 N. Y. 483, 121 N. E. 378.

**North Carolina.** *Rudisill v. Whitenner*, 146 N. Car. 403, 15 L. R. A. (N.S.) 81, 59 S. E. 995.

that the contract is unfair,<sup>3</sup> or unjust,<sup>4</sup> or unconscionable,<sup>5</sup> or that specific performance would be inequitable.<sup>6</sup>

In some of these cases there is unfair dealing or a suppression of the truth, although not amounting to technical fraud or duress.<sup>7</sup> Many of these cases can be explained on the theory of constructive fraud,<sup>8</sup> or undue influence.<sup>9</sup> In a number of the cases the contract is harsh and oppressive because of inadequacy of consideration.<sup>10</sup>

**§ 3287. Hardship and oppression in actual operation of contract.** In other cases, however, the contract is harsh and oppressive because, in its actual operation, it will cast a burden upon the party against whom relief is sought, which was not contem-

**North Dakota.** *Beebe v. Hanson*, 40 N. D. 559, 169 N. W. 31.

**Oklahoma.** *Melton v. Cherokee Oil & Gas Co.*, — Okla. —, 170 Pac. 691 [certiorari denied, *Cherokee Oil & Gas Co. v. Melton*, 38 Sup. Ct. Rep. 427].

**Oregon.** *Schlüssel v. Hays*, 89 Or. 463, 174 Pac. 722.

**South Carolina.** *Anthony v. Eve*, 109 S. Car. 255, 95 S. E. 513.

**Tennessee.** *Leathers v. Deloach*, 140 Tenn. 259, 204 S. W. 633.

**Virginia.** *Barnett v. Cloyd's Executors*, — Va. —, 100 S. E. 674; *Scott v. Albemarle Horse Show Association*, — Va. —, 104 S. E. 842.

<sup>3</sup>*Gronowski v. Jozefowicz*, 291 Ill. 266, 126 N. E. 108; *Carter v. Schrader*, 187 Ia. 1245, 175 N. W. 329; *Globe Woolen Co. v. Utica Gas & Electric Co.*, 224 N. Y. 483, 121 N. E. 378.

<sup>4</sup>*Keating v. Frint*, 291 Ill. 423, 126 N. E. 136; *Lexington & Eastern Ry. v. Williams*, 183 Ky. 343, 209 S. W. 59; *Anthony v. Eve*, 109 S. Car. 255, 95 S. E. 513.

<sup>5</sup>*Boylan v. Wilson*, 202 Ala. 26, 79 So. 364.

<sup>6</sup>*Alabama. Boylan v. Wilson*, 202 Ala. 26, 79 So. 364.

**Iowa.** *Griffin v. Nash*, — Ia. —, 174 N. W. 233; *Carter v. Schrader*, 187 Ia. 1245, 175 N. W. 329.

**Kansas.** *James v. Lane*, 103 Kan. 540, 175 Pac. 387; *Taylor v. Holyfield*, 104 Kan. 587, 180 Pac. 208.

**Louisiana.** *Snyder v. Wilder*, 146 La. 811, 84 So. 104.

**South Carolina.** *Anthony v. Eve*, 109 S. Car. 255, 95 S. E. 513.

<sup>7</sup>**Florida.** *Busch v. Baker*, — Fla. —, 83 So. 704.

**Iowa.** *Wagner v. Allen*, 184 Ia. 894, 169 N. W. 143.

**Massachusetts.** *Banaghan v. Malaney*, 200 Mass. 46, 19 L. R. A. (N.S.) 871, 85 N. E. 839.

**Nebraska.** *Loosing v. Loosing*, 85 Neb. 66, 25 L. R. A. (N.S.) 920, 122 N. W. 707.

**Tennessee.** *Leathers v. Deloach*, 140 Tenn. 259, 204 S. W. 633.

<sup>8</sup>*Globe Woolen Co. v. Utica Gas & Electric Co.*, 224 N. Y. 483, 121 N. E. 378. (Contract made between two corporations, by common director, at enormous loss to one.)

See §§ 405 et seq.

<sup>9</sup>See §§ 436 et seq.

<sup>10</sup>See §§ 641 et seq.

plated when the contract was made.<sup>1</sup> If the performance of a contract is unfair because of an advantage taken by the party who seeks specific performance, specific performance will be denied.<sup>2</sup>

If the actual course of events can be regarded as being fairly within the contemplation of the parties, the question of the harshness of the contract is to be determined by the facts as they exist when the contract was made, and not by the facts as they exist when relief is sought.<sup>3</sup> A party who has a reasonable opportunity of appreciating the possible contingencies which may arise can not resist specific performance because it turns out to be disadvantageous to him.<sup>4</sup> This rule is sometimes stated in the form that the courts will not make contracts for the parties or revise contracts for them.<sup>5</sup> In other words, the fact that a contract is more advantageous to one party than it is to another is not a reason for refusing specific performance.<sup>6</sup> The fact that experts testify that one to whom an option is given could get along without the land

<sup>1</sup> **United States.** Willard v. Tayloe, 75 U. S. (8 Wall.) 557, 19 L. ed. 501.

**Kentucky.** Lexington & Eastern Ry. v. Williams, 183 Ky. 343, 209 S. W. 59.

**New York.** Bradford, Eldred & Cuba Ry. v. New York, Lake Erie & Western Ry., 123 N. Y. 316, 11 L. R. A. 116, 25 N. E. 499; Globe Woolen Co. v. Utica Gas & Electric Co., 224 N. Y. 483, 121 N. E. 378.

**North Carolina.** Rudisill v. Whitener, 146 N. Car. 403, 15 L. R. A. (N.S.) 81, 59 S. E. 995.

**West Virginia.** Starcher v. Duty, 61 W. Va. 373, 9 L. R. A. (N.S.) 913, 56 S. E. 524.

<sup>2</sup> Witkowsky v. Affeld, 283 Ill. 557, 119 N. E. 630 (obiter); Lexington & Eastern Ry. v. Williams, 183 Ky. 343, 209 S. W. 59; Rudisill v. Whitener, 146 N. Car. 403, 15 L. R. A. (N.S.) 81, 59 S. E. 995.

<sup>3</sup> **England.** Adams v. Weare, 1 Brown Ch. 567.

**Alabama.** Blackburn v. McLaughlin, 202 Ala. 434, 80 So. 818.

**Idaho.** Fox v. Spokane International Ry., 26 Ida. 60, 140 Pac. 1103.

**Illinois.** Aldrich v. Aldrich, 287 Ill. 213, 122 N. E. 472; Miedema v. Wormhoudt, 288 Ill. 537, 123 N. E. 596.

**Iowa.** Larson v. Smith, 174 Ia. 619, 156 N. W. 813; Mitchell v. Mutch, 180 Ia. 1281, 164 N. W. 212.

**Kansas.** Linn County Bank v. Gresham, 105 Kan. 460, 185 Pac. 54.

**Maryland.** Cityco Realty Co. v. Friedenwald, 130 Md. 329, 100 Atl. 374.

**Washington.** Blanck v. Pioneer Mining Co., 93 Wash. 26, 159 Pac. 1077.

<sup>4</sup> Miedema v. Wormhoudt, 288 Ill. 537, 123 N. E. 596; Cityco Realty Co. v. Friedenwald, 130 Md. 329, 100 Atl. 374.

<sup>5</sup> Nelson v. Robinson, — Iowa —, 178 N. W. 416; Fairey v. Strange, 112 S. Car. 155, 98 S. E. 135; Davis v. Alderson, 125 Va. 681, 100 S. E. 541.

<sup>6</sup> Stahl v. Stevenson, 102 Kan. 447, 844, 171 Pac. 1164; Taylor v. Holyfield, 104 Kan. 587, 180 Pac. 208; Orestes v. Galanis, 78 N. H. 514, 102 Atl. 759; Bullis v. Pitman, 90 N. J. Eq. 88, 105 Atl. 589; Davis v. Alderson, 125 Va. 681, 100 S. E. 541.

which he has elected to take, does not show that he is acting in bad faith.<sup>7</sup>

The difference between the harsh and oppressive contract, on the one hand, and the contract which is merely a reasonably advantageous one, on the other, is a question of degree. No arbitrary rule can be laid down for determining the point at which the courts will refuse specific performance. The willingness to grant relief in cases of this sort is determined largely by the hardship which will be inflicted in case the remedy is either granted or denied.<sup>8</sup> The same principles are discussed as applications of the doctrine that specific performance is a matter of discretion rather than of right,<sup>9</sup> and that mutuality, so-called, is a necessary element of a contract for which specific performance can be given.<sup>10</sup>

**§ 3288. Necessity of consideration—Promise under seal.** If no consideration for the promise exists there is no contract, and specific performance is, of course, refused.<sup>1</sup> A so-called contract which imposes no valid obligation upon the promisee,<sup>2</sup> or which can

<sup>7</sup> *Trustees of Hamilton College v. Roberts*, 223 N. Y. 56, 119 N. E. 97.

<sup>8</sup> See §§ 3347 et seq.

<sup>9</sup> See § 3346.

<sup>10</sup> See §§ 3308 et seq.

<sup>1</sup> *Alabama. Day v. Stewart*, 202 Ala. 229, 80 So. 289.

*Colorado. Winter v. Geobner*, 21 Colo. 279, 40 Pac. 570.

*Illinois. Preston v. Williams*, 81 Ill. 176 (obiter); *Geer v. Goudy*, 174 Ill. 514, 51 N. E. 623.

*Kentucky. Bright v. Bright*, 47 Ky. (8 B. Mon.) 194.

*Maryland. Selby v. Case*, 87 Md. 459, 39 Atl. 1041.

*Missouri. Shinkle v. Vickery*, 156 Mo. 1, 55 S. W. 456.

*New Jersey. Fidelity Trust Co. v. Newark Milk & Cream Co.*, 89 N. J. Eq. 224, 108 Atl. 54.

*North Carolina. Solomon v. Sewerage Co.*, 142 N. Car. 439 [sub nomine, *Solomon v. Wilmington Sewerage Co.*, 6 L. R. A. (N.S.) 391, 55 S. E. 300].

*North Dakota. Streeter v. Archer*, — N. D. —, 176 N. W. 826.

*Ohio. Moeller v. Poland*, 80 O. S. 418, 89 N. E. 100.

*Oklahoma. Kolachny v. Galbreath*, 26 Okla. 772, 38 L. R. A. (N.S.) 451, 110 Pac. 902.

*Tennessee. McCampbell v. Farnsworth*, 43 Tenn. (3 Coldw.) 317.

*Virginia. Pennybacker v. Maupin*, 96 Va. 461, 31 S. E. 607; *Scott v. Albemarle Horse Show Association*, — Va. —, 104 S. E. 842.

*Wisconsin. Hibbert v. Mackinnon*, 79 Wis. 673, 49 N. W. 21; *Ludwig v. Ludwig*, 170 Wis. 41, 172 N. W. 726.

See §§ 537 et seq.

<sup>2</sup> *Solomon v. Sewerage Co.*, 142 N. Car. 439 [sub nomine, *Solomon v. Wilmington Sewerage Co.*, 6 L. R. A. (N.S.) 391, 55 S. E. 300]; *Streeter v. Archer*, — N. D. —, 176 N. W. 826; *Kolachny v. Galbreath*, 26 Okla. 772, 38 L. R. A. (N.S.) 451, 110 Pac. 902; *Beaser v. Allen*, — R. I. —, 111 Atl. 885.

See §§ 569 et seq.

be terminated by the promisee at will,<sup>3</sup> lacks consideration, and specific performance will not be granted.

If the rights of the parties in the estate of a decedent are uncertain, a contract for the compromise of such rights is supported by sufficient consideration;<sup>4</sup> but if the rights are undisputed, a promise by one to take less than the share that the law gives him lacks adequate consideration.<sup>5</sup>

In contracts in which consideration would be presumed at law, the same presumption will arise in equity where specific performance is sought, as in case of written contract,<sup>6</sup> or contracts under seal.<sup>7</sup> If the consideration is furnished to the promisor, it need not move from the promisee.<sup>8</sup>

Even in jurisdictions in which a contract under seal is enforceable at law by reason of its form, although it is not supported by a valuable consideration,<sup>9</sup> equity will not grant specific performance of a contract under seal unless it is supported by valuable consideration.<sup>10</sup>

**§ 3289. Mistake.** The fact that the parties have gone through the outward form of offer and acceptance does not require a court of equity to grant specific performance if some essential element

<sup>3</sup> *Solomon v. Wilmington Sewerage Co.*, 142 N. Car. 439, 6 L. R. A. (N.S.) 391, 55 S. E. 300; *Kolachny v. Galbreath*, 26 Okla. 772, 38 L. R. A. (N.S.) 451, 110 Pac. 902; *Ludwig v. Ludwig*, 170 Wis. 41, 172 N. W. 726 (change of residence not regarded as consideration).

See §§ 572 et seq.

<sup>4</sup> *Stutsman v. Crain*, 185 Ia. 514, 170 N. W. 806.

<sup>5</sup> *Casstevens v. Casstevens*, 227 Ill. 547, 118 Am. St. Rep. 291, 81 N. E. 709.

See however, *Stahl v. Stevenson*, 102 Kan. 447, 844, 171 Pac. 1164.

<sup>6</sup> *Cone v. Cone*, 118 Ia. 458, 92 N. W. 665.

<sup>7</sup> *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Mills v. Larrance*, 186 Ill. 635, 58 N. E. 219; *Lyle v. Addicks*, 62 N. J. Eq. 123, 49 Atl. 1121.

<sup>8</sup> *Brown v. Sebastopol*, 153 Cal. 704, 19 L. R. A. (N.S.) 178, 96 Pac. 363.

<sup>9</sup> See §§ 1166 et seq.

<sup>10</sup> *England. Williamson v. Codrington*, 1 Ves. Sr. 511.

*Illinois. Crandall v. Willig*, 166 Ill. 233, 46 N. E. 755; *Corbett v. Cronk-hite*, 239 Ill. 9, 87 N. E. 874.

*Kentucky. Buford v. McKee*, 31 Ky. (1 Dana) 107.

*Maryland. Selby v. Case*, 87 Md. 459, 39 Atl. 1041; *Schapiro v. Howard*, 113 Md. 360, 78 Atl. 58.

*Minnesota. Hale v. Dressen*, 73 Minn. 277, 76 N. W. 31.

*Missouri. Bosley v. Bosley*, 85 Mo. App. 424.

*New Jersey. Marvel v. Jonah*, 81 N. J. Eq. 369, 86 Atl. 968.

*North Carolina. Woodall v. Prevatt*, 45 N. Car. (Busbee Equity) 199; *Thomason v. Bescher*, 176 N. Car. 622, 2 A. L. R. 626, 97 S. E. 654 (obiter).

*Wisconsin. Smith v. Wood*, 12 Wis. 382.

of the contract is lacking, or if the apparent assent has been obtained through misrepresentation or undue influence; and the party who is subject to such fraud, misrepresentation, duress or undue influence wishes to avoid liability thereunder.<sup>1</sup>

If a contract in outward form exists, but there is some mistake as to an essential element,<sup>2</sup> specific performance will be refused.<sup>3</sup> If the parties enter into a contract under a mutual mistake as to one of the essential elements thereof, specific performance will be refused.<sup>4</sup> If one of the parties has made a mistake as to an essential element of the contract, and the adversary party has not made such mistake and does not know that such mistake has induced the first party to enter into the contract, it is generally held that the contract is valid,<sup>5</sup> and specific performance will be granted.<sup>6</sup> If the offeror has, by mistake, made an offer which includes more than he intends to offer, he can not avoid specific performance because of such mistake if the offeree does not know that the offer has been induced by such mistake.<sup>7</sup> Even in specific performance, one to whom a written offer is made and has an opportunity to read it, can not resist specific performance on the ground that he

<sup>1</sup> *Newell-Murdock Realty Co. v. Wickham*, — Cal. —, 190 Pac. 359; *Henneke v. Cooke*, 135 Md. 417, 109 Atl. 113; *Anthony v. Eve*, 109 S. Car. 255, 95 S. E. 513.

See §§ 216 et seq.

<sup>2</sup> See §§ 251 et seq.

<sup>3</sup> *Illinois. Hatch v. Kizer*, 140 Ill. 583, 33 Am. St. Rep. 258, 30 N. E. 605.

*Iowa. Wilkin v. Voss*, 120 Ia. 500, 94 N. W. 1123.

*Kentucky. McGowan v. Shearer*, 176 Ky. 312, 195 S. W. 485.

*Michigan. Hall v. Loomis*, 63 Mich. 709, 30 N. W. 374.

*Minnesota. Thwing v. Hall & Ducey Lumber Co.*, 40 Minn. 184, 41 N. W. 815.

*South Carolina. Anthony v. Eve*, 109 S. Car. 255, 95 S. E. 513.

See §§ 251 et seq.

<sup>4</sup> *Hatch v. Kizer*, 140 Ill. 583, 33 Am. St. Rep. 258, 30 N. E. 605; *McGowan v. Shearer*, 176 Ky. 312, 195 S. W. 485;

*Thwing v. Hall & Ducey Lumber Co.*, 40 Minn. 184, 41 N. W. 815.

<sup>5</sup> See § 266.

<sup>6</sup> *England. Tamplin v. James*, 15 Ch. Div. 215.

*Illinois. Cole v. Cole*, 292 Ill. 154, 126 N. E. 752.

*New Jersey. Campbell v. Parker*, 59 N. J. Eq. 342, 45 Atl. 116.

*Virginia. Harper v. Wallerstein*, 122 Va. 274, L. R. A. 1918C, 517, 94 S. E. 781.

*Washington. Cole v. Hunter Tract Improvement Co.*, 61 Wash. 365, 32 L. R. A. (N.S.) 125, Ann. Cas. 1912C, 749, 112 Pac. 368.

*West Virginia. Welch Publishing Co. v. Johnson Realty Co.*, 78 W. Va. 350, L. R. A. 1917A, 200, 89 S. E. 707.

<sup>7</sup> *Cole v. Cole*, 292 Ill. 154, 126 N. E. 752; *Minneapolis & St. Louis Ry. v. Cox*, 76 Ia. 306, 14 Am. St. Rep. 216, 41 N. W. 24; *Harper v. Wallerstein*, 122 Va. 274, L. R. A. 1918C, 517, 94 S. E. 781.

did not know the words of the offer when he accepted it.<sup>8</sup> As has already been said,<sup>8</sup> the courts of some jurisdictions, especially in the exercise of equity powers, take the opposite view, and are unwilling to enforce a promise which has been induced by mistake of the offeror, as long as the offeree has not altered his position in reliance upon such promise. Where this theory prevails specific performance is refused in cases of this sort.<sup>10</sup> If a party who knows the provision of a contract has signed it so as to become liable thereon personally, he can not resist specific performance for the reason that the contract was really intended for the benefit of a third person.<sup>11</sup>

Specific performance will be denied where the vendor has made a mistake as to the identity of the property which he is conveying,<sup>12</sup> or where he was mistaken as to the area of the realty which he was selling.<sup>13</sup> Specific performance will be denied as against a vendor who did not know that, under his contract, the amount of the mortgage was to be deducted from the purchase price.<sup>14</sup> In some jurisdictions in which specific performance is denied for mistakes of this sort, the plaintiff is allowed to enforce the promise as the defendant had intended to make it.<sup>15</sup> It seems difficult to explain the result in such a case on any theory of contract law. It would seem that the contract should be enforced as written, if it was operative; and if not, it would seem that the party whose

<sup>8</sup> *Minneapolis & St. Louis Ry. v. Cox*, 76 Ia. 306, 14 Am. St. Rep. 216, 41 N. W. 24; *Cape Fear Lumber Co. v. Matheson*, 69 S. Car. 87, 48 S. E. 111.

For unilateral mistake with reference to the contents of a written contract as a ground for refusing specific performance, see *Woldenberg v. Riphan*, 166 Wis. 433, 166 N. W. 21.

See also, §§ 270 et seq..

<sup>9</sup> See §§ 263 et seq.

<sup>10</sup> *England. Leslie v. Tompson*, 9 Hare 268.

*Delaware. Coppage v. Equitable Guarantee & Trust Co.*, 11 Del. Ch. 373, 102 Atl. 788.

*Maine. Mansfield v. Sherman*, 81 Me. 365, 17 Atl. 300.

*Maryland. Caplan v. Buckner*, 123 Md. 590, 91 Atl. 481; *Henneke v. Cooke*, 135 Md. 417, 109 Atl. 113.

*Minnesota. Baker v. Polydisky*, 144 Minn. 72, 174 N. W. 526.

*Washington. Buck v. Equitable Life Assurance Society*, 96 Wash. 683, 165 Pac. 878.

<sup>11</sup> *Buchhauser v. Yudelson*, 287 Ill. 138, 122 N. E. 100. (Stockholder signs so as to incur personal liability in place of corporation.)

<sup>12</sup> *Diffenderffer v. Knoche*, 118 Md. 189, 84 Atl. 416; *Henneke v. Cooke*, 135 Md. 417, 109 Atl. 113. (Vendor's agent also acted in excess of his authority.)

<sup>13</sup> *Coppage v. Equitable Guarantee & Trust Co.*, 11 Del. Ch. 373, 102 Atl. 788.

<sup>14</sup> *Baker v. Polydisky*, 144 Minn. 72, 174 N. W. 526.

<sup>15</sup> *Baker v. Polydisky*, 144 Minn. 72, 174 N. W. 526.

mistake had prevented the existence of a contract ought not to be compelled to perform a contract which, the court has held, never existed. The theory upon which some courts of equity rely in granting or refusing relief in cases of this sort is that there was a contract in spite of the mistake of the parties as to an essential element thereof; and that equity has power to enforce it or to deny specific performance, in accordance with the facts of each case.<sup>16</sup>

In some jurisdictions the mistake of one party alone will not justify the court in refusing specific performance if the adversary party has altered his position in such a way that he will suffer a serious detriment if he is denied specific performance.<sup>17</sup>

Mistake as to a collateral matter,<sup>18</sup> even if induced by the false statements of a third party,<sup>19</sup> does not justify the court in refusing specific performance.<sup>20</sup> If no fraud is shown, specific performance will not be denied because of the fact that the purchaser of realty is a negro and that, if the land is conveyed to him, it will affect the value of the remaining land which the vendor still owns.<sup>21</sup> If the mistake is due to the statements of a third person, to whom the offeror has referred the offeree for information, spe-

<sup>16</sup> "But in granting such relief equity does not declare there was no contract. Its jurisdiction stands upon the assumption that there is one and is interposed to relieve from it. In this respect there is a marked distinction between equity jurisdiction to rescind a contract, and jurisdiction to compel specific performance, founded upon the theory of discretion. In the former case the power of the court seems not to be discretionary, but in the latter it is to some extent at least. In the former the injured party can not, as a general rule, obtain any relief from his contract in a court of law. In the latter he may recover damages for non-performance, and this right is the basis of the discretionary power of courts of equity to refuse specific performance, when applications are made to them for enforcement of hard or oppressive bargains." Welch Publishing

Co. v. Johnson Realty Co., 78 W. Va. 350, L. R. A. 1917A, 200, 89 S. E. 707.

An unilateral mistake, not induced by the opposite party, may therefore be sufficient to justify a court in refusing to decree specific performance of the contract. Welch Publishing Co. v. Johnson Realty Co., 78 W. Va. 350, L. R. A. 1917A, 200, 89 S. E. 707 (obiter).

<sup>17</sup> Welch Publishing Co. v. Johnson Realty Co., 78 W. Va. 350, L. R. A. 1917A, 200, 89 S. E. 707.

<sup>18</sup> Wilson v. Keating, 4 De G. & J. 588; Cole v. Hunter Tract Improvement Co., 61 Wash. 365, 32 L. R. A. (N.S.) 125, Ann. Cas. 1912C, 749, 112 Pac. 368.

<sup>19</sup> Wilson v. Keating, 4 De G. & J. 588.

<sup>20</sup> See §§ 379 et seq.

<sup>21</sup> Co'e v. Hunter Tract Improvement Co., 61 Wash. 365, 32 L. R. A. (N.S.) 125, Ann. Cas. 1912C, 749, 112 Pac. 368.

cific performance is denied,<sup>22</sup> since this is rather a case of innocent misrepresentation than mistake.<sup>23</sup>

**§ 3290. Misrepresentation and fraud.** A party who has induced the adversary party to enter into a contract by fraud,<sup>1</sup> or by innocent misrepresentation,<sup>2</sup> can not have specific performance. Innocent misrepresentation as to one piece of property may result in the refusal of specific performance of a contract for the sale of another piece of property, if the latter would not have been bought without the former.<sup>3</sup> If the party seeking relief did not intend to perform the terms of the contract on his part to be performed, when he entered into the contract, the court does not abuse its judicial discretion by refusing specific performance.<sup>4</sup> Cases of this sort present fewer difficulties than cases of mistake, since the erroneous belief which induced the defendant to enter into the contract was caused by the plaintiff who is seeking to take advantage thereof. Concealment of the identity of the adversary party where material,<sup>5</sup> or fraudulent representations as to the value of the considerations to be furnished,<sup>6</sup> or as to the words of the

<sup>22</sup> *Keating v. Frint*, 291 Ill. 423, 126 N. E. 136.

<sup>23</sup> See § 363.

<sup>1</sup> *Delaware*. *Todd v. Diamond State Iron Co.*, 8 Houst. (Del.) 372 [sub nomine, *Diamond State Iron Co.*, v. *Todd*, 14 Atl. 27]. (Deceit as to value of stock.)

*Georgia*. *McMillan v. Branan*, 149 Ga. 737, 101 S. E. 792.

*Iowa*. *Carter v. Schrader*, 187 Ia. 1245, 175 N. W. 329.

*New Jersey*. *Neptune Fisheries Co. v. Cape May Real Estate Co.*, 89 N. J. Eq. 552, 105 Atl. 212.

*Pennsylvania*. *Edelstein v. Sell*, — Pa. St. —, 112 Atl. 435.

*South Carolina*. *Anthony v. Eve*, 109 S. Car. 255, 95 S. E. 513.

*Washington*. *Cohn v. Knabb*, 105 Wash. 363, 177 Pac. 794.

See §§ 281 et seq.

<sup>2</sup> *England*. *Lamore v. Dixon*, L. R. 6 H. L. 414.

*Alabama*. *Manning v. Carter*, 201 Ala. 218, 77 So. 744.

*Florida*. *Busch v. Baker*, — Fla. —, 83 So. 704.

*Massachusetts*. *New England Trust Co. v. Abbott*, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432.

*New Jersey*. *Muller v. Weiss*, — N. J. —, 109 Atl. 357.

*Pennsylvania*. *Allen v. Kirk*, 219 Pa. St. 574, 69 Atl. 50.

*South Carolina*. *Anthony v. Eve*, 109 S. Car. 255, 95 S. E. 513.

*Virginia*. *Barnett v. Cloyd's Executors*, 125 Va. 546, 100 S. E. 674.

See §§ 362 et seq.

<sup>3</sup> *Holliday v. Lockwood* [1917], 2 Ch. 47.

<sup>4</sup> *Engberry v. Rousseau*, 117 Wis. 52, 93 N. W. 824.

<sup>5</sup> *Newell-Murdock Realty Co. v. Wickham*, — Cal. —, 190 Pac. 359; *Cohn v. Knabb*, 105 Wash. 363, 177 Pac. 794.

<sup>6</sup> *Neptune Fisheries Co. v. Cape May Real Estate Co.*, 89 N. J. Eq. 552, 105 Atl. 212.

written instrument,<sup>7</sup> are grounds for refusing specific performance. A fraudulent representation which is not made with the intention of inducing action thereon, by the party who subsequently enters into the contract in question, is not ground for refusing specific performance,<sup>8</sup> as where A made a false representation to B as agent for X, and B subsequently acted in reliance on such statement.<sup>9</sup> A party who is not misled by fraud can not interpose fraud as a defense.<sup>10</sup> A husband can not resist specific performance of a contract to convey land on the ground that his wife was induced to sign such instrument through fraud.<sup>11</sup> If the party who has been induced to enter into a contract by fraud, or misrepresentation, elects to treat such contract as enforced,<sup>12</sup> as by continuing to accept the benefits thereof, with knowledge of the fraud,<sup>13</sup> he can not thereafter resist specific performance.

**§ 3291. Action by promisee in reliance on gratuitous promise.**

In one class of cases, equity will grant specific performance of promises which the law would not, apparently, regard as enforceable for want of consideration. It is generally held that the consideration must be one of the terms of the contract, and that a gratuitous promise can not be turned into an enforceable contract because of the fact that the promisee has acted in reliance thereon, if such action was not required by the terms of the contract and as a consideration therefor.<sup>1</sup> Equity, however, will apparently grant specific performance in cases of this sort, if the promisee has acted in such a way that serious injury will be inflicted upon him if he is unable to enforce the promise. From the nature of the cases, this question generally arises in equity in cases in which A has made a gratuitous promise to convey a tract of land to B, and in reliance on such promise B has taken possession of such realty and has made valuable improvements thereon. In such cases B can have specific performance even though A's promise was

<sup>7</sup> *McMillan v. Branan*, 149 Ga. 737, 101 S. E. 792.

<sup>8</sup> *McCane v. Wokoun*, — Ia. —, 179 N. W. 332.

<sup>9</sup> *McCane v. Wokoun*, — Ia. —, 179 N. W. 332.

<sup>10</sup> *Scott v. Habinck*, — Ia. —, 174 N. W. 1.

<sup>11</sup> *Scott v. Habinck*, — Ia. —, 174 N. W. 1.

<sup>12</sup> *Scott v. Habinck*, — Ia. —, 174 N. W. 1.

<sup>13</sup> *Scott v. Habinck*, — Ia. —, 174 N. W. 1.

<sup>1</sup> See § 522.

oral.<sup>2</sup> The same relief may be given in a suit to quiet title,<sup>3</sup> or to enjoin trespass.<sup>4</sup> In cases of this sort, the fact of change of possession and of alteration of condition are sufficient to induce equity to grant specific performance, although the promise lacked consideration and although it does not comply with the Statute of Frauds.<sup>5</sup> Such contract may be interposed as a defense to an action of ejectment if equitable defenses can be made in legal actions.<sup>6</sup>

If the gratuitous promise is one for the gift of personal property, the question does not arise in this form, since transfer of possession, which is usually an element of the part performance, is sufficient, in case of a gift, to transfer the legal title to the donee, and to render the assistance of equity unnecessary.

**§ 3292. Adequacy of consideration — Extreme inadequacy.** Whether the consideration must be adequate or not is a question which depends, in the first instance, on the nature of the subject-matter or promise on each side. If this is money, or something, the value of which is fixed by law in money, the consideration must be adequate, both in law and in equity.<sup>1</sup> Equity will not enforce a note and mortgage for three thousand dollars, given to take up a note of two thousand dollars.<sup>2</sup>

If the subject-matter or the consideration, or both, are not money obligations, or rights, whose value is fixed by law in money, inadequacy, if extreme enough, may prevent specific performance;

<sup>2</sup> *England*. *Dillwyn v. Llewellyn*, 31 L. J. Ch. (N.S.) 658.

*Illinois*. *Harlan v. Harlan*, 273 Ill. 155, 112 N. E. 452; *Mahannah v. Mahannah*, 202 Ill. 133, 126 N. E. 573.

*Iowa*. *Bevington v. Bevington*, 133 Ia. 351, 9 L. R. A. (N.S.) 508, 12 Ann. Cas. 490, 110 N. W. 840.

*Michigan*. *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 744.

*New Hampshire*. *Phelan v. Adam*, — N. H. —, 108 Atl. 814.

*New York*. *Messiah Home v. Rogers*, 212 N. Y. 315, 106 N. E. 59.

*Texas*. *Cable v. Worsham*, 96 Tex. 86, 97 Am. St. Rep. 871, 70 S. W. 737.

*Washington*. *Raymond v. Hatrick*, 104 Wash. 619, 177 Pac. 640.

*West Virginia*. *Crim v. England*, 46 W. Va. 480, 76 Am. St. Rep. 826, 33 S. E. 310; *Berry v. Berry*, 83 W. Va. 763, 99 S. E. 79.

See § 524 and §§ 1373 et seq.

<sup>3</sup> *Pranger v. Pranger*, 182 Ia. 639, 164 N. W. 607; *Trebesch v. Trebesch*, 130 Minn. 368, 153 N. W. 754; *Colby v. Street*, — Minn. —, 178 N. W. 599.

<sup>4</sup> *Dwight v. Giebisch*, 77 Or. 254 150 Pac. 749.

<sup>5</sup> See §§ 1251 et seq. and §§ 1371 et seq.

<sup>6</sup> *Hayes v. Hayes*, 126 Minn. 389, 148 N. W. 125.

<sup>1</sup> See § 643.

<sup>2</sup> *Richardson v. Barrick*, 16 Ia. 407.

but there is a decided lack of authority in the abstract statement of this principle and somewhat less variance in its practical application. It seems to be clear, that, in most jurisdictions, equity will go further than law in requiring adequacy of consideration. If the consideration is so extremely inadequate that the contract is unconscionable, equity will refuse specific performance,<sup>3</sup> even though the contract may be enforceable at law, and although equity will not grant rescission.<sup>4</sup> In such cases, the party who seeks relief will be left to his remedy at law.<sup>5</sup> The rule which requires adequacy for specific performance has been carried into statutory form in some jurisdictions.<sup>6</sup>

**§ 3293. Inadequacy less than extreme.** At the same time, the unwillingness of courts of equity to make contracts for the parties, or to revise contracts which have been made in good faith, has led the courts of many jurisdictions to declare that mere inadequacy of consideration does not render the contract invalid and does not prevent specific performance;<sup>7</sup> but that the inadequacy

<sup>3</sup> **United States.** *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N.S.) 317, 12 Ann. Cas. 120.

**California.** *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689.

**Iowa.** *Condon v. Osgood*, 97 Ia. 1, 65 N. W. 1003 (contract made by unauthorized agent, for inadequate consideration).

**Massachusetts.** *Lee v. Kirby*, 104 Mass. 420.

**Michigan.** *Butler v. Duncan*, 47 Mich. 94, 41 Am. Rep. 711, 10 N. W. 123.

**Montana.** *Interior Securities Co. v. Campbell*, 55 Mont. 459, 178 Pac. 582.

**North Dakota.** *Beebe v. Hanson*, 40 N. D. 559, 169 N. W. 31 (statute).

**Oklahoma.** *Ferguson v. Blackwell*, 8 Okla. 489, 58 Pac. 647.

**Washington.** *Pasco Fruit Lands Co. v. Timmerman*, 88 Wash. 112, 152 Pac. 675.

**West Virginia.** *Conaway v. Sweeney*, 24 W. Va. 643.

**Wisconsin.** *Mulligan v. Albertz*, 103 Wis. 140, 78 N. W. 1093; *Ludwig v. Ludwig*, 170 Wis. 41, 172 N. W. 726.

It is said that, possibly, inadequacy alone is not enough to justify equity in refusing specific performance. *Lexington & Eastern Ry. Co. v. Williams*, 183 Ky. 343, 209 S. W. 59.

See also, §§ 637 et seq.

<sup>4</sup> See § 638.

<sup>5</sup> *Bruck v. Tucker*, 42 Cal. 346; *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239; *Kelly v. Central Pacific Railroad Co.*, 74 Cal. 557, 5 Am. St. Rep. 470, 16 Pac. 386; *Mathews v. Davis*, 102 Cal. 202, 36 Pac. 358.

<sup>6</sup> *Beebe v. Hanson*, 40 N. D. 559, 169 N. W. 31; *Streeter v. Archer*, — N. D. —, 176 N. W. 826.

<sup>7</sup> **England.** *Coles v. Trecothick*, 9 Ves. Jr. 234.

**United States.** *Heyward v. Bradley*, 179 Fed. 325, 102 C. C. A. 509.

**Alabama.** *South & North Alabama Ry. Co. v. Highland Avenue & Belt Ry.*, 98 Ala. 400, 39 Am. St. Rep. 74, 13 So. 682.

**Arizona.** *Kimball v. Statler*, 20 Ariz. 81, 176 Pac. 843.

must be so gross as to shock the conscience of the chancellor,<sup>2</sup> or must be so great as to suggest fraud, mistake, and the like.<sup>3</sup> Specific performance has been given in spite of a very considerable inadequacy of consideration if the evidence showed that the promisor understood the facts and that he was treated fairly.<sup>4</sup> This is especially true where the consideration is one for which compensation can not be made in money,<sup>5</sup> as where a part of the consideration consists of the promisee's giving up his place of residence, and the like.<sup>6</sup>

**Colorado.** *McDermott v. Lingquist*, 66 Colo. 88 [sub nomine, *McDermott v. Lindquist*, 179 Pac. 147].

**Illinois.** *Ullsperger v. Meyer*, 217 Ill. 262, 75 N. E. 482; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645.

**Indiana.** *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535.

**Iowa.** *Scott v. Habinck*, — Ia. —, 174 N. W. 1.

**Kansas.** *Greenwood v. Greenwood*, 97 Kan. 380, 155 Pac. 807; *Stahl v. Stevenson*, 102 Kan. 447, 844, 171 Pac. 1164.

**Kentucky.** *Schmidtz v. Louisville & Nashville Ry.*, 101 Ky. 441 [sub nomine, *Schmidt v. Louisville & Nashville Ry.*, 38 L. R. A. 809, 41 S. W. 1015].

**Maryland.** *Chicora Fertilizer Co. v. Dunan*, 91 Md. 144, 50 L. R. A. 401, 46 Atl. 347.

**Massachusetts.** *Lee v. Kirby*, 104 Mass. 420; *Roberts v. Cambridge*, 170 Mass. 199, 49 N. E. 84; *Nickerson v. Bridges*, 216 Mass. 416, 103 N. E. 939; *Capen v. Capen*, 234 Mass. 355, 125 N. E. 692.

**Michigan.** *Engle v. Engle*, — Mich. —, 176 N. W. 547.

**New Jersey.** *McCormick v. Stephany*, 57 N. J. Eq. 257, 41 Atl. 840; *Madison Athletic Association v. Brittin*, 60 N. J. Eq. 160, 46 Atl. 652.

**New York.** *Seymour v. Delancy*, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270.

**North Carolina.** *Combes v. Adams*, 150 N. Car. 64, 63 S. E. 186.

**Ohio.** *Galloway v. Barr*, 12 Ohio 354.

**Rhode Island.** *Sweeney v. Brow*, 35 R. I. 227, 86 Atl. 115.

**West Virginia.** *Conaway v. Sweeney*, 24 W. Va. 643.

<sup>2</sup> *Coles v. Trecothick*, 9 Ves. Jr. 234; *Scott v. Habinck*, — Ia. —, 174 N. W. 1; *Stahl v. Stevenson*, 102 Kan. 447, 844, 171 Pac. 1164.

See also, § 637.

<sup>3</sup> *Cathcart v. Robinson*, 30 U. S. (5 Pet.) 264, 8 L. ed. 120; *Woodrow v. Quaid*, 292 Ill. 27, 126 N. E. 583; *Ullsperger v. Meyer*, 217 Ill. 262, 2 L. R. A. (N.S.) 221, 3 Ann. Cas. 1032, 75 N. E. 482; *Greenwood v. Greenwood*, 96 Kan. 591, 152 Pac. 657, S. C. 97 Kan. 380, 155 Pac. 807; *Nickerson v. Bridges*, 216 Mass. 416, 103 N. E. 939.

<sup>4</sup> **Arizona.** *Kimball v. Statler*, 20 Ariz. 81, 176 Pac. 843.

**Iowa.** *Scott v. Habinck*, — Ia. —, 174 N. W. 1.

**Kansas.** *Nordboe v. Frye*, 107 Kan. 291, 191 Pac. 282.

**Michigan.** *Engle v. Engle*, — Mich. —, 176 N. W. 547 (consideration worth about one-fifth of value of property).

**Wisconsin.** *Miller Saw-Trimner Co. v. Cheshire*, — Wis. —, 178 N. W. 855.

<sup>5</sup> *Nordboe v. Frye*, 107 Kan. 291, 191 Pac. 282; *Capen v. Capen*, 234 Mass. 355, 125 N. E. 692; *Colby v. Street*, — Minn. —, 178 N. W. 590.

<sup>6</sup> *Capen v. Capen*, 234 Mass. 355, 125 N. E. 692; *Colby v. Street*, — Minn. —, 178 N. W. 590.

If a modification of a contract is made in order to express the original intention of the parties more clearly, specific performance of such contract, as modified, will be decreed, although there was only a nominal consideration for such modification apart from the intention of the parties to make such modification express the real agreement.<sup>7</sup>

**§ 3294. Date as of which inadequacy to be determined.** While extreme inadequacy of consideration may be the occasion for refusing specific performance, the question of inadequacy must be decided by the facts as they exist when the contract is made, and not by the subsequent developments.<sup>1</sup> A contract to develop a mine, which is fair and reasonable when made, is not rendered unconscionable by the discovery, at a subsequent time, of a rich vein of ore;<sup>2</sup> nor, on the other hand, by the failure of the vein.<sup>3</sup> If a contract to furnish support for life is fair and reasonable when it is made, specific performance will be decreed, although, by reason of the death of the promisor, the expense of performance is relatively small.<sup>4</sup> An agreement to accept shares of stock on which nothing has ever been paid, and relieve the transferor from all liability thereon, is such consideration as to justify specific performance.<sup>5</sup> On the other hand, a promise by A, who owns no property in a certain locality, to transfer a certain fraction of whatever he may acquire there, to B, has been held not enforceable

<sup>7</sup> *Miller Saw-Trimmer Co. v. Cheshire*, — Wis. —, 178 N. W. 855.

<sup>1</sup> *California. Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190.

*Illinois. Aldrich v. Aldrich*, 287 Ill. 213, 122 N. E. 472; *Compton v. Weber*, — Ill. —, 129 N. E. 764.

*Iowa. Mitchell v. Mutch*, 180 Ia. 1281, 164 N. W. 212; *Tuttle v. King*, 181 Ia. 288, 164 N. W. 616.

*Kansas. Nordboe v. Frye*, 107 Kan. 291, 191 Pac. 282.

*Michigan. Baller v. Spivack*, — Mich. —, 182 N. W. 70.

*Missouri. Campbell v. McLaughlin*, — Mo. —, 205 S. W. 18.

*Montana. Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123.

*Washington. Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 159 Pac. 1077.

*Wisconsin. Peterson v. Chase*, 115 Wis. 239, 91 N. W. 687.

Subsequent increase in value is not, of itself, ground for denying specific performance. *Compton v. Weber*, — Ill. —, 129 N. E. 764.

<sup>2</sup> *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123.

<sup>3</sup> *Haywood v. Cope*, 25 Beav. 140.

<sup>4</sup> *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582; *Drefahl v. Security Savings Bank*, 132 Ia. 563, 107 N. W. 179; *Campbell v. McLaughlin*, — Mo. —, 205 S. W. 18.

<sup>5</sup> *Cheale v. Kenward*, 3 De G. & J. 27.

specifically, if such interest ultimately amounts to many times the value of the consideration.<sup>8</sup>

**§ 3295. Illegal and void contracts.** If the subject-matter is such as to make the contract void or illegal at law, equity will not grant specific performance.<sup>1</sup> Specific performance will not be granted of a contract which tends to create a monopoly,<sup>2</sup> or of a contract to defraud the creditors of one of the parties,<sup>3</sup> or of a contract which is, in effect, a gambling contract,<sup>4</sup> or one by which an unreasonable preference is given by a public service corporation in violation of statute,<sup>5</sup> or of a contract between public service corporations to which the approval of the railway commission,

<sup>8</sup> *Marks v. Gates*, 154 Fed. 481, 83 C. C. A. 321, 14 L. R. A. (N.S.) 317, 12 Ann. Cas. 120.

<sup>1</sup> *Alabama*. *Pryor v. Gowan*, 204 Ala. 257, 85 So. 370.

*California*. *Simons v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35, 55 Pac. 3; *Napa Valley Electric Co. v. Calistoga Electric Co.*, — Cal. —, 176 Pac. 699.

*Georgia*. *Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44; *Whitley v. McConnell*, 133 Ga. 738, 27 L. R. A. (N.S.) 287, 66 S. E. 933; *Glennville Investment Co. v. Grace*, 134 Ga. 572, 29 L. R. A. (N.S.) 758, 68 S. E. 301.

*Illinois*. *Bowman v. Cunningham*, 78 Ill. 48; *South Chicago City Ry. v. Calumet Electric Street Ry.*, 171 Ill. 391, 49 N. E. 576.

*Kentucky*. *Fields v. Holland*, 158 Ky. 544, L. R. A. 1915C, 865, 165 S. W. 699.

*Oklahoma*. *Clark v. Frazier*, — Okla. —, 177 Pac. 589.

*Oregon*. *Ford v. Oregon Electric Ry. Co.*, 60 Or. 278, 36 L. R. A. (N.S.) 358, Ann. Cas. 1914A, 280, 117 Pac. 809.

*Pennsylvania*. *V. & S. Bottle Co. v. Mountain Gas Co.*, 261 Pa. St. 523, 104 Atl. 667.

*Tennessee*. *Jenkins v. Atkins*, 20 Tenn. (1 Humph.) 294, 34 Am. Dec.

648; *Parks v. McKamy*, 40 Tenn. (3 Head.) 297.

*Washington*. *Boothe v. Bassett*, 82 Wash. 95, 7 A. L. R. 145, 143 Pac. 449.

*West Virginia*. *Ralphsnyder v. Shaw*, 45 W. Va. 680, 31 S. E. 953; *Dorr v. Chesapeake & Ohio Ry.*, 78 W. Va. 150, L. R. A. 1916E, 622, 88 S. E. 666.

*Wisconsin*. *Baum v. Baum*, 109 Wis. 47, 53 L. R. A. 650, 85 N. W. 122; *Dells Paper & Pulp Co. v. Willow River Lumber Co.*, 170 Wis. 19, 173 N. W. 317.

<sup>2</sup> *Fields v. Holland*, 158 Ky. 544, L. R. A. 1915C, 865, 165 S. W. 699.

The tendency of the 'contract must be determined with reference to the condition of affairs when the contract was made and not at the time at which specific performance is sought. *Dells Paper & Pulp Co. v. Willow River Lumber Co.*, 170 Wis. 19, 173 N. W. 317.

<sup>3</sup> *Boothe v. Bassett*, 82 Wash. 95, 7 A. L. R. 145, 143 Pac. 449.

<sup>4</sup> *Whitley v. McConnell*, 133 Ga. 738, 27 L. R. A. (N.S.) 287, 66 S. E. 933; *Glennville Investment Co. v. Grace*, 134 Ga. 572, 29 L. R. A. (N.S.) 758, 68 S. E. 301.

<sup>5</sup> *V. & S. Bottle Co. v. Mountain Gas Co.*, 261 Pa. St. 523, 104 Atl. 667.

which was required by statute, has not been obtained,<sup>6</sup> or of a contract to issue a pass which is rendered invalid by subsequent legislation,<sup>7</sup> or, in some jurisdictions, of a contract by a common carrier to stop its trains or cars at specified points,<sup>8</sup> or of a contract to convey property in payment of a premium for life insurance, in violation of a statute requiring such terms to appear on the face of the policy.<sup>9</sup> If a contract for the sale of a homestead is made void by statute because the wife has not signed it, specific performance can not be decreed against the husband, who signed it.<sup>10</sup> Where an institution owning land which it could not alienate by the terms of the grant to it, agrees with a city and a third person to sell the property to such third person by having the city go through the form of taking it for park purposes by eminent domain and then conveying to such third person, specific performance will not be given.<sup>11</sup>

In accordance with the general principles which govern illegal contracts,<sup>12</sup> equity will not attempt to pick out the valid provisions of such contract and to make a new contract therefrom in order to enforce it specifically.<sup>13</sup>

In denying relief on the ground that the contract is illegal or contrary to public policy, equity is not restricted by the rules which govern contracts at law; and equity may accordingly refuse to grant specific performance of contracts which are held to be valid at law.<sup>14</sup> The fact that a contract for conducting litigation for another, in consideration of a portion of the recovery, may be

<sup>6</sup> *Napa Valley Electric Co. v. Calistoga Electric Co.*, — Cal. —, 176 Pac. 699.

<sup>7</sup> *Door v. Chesapeake & Ohio Ry.*, 78 W. Va. 150, L. R. A. 1916E, 622, 88 S. E. 666.

See § 2699.

<sup>8</sup> *Ford v. Oregon Electric Ry.*, 60 Or. 278, 36 L. R. A. (N.S.) 358, Ann. Cas. 1914A, 280, 117 Pac. 809.

See § 910.

<sup>9</sup> *Pryor v. Gowan*, 204 Ala. 257, 85 So. 370.

<sup>10</sup> *Clark v. Bird*, 158 Ala. 278, 48 So. 359; *Stodalka v. Novotny*, 144 Ill. 125, 33 N. E. 534; *Tucker v. Finch*, 106 Kan.

419, 188 Pac. 235; *Rosenthal v. Pleck*, 166 Wis. 598, 166 N. W. 445.

Contra, if under a statute which merely makes such contract invalid as to the wife. *Davis v. Merson*, 103 Neb. 397, 172 N. W. 50; *Hudgins v. Thompson*, 109 Tex. 433, 211 S. W. 586.

<sup>11</sup> *Driscoll v. New Haven*, 75 Conn. 92, 52 Atl. 618.

<sup>12</sup> See §§ 1029 et seq.

<sup>13</sup> *Clark v. Frazier*, — Okla. —, 177 Pac. 589; *Boothe v. Bassett*, 82 Wash. 95, 7 A. L. R. 145, 143 Pac. 449.

<sup>14</sup> *Casserleigh v. Wood*, 119 Fed. 308; *Bowman v. Cunningham*, 78 Ill. 48; *Gleason v. Earles*, 78 Wash. 491, 51 L. R. A. (N.S.) 785, 139 Pac. 213.

held to be valid at law,<sup>15</sup> does not make it necessary for a court of equity to grant specific performance.<sup>16</sup> Equity may refuse specific performance of a contract for voting stock, though it may be valid at law.<sup>17</sup>

**§ 3296. Specific performance against defendant lacking full capacity.** Specific performance can not be granted against a party as to whom the contract is void because of his lack of full capacity, or as to whom the contract is voidable for the same reason, and who has chosen to exercise his election to make it void.<sup>1</sup> Since the contract of a married woman is void, in the absence of statutes, specific performance can not be given against her.<sup>2</sup> A contract of sale made by trustees whose power is in doubt will not be enforced against them specifically.<sup>3</sup> Specific performance will not be granted if it was made by an executor acting under a will which required the confirmation of the sale by the court of probate powers, and such court has not confirmed the sale.<sup>4</sup> If, however, the executor has power to make the lease, or to ratify it, specific performance may be given.<sup>5</sup> Specific performance of a contract to sell realty, entered into by the tenants in common, some of whom were minors, can not be enforced against any of the defendants unless the court, which has jurisdiction of

<sup>15</sup> See §§ 699 et seq.

<sup>16</sup> *Casserleigh v. Wood*, 119 Fed. 308, 56 C. C. A. 212; *Bowman v. Cunningham*, 78 Ill. 48.

<sup>17</sup> *Gleason v. Earles*, 78 Wash. 491, 51 L. R. A. (N.S.) 785, 139 Pac. 213.

<sup>1</sup> *United States v. Winslow v. Baltimore & Ohio Ry.*, 188 U. S. 646, 47 L. ed. 635.

**Alabama.** *Jackson Lumber Co. v. Bass*, 181 Ala. 169, 61 So. 271.

**Colorado.** *McDermott v. Lingquist*, 66 Colo. 88, [sub nomine, *McDermott v. Lindquist*, 179 Pac. 147].

**Nebraska.** *Miles v. Lampe*, 102 Neb. 619, 168 N. W. 640.

**New Jersey.** *Busath v. Prival*, 84 N. J. Eq. 599, 95 Atl. 136.

**West Virginia.** *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257.

See §§ 1568 et seq.

<sup>2</sup> *Jackson Lumber Co. v. Bass*, 181

Ala. 169, 61 So. 271; *Busath v. Prival*, 84 N. J. Eq. 599, 95 Atl. 136; *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257.

No relief can be given if the deed which she executes does not contain words which purport to convey her interest. *Agricultural Bank v. Rice*, 45 U. S. (4 How.) 225, 11 L. ed. 949.

If by statute she would be bound by a contract to sell realty if acknowledged for recordation, such relief can not be given against her if such contract is not thus acknowledged. *Amick v. Ellis*, 53 W. Va. 421, 44 S. E. 257.

<sup>3</sup> *Winslow v. Baltimore & Ohio Ry.*, 188 U. S. 646, 47 L. ed. 635.

<sup>4</sup> *McDermott v. Lingquist*, 66 Colo. 88 [sub nomine, *McDermott v. Lindquist*, 179 Pac. 147].

<sup>5</sup> *Thompson v. Thomas & Thompson Co.*, 132 Md. 483, 104 Atl. 49.

the guardianship of such minors, confirms the sale.<sup>6</sup> Specific performance can not be had if the contract is signed by an agent in excess of his authority,<sup>7</sup> especially if the nature and the extent of his power was known to the adversary party.<sup>8</sup> If one of two tenants in common execute a contract of sale on behalf of his co-tenant, as well as himself, and the other co-tenant refuses to be bound thereby, specific performance may be given against the tenant who executed such instrument, as to his interest in such property.<sup>9</sup>

**§ 3297. Statute of Frauds—Part performance.** There are, however, certain exceptions to the general rule that in order to obtain specific performance in equity the contract to be enforced must be enforceable at law. While the Statute of Frauds ordinarily applies in equity as well as at law, and specific performance of an oral contract within the terms of the statute can not be had,<sup>1</sup> equity has made an exception in cases in which there has been such part performance of the oral contract that refusal to grant

<sup>6</sup> *Brown v. Power*, 263 Pa. St. 287, 106 Atl. 539.

<sup>7</sup> *Miles v. Lampe*, 102 Neb. 619, 168 N. W. 640; *Palmer v. McBride*, — Wash. —, 197 Pac. 613.

<sup>8</sup> *Miles v. Lampe*, 102 Neb. 619, 168 N. W. 640.

<sup>9</sup> *Melin v. Woolley*, 103 Minn. 498, 22 L. R. A. (N.S.) 595, 115 N. W. 654.

<sup>1</sup> *Alabama*. *Walden v. McKinnon*, 157 Ala. 291, 22 L. R. A. (N.S.) 716, 47 So. 874.

*Arkansas*. *Ashcraft v. Tucker*, 136 Ark. 441, 206 S. W. 896; *Kilday v. Schreucupp*, — Conn. —, L. R. A. 1917A, 197, 98 Atl. 335.

*Idaho*. *Allen v. Kitchen*, 16 Ida. 133, L. R. A. 1917A, 563, 18 Ann. Cas. 914, 100 Pac. 1052.

*Illinois*. *Widell v. Carmichael*, 285 Ill. 15, 120 N. E. 529; *Weir v. Weir*, 287 Ill. 495, 122 N. E. 868.

*Kentucky*. *Doty v. Doty*, 118 Ky. 204, 2 L. R. A. (N.S.) 713, 4 Ann. Cas. 1064, 80 S. W. 803; *Sizemore v. Davidson*, 183 Ky. 166, 208 S. W. 810.

*New Hampshire*. *Muir v. Bartlett*, 78 N. H. 313, 99 Atl. 553.

*Pennsylvania*. *Manufacturers' Light & Heat Co. v. Lamp*, — Pa. St. —, 112 Atl. 679.

*Utah*. *Lee v. Polyhrones*, — Utah —, 195 Pac. 201.

*Washington*. *King v. Upper*, 57 Wash. 130, 31 L. R. A. (N.S.) 606, 106 Pac. 612.

*West Virginia*. *Henderson v. Hendrie*, 68 W. Va. 562, 34 L. R. A. (N.S.) 628, Ann. Cas. 1912B, 318, 71 S. E. 172.

*Wisconsin*. *Scheuer v. Cochem*, 126 Wis. 209, 4 L. R. A. (N.S.) 427, 105 N. W. 573; *Ludwig v. Ludwig*, 170 Wis. 41, 172 N. W. 726.

For specific performance of a contract which was oral as to the details of performance, see *Hughes v. Knapp*, — Kan. —, 197 Pac. 862.

Oral authority to an agent is sufficient in the absence of specific statute. *Lipkowitz v. Freedman*, — Conn. —, 113 Atl. 152.

See §§ 1371 et seq. and § 1396 et seq.

relief would work irreparable injury to the party who seeks such relief.<sup>2</sup>

It is said in general terms that an oral contract of this sort can not be enforced specifically unless the part performance is such that it would operate as a fraud on the party who seeks relief,<sup>3</sup> or unless the parties can not be restored to their respective positions.<sup>4</sup> The application of these general principles has led to a diversity of results, even among the courts which agree on the general principle.<sup>5</sup> Taking possession and making valuable improvements constitutes part performance.<sup>6</sup> Erecting valuable improvements on the land in which the promisor has an interest, without taking possession, has been held to be part performance.<sup>7</sup>

<sup>2</sup> **Alabama.** Penney v. Norton, 202 Ala. 690, 81 So. 666.

**California.** Wolfson v. Smyer, 178 Cal. 775, 175 Pac. 10.

**Colorado.** Hoehne Ditch Co. v. John Flood Ditch Co., 68 Colo. 531, 191 Pac. 108.

**Georgia.** Garbutt v. Mayo, 128 Ga. 269, 13 L. R. A. (N.S.) 58, 57 S. E. 495; Bird v. Trapnell, 149 Ga. 767, 102 S. E. 131; Richardson v. Cade, 150 Ga. 535, 104 S. E. 207.

**Iowa.** Brower v. Walker, 182 Ia. 804, 166 N. W. 269; McInnerny v. Graham, — Ia. —, 174 N. W. 395.

**Kansas.** Taylor v. Holyfield, 104 Kan. 587, 180 Pac. 208.

**Michigan.** Pearson v. Gardner, 202 Mich. 360, L. R. A. 1918F, 384, 169 N. W. 485; Fowler v. Isbell, 202 Mich. 572, 168 N. W. 414; Engle v. Engle, — Mich. —, 176 N. W. 547.

**Minnesota.** Seigne v. Warren Auto Co., — Minn. —, 179 N. W. 648.

**Missouri.** Berg v. Moreau, 199 Mo. 416, 9 L. R. A. (N.S.) 157, 97 S. W. 901; Signaigo v. Signaigo, — Mo. —, 205 S. W. 23; Woodard v. Stowell, — Mo. —, 222 S. W. 815.

**Oklahoma.** Fulkerson v. Mara, — Okla. —, 173 Pac. 811; King v. Gant, 77 Okla. 105, 186 Pac. 960.

**South Carolina.** Anthony v. Eve, 109 S. Car. 255, 95 S. E. 513.

**Texas.** Hudgins v. Thompson, 109 Tex. 433, 211 S. W. 586.

**West Virginia.** Oberman v. Red Rock Fuel Co., 83 W. Va. 531, 99 S. E. 66; Brown v. Western Maryland Ry., — W. Va. —, 99 S. E. 457; Moore v. Moore, — W. Va. —, 104 S. E. 266.

**Wisconsin.** Booher v. Slathar, 167 Wis. 196, 167 N. W. 261.

See §§ 1371 et seq.

<sup>3</sup> Weir v. Weir, 287 Ill. 495, 122 N. E. 868; Harrison v. Eassom, 206 Mich. 685, 176 N. W. 460; Muir v. Bartlett, 78 N. H. 313, 99 Atl. 553.

<sup>4</sup> Peterson v. Nichols, 110 Wash. 288, 188 Pac. 498.

<sup>5</sup> See §§ 1373 et seq.

<sup>6</sup> Rugen v. Vaughan, 142 Ark. 176, 218 S. W. 205; Friberg v. Bjelland, 95 Or. 320, 186 Pac. 1113.

Change of possession and payment of the purchase price is held to be sufficient. Penney v. Lyle, — Ala. —, 88 So. 580.

Change of possession of part of an entire tract is sufficient. Hopfensperger v. Bruehl, — Wis. —, 183 N. W. 171.

See §§ 1375 et seq.

<sup>7</sup> Henrikson v. Henrikson, 143 Wis. 314, 33 L. R. A. (N.S.) 534, 127 N. W. 962 (promisor and promisee were both remainder-men).

In some jurisdictions a mere taking possession under the contract,<sup>8</sup> or the making of improvements of comparatively slight value,<sup>9</sup> do not amount to such part performance as will give to a court of equity, jurisdiction to enforce the contract specifically.

In some jurisdictions the rendition of services of a personal character is not sufficient part performance to take the case out of the Statute of Frauds;<sup>10</sup> while in other jurisdictions it is held that a judgment at law for money is not an adequate remedy; and accordingly specific performance will be granted.<sup>11</sup>

Part performance is in most jurisdictions exclusively a doctrine of equity, without any effect at law. In such jurisdictions technical part performance of an oral contract which is included in the terms of the Statute of Frauds makes such contract enforceable in equity but not at law.<sup>12</sup> These questions have been discussed in detail in connection with the Statute of Frauds.<sup>13</sup>

**§ 3298. Impossibility.** The principles of impossibility of performance which apply to contracts in general,<sup>1</sup> apply to contracts of which specific performance is sought. If a contract is personal in its character, the death of the party who is to render personal services before performance, is an impossibility which prevents specific performance.<sup>2</sup> If the contract calls for the conveyance of a specific subject-matter, the destruction of such subject-matter, without the fault of either party, and after the contract is made,

<sup>8</sup> *Knoff v. Grace*, 68 Colo. 527, 190 Pac. 526; *Weir v. Weir*, 287 Ill. 495, 122 N. E. 868; *Harrison v. Eassom*, 208 Mich. 685, 176 N. W. 460.

<sup>9</sup> *Ashcraft v. Tucker*, 136 Ark. 447, 206 S. W. 896; *Mitchell v. Redus*, 144 Ark. 332, 222 S. W. 47; *Murphy v. Hohne*, 73 Fla. 803, L. R. A. 1917F, 594, 74 So. 973; *Widell v. Carmichael*, 285 Ill. 15, 120 N. E. 529; *Falk v. Devendorf*, — Wis. —, 177 N. W. 894.

<sup>10</sup> *Weir v. Weir*, 287 Ill. 495, 122 N. E. 868; *Walker v. Dill's Administrator*, 186 Ky. 638, 218 S. W. 247; *Grindling v. Rehl*, 149 Mich. 641, 15 L. R. A. (N.S.) 466, 113 N. W. 290.

<sup>11</sup> *Illinois. Aldrich v. Aldrich*, 287 Ill. 213, 122 N. E. 472; *Crawley v. Howe*, 291 Ill. 107, 125 N. E. 743.

*Kansas. Schoonover v. Schoonover*, 86 Kan. 487, 38 L. R. A. (N.S.) 752, 121 Pac. 485; *Smith v. Cameron*, 92 Kan. 652, 52 L. R. A. (N.S.) 1057, 141 Pac. 596.

*Minnesota. Odenbreit v. Utheim*, 131 Minn. 56, L. R. A. 1916D, 421, 154 N. W. 741.

*Missouri. Berg v. Moreau*, 199 Mo. 416, 9 L. R. A. (N.S.) 157, 97 S. W. 901.

*North Dakota. Torgerson v. Hauge*, 34 N. D. 646, 3 A. L. R. 164, 159 N. W. 6.

<sup>12</sup> See § 1372.

<sup>13</sup> See §§ 1371 et seq.

<sup>1</sup> See §§ 2667 et seq.

<sup>2</sup> *Alexander v. Lewes*, 104 Wash. 32, 175 Pac. 572.

operates as a discharge.<sup>3</sup> Specific performance is accordingly refused if the contract provides for the issue of stock in a corporation which has ceased to do business,<sup>4</sup> or for the delivery of specific bonds which have since been destroyed,<sup>5</sup> or for the repair of a road to a landing, after the road and landing have both been destroyed by flood.<sup>6</sup>

Whether the destruction of a building after a contract for the sale of such realty has been made, and before legal title has passed, operates as a discharge of such contract, depends upon the theory of ownership which the particular court recognizes. In most states, the legal theory is that the owner of the legal title remains the owner until he has conveyed such property by deed; while the theory of equity is that the purchaser becomes the owner as soon as he has made a valid contract for the purchase of such realty. As has already been indicated,<sup>7</sup> the theory of equity is recognized in most jurisdictions, even in an action at law. This theory should be recognized even more clearly in equity; and it is held by the weight of authority that the purchaser becomes the owner of the property in equity as soon as the contract of sale is made, that subsequent loss falls on the purchaser, and that the purchaser can not resist specific performance because of the destruction of a building,<sup>8</sup> or depreciation in the value of the realty

<sup>3</sup> **United States.** *Waite v. O'Neil*, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550.

**Massachusetts.** *Libman v. Levenson*, — Mass. —, 128 N. E. 13.

**Oklahoma.** *Powell v. Adler*, — Okla. —, 172 Pac. 55.

**Oregon.** *Elmore v. Stephens-Russell Co.*, 88 Or. 509, 171 Pac. 763.

**Virginia.** *Roanoke Street Ry. v. Hicks*, 96 Va. 510, 32 S. E. 295.

<sup>4</sup> *Powell v. Adler*, — Okla. —, 172 Pac. 55.

<sup>5</sup> *Roanoke Street Ry. v. Hicks*, 96 Va. 510, 32 S. E. 295.

<sup>6</sup> *Waite v. O'Neil*, 76 Fed. 408, 22 C. C. A. 248, 34 L. R. A. 550.

<sup>7</sup> See § 2695.

<sup>8</sup> **England.** *Paine v. Meller*, 6 Ves. Jr. 349.

**California.** *White v. Gilman*, 138 Cal. 375, 71 Pac. 436.

**Connecticut.** *Williams v. Lilley*, 67 Conn. 50, 37 L. R. A. 150, 34 Atl. 765.

**Kansas.** *Linn County Bank v. Gris- ham*, 105 Kan. 460, 185 Pac. 54.

**Maryland.** *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582.

**New Jersey.** *Cropper v. Brown*, 76 N. J. Eq. 406, 139 Am. St. Rep. 770, 74 Atl. 987; *Fraternal Order of Eagles v. Weatherby*, 82 N. J. Eq. 455, 88 Atl. 847 (obiter).

**New York.** *Sewell v. Underhill*, 197 N. Y. 168, 134 Am. St. Rep. 863, 27 L. R. A. (N.S.) 233, 18 Ann. Cas. 795, 90 N. E. 430.

**Ohio.** *Gilbert v. Port*, 28 O. S. 276.

**Oklahoma.** *Dunn v. Yakish*, 10 Okla. 388, 61 Pac. 926; *Fouts v. Foudray*, 31 Okla. 221, 38 L. R. A. (N.S.) 251, Ann. Cas. 1913E, 301, 120 Pac. 960.

See, *The Burden of Loss as an Incident of the Right to the Specific*

due to flood.<sup>9</sup> In other jurisdictions, however, the courts take the legal theory of the ownership of realty, even in equity. The original owner is held to be the owner in spite of the contract of sale; and specific performance is refused if the building, which formed a substantial part of the consideration, is destroyed, before such realty has been conveyed,<sup>10</sup> or if such building is injured so seriously as to impair its value greatly.<sup>11</sup> On the same principle, specific performance of a contract to sell timber land has been refused to the vendor if a great part of such timber was destroyed by a forest fire, after the contract was made.<sup>12</sup> It may be noted that, in some of these cases, the courts have decided cases in equity on the authority of earlier cases at law.<sup>13</sup>

In some jurisdictions it seems to be held that the loss must fall upon the purchaser if he is in possession and otherwise upon the vendor.<sup>14</sup>

If the property which has been sold is injured without the fault of either party, at a time at which the vendor could not have conveyed in accordance with the terms of his contract, the loss falls on the vendor.<sup>15</sup>

Subsequent impossibility, due to the act of the law, does not prevent specific performance, if it relates to a collateral matter which is not a part of the contract itself.<sup>16</sup> The adoption of a zoning ordinance which prevents the erection of the building which

Performance of a Contract, by William A. Keener, 1 *Columbia Law Review* 1; Equitable Conversion by Contract, by Harlan F. Stone, 13 *Columbia Law Review* 369; and Some Problems in Specific Performance, by George L. Clark, 31 *Harvard Law Review* 271.

<sup>9</sup> *McCarty v. Wilson*, — Cal. —, 193 Pac. 578.

<sup>10</sup> *Kinney v. Hickox*, 24 Neb. 167, 38 N. W. 816; *Wilson v. Clark*, 60 N. H. 352. For the recognition of this doctrine at law, see *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325; *Thompson v. Gould*, 37 Mass. (20 Pick.) 134; *Hawkes v. Kehoe*, 193 Mass. 419, 10 L. R. A. (N.S.) 125, 9 Ann. Cas. 1053, 79 N. E. 766; *Smith v. McCluskey*, 45 Barb. (N. Y.) 610; *Wicks v. Bowman*, 5 Daly (N. Y.) 225.

<sup>11</sup> *Libman v. Levenson*, — Mass. —, 128 N. E. 13 (fall of retaining wall).

<sup>12</sup> *Elmore v. Stephens-Russell Co.*, 88 Or. 509, 171 Pac. 763.

<sup>13</sup> *Libman v. Levenson*, — Mass. —, 128 N. E. 13 [following, *Thompson v. Gould*, 37 Mass. (20 Pick.) 134, and *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65]; *Elmore v. Stephens-Russell Co.*, 88 Or. 509, 171 Pac. 763 [following, *Powell v. Dayton, Sheridan & Grande Ronde Ry.*, 12 Or. 488, 8 Pac. 544].

<sup>14</sup> *Good v. Jarrard*, 93 S. Car. 229, 43 L. R. A. (N.S.) 383, 76 S. E. 698.

<sup>15</sup> *Rhinizy v. Guernsey*, 111 Ga. 346, 78 Am. St. Rep. 207, 50 L. R. A. 680, 36 S. E. 796; *Eppstein v. Kuhn*, 225 Ill. 115, 10 L. R. A. (N.S.) 117, 80 N. E. 80.

<sup>16</sup> *Biggs v. Steinway*, 229 N. Y. 320, 128 N. E. 211.

the purchaser had intended to erect upon the realty which he had bought, does not prevent specific performance if the erection of such building was not a term of the contract.<sup>17</sup> The action of the fuel administrator in confiscating coal and in regulating the consumption of fuel has been held not to prevent a decree for specific performance by a lessor of his covenant to furnish heat and of damages for his failure to furnish heat, if it appears that he furnished much less heat than the fuel regulations would have permitted him to furnish.<sup>18</sup>

**§ 3299. Breach and performance—General principles.** The general rules that apply in case of performance,<sup>1</sup> tender,<sup>2</sup> and breach,<sup>3</sup> apply to contracts upon which the remedy of specific performance is sought in equity, except for the fact that equity, by reason of its greater flexibility of remedy, and by reason of its ability to compel specific performance on the one side, and to grant compensation for failure to perform literally on the other,<sup>4</sup> recognized the doctrine of substantial performance before the law recognized it;<sup>5</sup> and it has, as a rule, been less technical than law in demanding complete performance on the part of the party who seeks specific performance.

Failure of the vendor to do all that he was required to do by the terms of the contract,<sup>6</sup> such as his failure to assign an insurance policy before the conveyance of the realty,<sup>7</sup> or his failure to pay a small fee when the adversary party is indebted to him in a large amount,<sup>8</sup> does not prevent the vendor from obtaining specific performance. If the parties have treated a contract as discharged by their voluntary agreement, specific performance will not be granted thereafter.<sup>9</sup>

**§ 3300. Material breach by plaintiff — Non-performance.** A plaintiff who has not performed, substantially at least, may be

<sup>17</sup> *Biggs v. Steinway*, 229 N. Y. 320, 128 N. E. 211.

<sup>18</sup> *McDuffee v. Colwell*, 207 Mich. 154, 173 N. W. 355. (Real question one of damages.)

<sup>1</sup> See §§ 2772 et seq.

<sup>2</sup> See §§ 2852 et seq.

<sup>3</sup> See §§ 2878 et seq.

<sup>4</sup> See §§ 3356 et seq.

<sup>5</sup> See §§ 2788 and § 2785.

<sup>6</sup> *Buchhauser v. Yudelsohn*, 287 Ill. 138, 122 N. E. 100; *Kaufman v. Hastings*, 93 Or. 623, 184 Pac. 265.

<sup>7</sup> *Kaufman v. Hastings*, 93 Or. 623, 184 Pac. 265.

<sup>8</sup> *Buchhauser v. Yudelsohn*, 287 Ill. 138, 122 N. E. 100.

<sup>9</sup> *Reece Folding Mach. Co. v. Fenwick*, 140 Fed. 287, 72 C. C. A. 30, 2 L. R. A. (N.S.) 1094.

denied specific performance.<sup>1</sup> In order to obtain specific performance the purchaser must have complied with the requisites of performance as to the covenants on his part to be performed.<sup>2</sup> A vendee who has agreed to pay cash can not have specific performance if he has tendered a note and a certificate of deposit instead.<sup>3</sup>

A vendor who has agreed, either expressly or by fair implication to furnish a good title, a merchantable title, and the like, can not have specific performance if the title which he offers does not conform to the terms of his contract,<sup>4</sup> or is even doubt-

<sup>1</sup> **England.** *Brickles v. Snell* [1916], 2 A. C. 599.

**California.** *Turner v. Hitchcock*, 165 Cal. 121, 130 Pac. 1190; *Salisbury v. Yawger*, — Cal. —, 195 Pac. 682.

**Iowa.** *Griffin v. Nash*, 187 Ia. 345, 174 N. W. 233; *Hoard v. Hatch*, — Ia. —, 182 N. W. 197; *Dunwoody v. Wood*, — Ia. —, 182 N. W. 785.

**Massachusetts.** *Pearlstein v. Novitch*, — Mass. —, 131 N. E. 853.

**Minnesota.** *Reynolds v. Pike-Horning Granite Co.*, — Minn. —, 182 N. W. 906.

**Oklahoma.** *Powell v. Adler*, — Okla. —, 172 Pac. 55.

**Pennsylvania.** *Salot v. Hechtmann*, — Pa. St. —, 113 Atl. 191.

For the doctrine of judicial discretion in granting specific performance, see §§ 3346 et seq. For specific performance with compensation, see §§ 3356 et seq.

<sup>2</sup> **Arkansas.** *Swaim v. Beakley*, 133 Ark. 406, 202 S. W. 476.

**California.** *Salisbury v. Yawger*, — Cal. —, 195 Pac. 682.

**Colorado.** *Rude v. Levy*, 43 Colo. 482, 24 L. R. A. (N. S.) 91, 96 Pac. 560.

**Delaware.** *Jones v. Carpenter*, — Del. —, 112 Atl. 374.

**Illinois.** *Turn Verein Eiche v. Kionka*, 255 Ill. 392, 43 L. R. A. (N.S.) 44, 99 N. E. 684; *Bennett v. Burkhalter*, 257 Ill. 572, 44 L. R. A. (N.S.) 733, 101 N. E. 189; *Riemenschneider v. Tortoriello*, 287 Ill. 482, 122 N. E. 799.

**Iowa.** *Quarton v. American Law Book Co.*, 143 Ia. 517, 32 L. R. A. (N. S.) 1, 121 N. W. 1009; *Hoard v. Hatch*,

— Ia. —, 182 N. W. 197; *Dunwoody v. Wood*, — Ia. —, 182 N. W. 785.

**Maryland.** *Abrams v. Eckenrode*, 136 Md. 244, 110 Atl. 468.

**Massachusetts.** *Pearlstein v. Novitch*, — Mass. —, 131 N. E. 853.

**Minnesota.** *Reynolds v. Pike-Horning Granite Co.*, — Minn. —, 182 N. W. 906.

**Nebraska.** *Rossbach v. Micks*, 89 Neb. 821, 42 L. R. A. (N.S.) 444, 132 N. W. 526.

**Oregon.** *Smith v. Martin*, 94 Or. 132, 185 Pac. 236.

**Pennsylvania.** In re *Kutz's Estate*, 259 Pa. St. 548, 103 Atl. 293; *Doughty v. Cooney*, 266 Pa. St. 337, 109 Atl. 619; *Salot v. Hechtmann*, — Pa. St. —, 113 Atl. 191.

**South Dakota.** *Carpenter v. Murphy*, 40 S. D. 280, 167 N. W. 175.

<sup>3</sup> *Wilkin v. Voss*, 120 Ia. 500, 94 N. W. 1123.

<sup>4</sup> **Alabama.** *Boylan v. Wilson*, 202 Ala. 26, 79 So. 364.

**Illinois.** *Dole v. Shaw*, 282 Ill. 642, 118 N. E. 1044; *Baker v. Baker*, 284 Ill. 537, 120 N. E. 525.

**Iowa.** *Rourke v. Peterson*, 187 Ia. 1155, 174 N. W. 945; *Crom v. Henderson*, — Ia. —, 175 N. W. 983.

**Kentucky.** *Bluegrass Realty Co. v. Shelton*, 148 Ky. 666, 41 L. R. A. (N. S.) 384, 147 S. W. 33; *Lowther-Kaufman Oil & Coal Co. v. Gunnell*, 184 Ky. 587, 212 S. W. 593.

**Michigan.** *Mesheew v. Southworth*, 133 Mich. 335, 94 N. W. 1047; *Solomon*

ful.<sup>5</sup> If the vendor has agreed to furnish an abstract of title showing title of a certain kind, he can not have specific performance unless he complies with such provision.<sup>6</sup> A vendor who offers a deed which his grantor has delivered to him, in which the name of the grantee is blank, can not have specific performance,<sup>7</sup> at least if he does not show that he is able to supply the apparent defects of such conveyance.<sup>8</sup>

To prevent specific performance, however, there must be a real risk of a defective performance, and not the mere possibility of one.<sup>9</sup> The possibility that the purchaser may be subject to an injunction suit to restrain him from using the property as he contemplates, does not prevent the vendor from having specific performance,<sup>10</sup> if the court is able to determine from the instruments in the chain of title, as a matter of law, that the purchaser can not be enjoined.<sup>11</sup>

**§ 3301. Substantial performance by plaintiff.** The general rule that there must be substantial performance, at least,<sup>1</sup> of precedent covenants;<sup>2</sup> and a readiness and willingness to perform concurrent covenants, substantially at least, together with a demand for performance by the adversary party,<sup>3</sup> apply with even greater force, if specific performance is sought, although the courts of equity are possibly somewhat more liberal in their views of what constitutes substantial performance. The party who seeks

v. Shewitz, 185 Mich. 620, 3 A. L. R. 557, 152 N. W. 196.

Missouri. Danzer v. Moerschel, — Mo. —, 214 S. W. 849.

North Carolina. Triplett v. Williams, 149 N. Car. 394, 24 L. R. A. (N.S.) 514, 63 S. E. 79.

North Dakota. Brugman v. Charlson, — N. D. —, 4 A. L. R. 400, 171 N. W. 882.

<sup>5</sup> Kittinger v. Rossman, — Del. —, 112 Atl. 388; Richards v. Knight, 64 N. J. Eq. 196, 53 Atl. 452; Zane v. Weintz, 65 N. J. Eq. 214, 55 Atl. 641; Triplett v. Williams, 149 N. Car. 394, 24 L. R. A. (N.S.) 514, 63 S. E. 79.

<sup>6</sup> Baker v. Baker, 284 Ill. 537, 120 N. E. 525; Bradway v. Miller, 200 Mich. 648, 167 N. W. 15.

<sup>7</sup> Brugman v. Charlson, — N. D. —, 4 A. L. R. 400, 171 N. W. 882.

<sup>8</sup> Brugman v. Charlson, — N. D. —, 4 A. L. R. 400, 171 N. W. 882.

<sup>9</sup> Grasser v. Blank, 110 La. 493, 34 So. 648; Reformed Protestant Dutch Church v. Madison Avenue Building Co., 214 N. Y. 268, L. R. A. 1915F, 651, 108 N. E. 444.

<sup>10</sup> Reformed Protestant Dutch Church v. Madison Avenue Building Co., 214 N. Y. 268, L. R. A. 1915F, 651, 108 N. E. 444.

<sup>11</sup> Reformed Protestant Dutch Church v. Madison Avenue Building Co., 214 N. Y. 268, L. R. A. 1915F, 651, 108 N. E. 444.

<sup>1</sup> See §§ 2778 et seq.

<sup>2</sup> See §§ 2951 et seq.

<sup>3</sup> See §§ 2961 et seq.

specific performance must have complied with these requirements as to performance of covenants on his part, in order to obtain specific performance.<sup>4</sup> One who has failed to make a sufficient tender because he has deducted too large an amount as damages, may have specific performance if he offers to pay the amount that the court may find to be due.<sup>5</sup> The extent to which equity can decree specific performance with compensation is discussed elsewhere.<sup>6</sup>

<sup>4</sup> **United States.** *Boone v. Missouri Iron Co.*, 58 U. S. (17 How.) 340, 15 L. ed. 171; *Weacott v. Mulvane*, 58 Fed. 305, 7 C. C. A. 242.

**Alabama.** *Cooper v. Cooper*, 201 Ala. 477, 78 So. 383; *Boylan v. Wilson*, 202 Ala. 26, 79 So. 364.

**Arizona.** *Costello v. Friedman*, 8 Ariz. 215, 71 Pac. 935.

**Colorado.** *Rude v. Levy*, 43 Colo. 482, 24 L. R. A. (N.S.) 91, 96 Pac. 560.

**Illinois.** *Cohn v. Mitchell*, 115 Ill. 124, 3 N. E. 420; *Work v. Welsh*, 160 Ill. 468, 43 N. E. 719; *Turn Verein Eiche v. Kionka*, 255 Ill. 392, 43 L. R. A. (N.S.) 44, 99 N. E. 684; *Bennett v. Burkhalter*, 257 Ill. 572, 44 L. R. A. (N.S.) 733, 101 N. E. 189; *Baker v. Baker*, 284 Ill. 537, 120 N. E. 525; *Willhite v. Schurtz*, 294 Ill. 309, 128 N. E. 551.

**Iowa.** *Wilkin v. Voss*, 120 Ia. 500, 94 N. W. 1123; *Quarton v. American Law Book Co.*, 143 Ia. 517, 32 L. R. A. (N.S.) 1, 121 N. W. 1009; *Rourke v. Peterson*, 187 Ia. 1155, 174 N. W. 945; *Crom v. Henderson*, — Ia. —, 175 N. W. 983.

**Kansas.** *McMichael v. Crawford*, 104 Kan. 778, 180 Pac. 777; *Crane v. Coons*, 105 Kan. 214, 182 Pac. 554; *Commonwealth Oil Co. v. Neosho Oil, Gas & Refining Co.*, 106 Kan. 723, 189 Pac. 966.

**Kentucky.** *Bluegrass Realty Co. v. Shelton*, 148 Ky. 666, 41 L. R. A. (N. S.) 384, 147 S. W. 33; *Kirkpatrick v. Lebus*, 184 Ky. 139, 211 S. W. 572; *Lowther-Kaufman Oil & Coal Co. v. Gunnell*, 184 Ky. 587, 212 S. W. 593.

**Maryland.** *Abrams v. Eckenrode*, 136 Md. 244, 110 Atl. 468.

**Massachusetts.** *Williams v. Hart*, 116 Mass. 513.

**Michigan.** *Bradway v. Miller*, 200 Mich. 648, 167 N. W. 15; *Lozon v. McKay*, 203 Mich. 364, 169 N. W. 11; *Oakman v. Esper*, 206 Mich. 315, 172 N. W. 375; *Schoenfeld v. Kemter*, — Mich. —, 179 N. W. 243.

**Missouri.** *Hallmann v. Conlon*, 143 Mo. 369, 45 S. W. 275; *Danzer v. Moerschel*, — Mo. —, 214 S. W. 849.

**Nebraska.** *English v. Milligan*, 27 Neb. 326, 43 N. W. 120; *Fisher v. Buchanan*, 2 Neb. (Unofficial) 158, 96 N. W. 339; *Rossback v. Micks*, 89 Neb. 821, 42 L. R. A. (N.S.) 444, 132 N. W. 526.

**New Jersey.** *Ocean City Association v. Headley*, 62 N. J. Eq. 322, 50 Atl. 78.

**North Carolina.** *Triplett v. Williams*, 149 N. Car. 394, 24 L. R. A. (N.S.) 514, 63 S. E. 79.

**North Dakota.** *Brugman v. Charlson*, — N. D. —, 4 A. L. R. 400, 171 N. W. 882.

**Ohio.** *Kirby v. Harrison*, 2 O. S. 326, 59 Am. Dec. 677.

**Oregon.** *Smith v. Martin*, 94 Or. 132, 185 Pac. 236.

**Pennsylvania.** *In re Kutz's Estate*, 259 Pa. St. 548, 103 Atl. 293; *Doughty v. Cooney*, 266 Pa. St. 337, 109 Atl. 619.

**South Dakota.** *Keller v. Garneaux*, 40 S. D. 53, 166 N. W. 305.

**Vermont.** *Bodwell v. Bodwell*, 66 Vt. 101, 28 Atl. 870.

<sup>5</sup> *Skidmore v. Leavitt*, — Okla. —, 175 Pac. 503.

<sup>6</sup> See §§ 3356 et seq.

**§ 3302. Breach as to time of performance.** As has been said elsewhere,<sup>1</sup> this performance must be within the time limited by the contract, if time is of the essence of the contract.<sup>2</sup> Unless time is of the essence of the contract, performance in a reasonable time is sufficient.<sup>3</sup> If time is not of the essence, failure to comply with the requisites of performance within the time limited will not prevent specific performance.<sup>4</sup> In any event, the requisites of performance must take place within a reasonable time,<sup>5</sup> or within a reasonable time from notice of forfeiture of the contract for non-performance.<sup>6</sup>

**§ 3303. Interference with performance by adversary party.** In accordance with the general principles which apply when one party has interfered with performance by the other,<sup>1</sup> a purchaser who has interfered with the performance of the contract by the vendor,<sup>2</sup> or who has obtained the purchase price in fraud of the vendor's rights,<sup>3</sup> can not have specific performance.

**§ 3304. Renunciation by plaintiff.** If one of the parties to a contract has refused to perform in such a way as to indicate that he does not intend to be bound by the contract, and the adversary

<sup>1</sup> See §§ 2103 et seq.

<sup>2</sup> Delaware. *Jones v. Carpenter*, — Del. —, 112 Atl. 374.

Illinois. *Turn Verein Eiche v. Kionka*, 255 Ill. 302, 43 L. R. A. (N.S.) 44, 90 N. E. 684.

Maryland. *Abrams v. Eckenrode*, — Md. —, 110 Atl. 468.

Pennsylvania. *Doughty v. Cooney*, 266 Pa. St. 337, 109 Atl. 619; *Mansfield v. Redding*, — Pa. St. —, 112 Atl. 437.

South Dakota. *Keller v. Garneaux*, 40 S. D. 53, 166 N. W. 305; *Carpenter v. Murphy*, 40 S. D. 280, 167 N. W. 175.

Omission of the defendant to tender performance of a concurrent covenant does not excuse the default of the plaintiff. *Mansfield v. Redding*, — Pa. St. —, 112 Atl. 437.

See Questions Relating to Time in Cases of Specific Performance, by William Draper Lewis, 41 American Law

Register (N.S.) 639, and 42 American Law Register (N.S.) 1.

<sup>3</sup> *Curry v. Curry*, — Mich. —, 182 N. W. 98; *Rollyson v. Bourn*, 85 W. Va. 15, 100 S. E. 682.

See §§ 2103 et seq.

<sup>4</sup> *Flora v. Glover*, — Colo. —, 193 Pac. 665; *Kaufman v. Hastings*, 93 Or. 623, 184 Pac. 265.

If no time is fixed, reasonable time for performance must be given. *Adams v. Rhodes*, 143 Ark. 172, 220 S. W. 29.

<sup>5</sup> *Crane v. Coons*, 105 Kan. 214, 182 Pac. 554; *Kirkpatrick v. Lebus*, 184 Ky. 130, 211 S. W. 572 (sale of stock).

<sup>6</sup> *Oakman v. Esper*, 206 Mich. 315, 172 N. W. 375.

<sup>1</sup> See §§ 2881 et seq.

<sup>2</sup> *McMichael v. Crawford*, 104 Kan. 778, 180 Pac. 777.

<sup>3</sup> *Waller v. Lewis*, — Ark. —, 203 S. W. 697.

party treats such renunciation as a discharge,<sup>1</sup> the party who has thus refused specific performance can not thereafter retract such refusal and compel the other party to perform specifically.<sup>2</sup>

A purchaser who has indicated that he does not intend to perform the contract in accordance with its terms, can not thereafter have specific performance.<sup>3</sup> A purchaser who refuses to perform unless he receives a deed different from that required by the contract, can not have specific performance.<sup>4</sup> If A has agreed to render services as a member of B's family in consideration of his interest in B's estate, at his death, A can not have specific performance if she subsequently marries C and refuses to continue performance unless C is received into B's family.<sup>5</sup> A purchaser who has announced that he would not perform, can not subsequently have specific performance against the vendor who has acquiesced in such breach and has made improvements on the property and has leased it to others.<sup>6</sup> While, in most of these cases, the renunciation of a contract was wrongful, the same rule applies if such renunciation is rightful because of the default of the adversary party.<sup>7</sup> If the vendor has tendered a defective title and the purchaser gives notice thereon of his intention to treat the

<sup>1</sup> See § 2900.

<sup>2</sup> *United States. McCabe v. Matthews*, 155 U. S. 550, 39 L. ed. 256.

*Alabama. Cooper v. Cooper*, 201 Ala. 477, 78 So. 383.

*Illinois. Lasher v. Loeffler*, 190 Ill. 150, 60 N. E. 85; *Bennett v. Burkhalter*, 257 Ill. 572, 44 L. R. A. (N.S.) 733, 101 N. E. 189.

*Iowa. Giltner v. Rayl*, 93 Ia. 16, 61 N. W. 225; *Hopwood v. McCausland*, 120 Ia. 218, 94 N. W. 469; *Hambleton v. Jameson*, 162 Ia. 186, 143 N. W. 1010.

*Kansas. Riley v. Allen*, 71 Kan. 625, 81 Pac. 186.

*Massachusetts. Thaxter v. Sprague*, 159 Mass. 397, 34 N. E. 541.

*Minnesota. Enkema v. McIntyre*, 136 Minn. 293, 2 A. L. R. 411, 161 N. W. 587.

*Nebraska. Schultz v. Hastings Lodge*, 90 Neb. 454, 133 N. W. 846.

*Utah. Thackeray v. Knight*, — Utah —, 192 Pac. 263.

*Virginia. Chilhowie Iron Co. v. Gardiner*, 79 Va. 305.

*Washington. Voight v. Fidelity Investment Co.*, 49 Wash. 612, 96 Pac. 162.

<sup>3</sup> *Cooper v. Cooper*, 201 Ala. 477, 78 So. 383; *Enkema v. McIntyre*, 136 Minn. 293, 2 A. L. R. 411, 161 N. W. 587. The same principle applies to a contract between landlord and tenant. *Schultz v. Hastings Lodge*, 90 Neb. 454, 133 N. W. 846.

<sup>4</sup> *Riemenschneider v. Tortoriello*, 287 Ill. 482, 122 N. E. 799.

<sup>5</sup> *Bennett v. Burkhalter*, 257 Ill. 572, 44 L. R. A. (N.S.) 733, 101 N. E. 189.

<sup>6</sup> *Hapwood v. McCausland*, 120 Ia. 218, 94 N. W. 469.

<sup>7</sup> *Thackeray v. Knight*, — Utah —, 192 Pac. 263.

contract as discharged, the purchaser can not have specific performance thereafter.<sup>8</sup>

Refusal to accept defective performance or to perform in turn until the adversary party has performed his precedent covenants or has offered to perform his concurrent covenants, if made in such manner as to indicate that the contract is still in effect, and that performance on the part of the party in default is demanded, does not show an intention to terminate the contract; and it is generally held that such refusal does not prevent such party from having specific performance if the adversary party is able thereafter to perform.<sup>9</sup>

Specific performance will not be denied for the purchaser's refusal to perform in a manner different from that required by the contract.<sup>10</sup>

**§ 3305. Renunciation by defendant as excuse for non-performance by plaintiff.** Renunciation by one party to the contract before performance is due on the part of the adversary party, excuses the adversary party from offering to perform, and prevents his failure to perform from operating as a breach on his part,<sup>1</sup> since it would be requiring a useless thing to demand that he offer performance to one who has indicated his intention not to accept it. Accordingly, in such cases, such adversary party is not prevented from obtaining specific performance by such non-performance on his part after such renunciation.<sup>2</sup> Renunciation by

<sup>8</sup> *Thackeray v. Knight*, — Utah —, 192 Pac. 263.

<sup>9</sup> *Walton v. McKinney*, 11 Ariz. 385, 94 Pac. 1122; *Saldutti v. Flynn*, 72 N. J. Eq. 157, 65 Atl. 246; *Haffey v. Lynch*, 143 N. Y. 241, 38 N. E. 298.

Contra, *Riley v. Allen*, 71 Kan. 625, 81 Pac. 186.

<sup>10</sup> *Jackson v. Rogers*, 111 S. Car. 49, 96 S. E. 692.

<sup>1</sup> See §§ 2882 et seq.

<sup>2</sup> *United States. Cheney v. Libby*, 134 U. S. 68, 33 L. ed. 818; *Blanton v. Warehouse Co.*, 120 Fed. 318.

*Illinois. Scott v. Beach*, 172 Ill. 273, 50 N. E. 196.

*Iowa. Veeder v. McMurray*, 70 Ia. 118, 29 N. W. 818.

*Kansas. Arnett v. Westcott*, 107 Kan. 693, 193 Pac. 377.

*Kentucky. Tyler v. Onzts*, 93 Ky. 331, 20 S. W. 256.

*Massachusetts. Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340.

*Mississippi. Gannaway v. Toler*, 122 Miss. 111, 84 So. 129.

*Missouri. Cape Girardeau-Jackson Interurban Ry. v. Light & Development Co.*, 277 Mo. 579, 210 S. W. 361; *Starr v. Crenshaw*, 279 Mo. 344, 213 S. W. 811.

*New Jersey. McCormick v. Hickey*, 56 N. J. Eq. 848, 42 Atl. 1019.

*South Dakota. McPherson v. Fargo*, 10 S. D. 611, 66 Am. St. Rep. 723, 74 N. W. 1057.

the seller excuses the buyer from tendering the purchase price;<sup>3</sup> and renunciation by the buyer excuses the seller from offering to perform.<sup>4</sup>

**§ 3306. Waiver of breach as discharge.** The party who is not in default may elect to treat the contract as still in force in spite of the breach of the adversary party;<sup>1</sup> and a vendor who waives the breach of the purchaser and treats the contract as in force, can not thereafter treat such breach as a discharge for the purpose of resisting specific performance.<sup>2</sup> If the purchaser elects to waive the breach of the vendor as a discharge, he can not thereafter resist specific performance therefor.<sup>3</sup> Conduct of the purchaser in taking or retaining possession of the realty, notwithstanding such breach, operates as a waiver.<sup>4</sup>

**§ 3307. Breach by defendant—Necessity and effect.** In order that specific performance may be granted, it must be shown that the party against whom relief is sought has, at least, committed some breach of the contractual obligation which he has assumed. If breach is not shown to exist, specific performance can not be granted, although the party who seeks such relief may not have obtained what he had expected or hoped.<sup>1</sup> If A and B, who own

**Virginia.** *Wolford v. Jackson*, 123 Va. 280, 96 S. E. 237.

**Washington.** *Alexander v. Lewes*, 104 Wash. 32, 175 Pac. 572; *Lindholm v. Patrick*, 107 Wash. 243, 181 Pac. 876.

<sup>3</sup> *Hager v. Rey*, — Mich. —, 176 N. W. 443. Renunciation by one who is to receive support, excuses failure to furnish such support. *Alexander v. Lewes*, 104 Wash. 32, 175 Pac. 572. Such renunciation excuses the seller from making a report of drillings, which the contract required. *Starr v. Crenshaw*, 279 Mo. 344, 213 S. W. 811.

<sup>4</sup> *Wolford v. Jackson*, 123 Va. 280, 96 S. E. 237; *Lindholm v. Patrick*, 107 Wash. 243, 181 Pac. 876.

<sup>1</sup> See §§ 3037 et seq.

<sup>2</sup> *Sorrels v. Marble*, 142 Ark. 300, 218 S. W. 671; *Gannaway v. Toler*, — Miss. —, 84 So. 129.

<sup>3</sup> *Jamison v. Van Auken*, — Mo. —, 210 S. W. 404; *Rollyson v. Bourn*, 85 W. Va. 15, 100 S. E. 682.

<sup>4</sup> *Jamison v. Van Auken*, — Mo. —, 210 S. W. 404; *Rollyson v. Bourn*, 85 W. Va. 15, 100 S. E. 682.

<sup>1</sup> **Arizona.** *Genardini v. Kline*, 19 Ariz. 558, 173 Pac. 882.

**Massachusetts.** *Grennan v. Pierce*, 229 Mass. 292, 118 N. E. 301.

**Michigan.** *Wayne Woods Land Co. v. Beeman*, — Mich. —, 178 N. W. 696.

**Minnesota.** *Luthey v. Joyce*, 132 Minn. 451, L. R. A. 1916E, 1235, 157 N. W. 706.

**Pennsylvania.** *Safron v. McBurney*, — Pa. St. —, 112 Atl. 677.

Specific performance will not be granted against a vendor who has no title and who has agreed to convey only if he can get title. *Safron v. McBurney*, — Pa. St. —, 112 Atl. 677.

certain interests in land, have agreed to convey such interests if the entire tract is sold by all having interest therein, they can not be compelled to convey their respective interests on payment of a proportionate part of the purchase price.<sup>2</sup> If A, B and C are joint tenants, and A and B have given an option on such property, they can not be compelled to convey the entire estate, even after the death of C.<sup>3</sup> If a testamentary trustee has agreed to sell, if the sale were approved by the probate court, specific performance can not be had against him if the court refuses to approve the sale, on his report that he could obtain a higher price, even though he had power to sell without the approval of the court.<sup>4</sup> If a contract to make a lease is performed by the execution and delivery of the lease, specific performance can not be had, although the lessee does not obtain exclusive possession.<sup>5</sup> If a lease for a given space of time gives to the lessee the privilege of a longer time, at his option, the right to the longer time exists by virtue of the lease itself; and specific performance can not be had to compel the lessor to execute a new lease.<sup>6</sup> Specific performance can not be given of a contract to effect insurance where the suit is brought after the loss, and other insurance on the same property has already been collected exceeding the value of the property insured.<sup>7</sup> Specific performance of a contract to reconvey on the happening of certain conditions, will not be given as against a grantee who has reasonable ground for believing that such conditions and such covenant for a reconveyance had been waived.<sup>8</sup>

On repudiation by the vendor, specific performance may be decreed against him before the time fixed by the contract for performance.<sup>9</sup>

<sup>2</sup> *Affrime v. Mandel*, 267 Pa. St. 387, 111 Atl. 255.

<sup>3</sup> *Wayne Woods Land Co. v. Beeman*, — Mich. —, 178 N. W. 696.

<sup>4</sup> *Grennan v. Pierce*, 229 Mass. 292, 118 N. E. 301.

<sup>5</sup> *Genardini v. Kline*, 19 Ariz. 558, 173 Pac. 882.

<sup>6</sup> *Luthey v. Joyce*, 132 Minn. 451, L. R. A. 1916E, 1235, 157 N. W. 708.

<sup>7</sup> *Insurance Co. of North America v.*

*Schall*, 96 Md. 225, 61 L. R. A. 301, 53 Atl. 925.

<sup>8</sup> *Ball v. Milliken*, 31 R. I. 36, 37 L. R. A. (N.S.) 623, Ann. Cas. 1912B, 30, 76 Atl. 789.

<sup>9</sup> *Payne v. Melton*, 67 S. Car. 233, 45 S. E. 154; *Miller v. Jones*, 68 W. Va. 526, 36 L. R. A. (N.S.) 408, 71 S. E. 248.

*Contra*, *Crosby v. Georgia Realty Co.*, 138 Ga. 746, 76 S. E. 38.

See § 2886.

### III MUTUALITY

**§ 3308. Mutuality—General nature.** While the term “mutuality” is a most unfortunate one, meaning, in its various uses, almost everything, anything, or nothing, as the cases may be, its repeated reiteration by the courts makes it necessary to consider the scope, extent and application of the doctrine. In many cases, and in varying forms, the courts have said that specific performance will be denied in contracts where mutuality is lacking.<sup>1</sup> The term “mutuality,” however, is a vague term, of more than one meaning, and covering a group of more or less vague ideas. The accurate statement of the meaning of this rule presents, therefore, two difficulties: (1) the difficulty of determining exactly what the term “mutuality” includes; and, (2) the conflict of authority as to whether in order to defeat specific performance mutuality must be lacking when the contract is entered into, or when the suit for specific performance is brought.

Cases involving questions of mutuality may with some accuracy be distributed under two heads: those involving mutuality of obligation of the contract, and those involving mutuality of remedy.

<sup>1</sup> **United States.** *Marble Company v. Ripley*, 77 U. S. (10 Wall.) 339, 19 L. ed. 955.

**Alabama.** *Rushton v. McKee*, 201 Ala. 49, 77 So. 343.

**Illinois.** *Lunt v. Lorscheider*, 285 Ill. 589, 121 N. E. 237.

**Iowa.** *Steltzer v. Compton*, 167 Ia. 266, 149 N. W. 243.

**Kentucky.** *Volz v. Scully*, 159 Ky. 226, 166 S. W. 1015.

**Maine.** *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635.

**Missouri.** *Glass v. Rowe*, 103 Mo. 513, 15 S. W. 334.

**New Mexico.** *Lockhart v. Washington Gold & Silver Mining Co.*, 16 N. M. 223, 117 Pac. 833.

**Pennsylvania.** *Bodine v. Glading*, 21 Pa. St. 50, 59 Am. Dec. 749; *In re Kutz's Estate*, 259 Pa. St. 548, 103 Atl. 293.

**Tennessee.** *Leathers v. Deloach*, 140 Tenn. 259, 204 S. W. 633.

**Texas.** *De Cordova v. Smith*, 9 Tex. 129, 58 Am. Dec. 136.

**Virginia.** *Moore v. Fitz Randolph*, 33 Va. (6 Leigh) 175, 29 Am. Dec. 208.

See *Mutuality in Specific Performance*, by James B. Ames, 3 *Columbia Law Review* 1; *Specific Performance of Contracts—Defence of Lack of Mutuality*, by William Draper Lewis, 40 *American Law Register* (N.S.) 270, 383, 447, 507, 559, and 41 *American Law Register* (N.S.) 251, 329; *The Present Status of the Defence of Want of Mutuality in Specific Performance*, by William Draper Lewis, 42 *American Law Register* (N.S.) 591; and *Mutuality of obligation and remedy as a requisite to equitable relief, with special reference to oil and gas leases*, by H. C. McClintock, 58 *Pennsylvania Law Review* 16.

In order to have specific performance, the contract sued on must have mutuality of obligation; that is, the contract must be binding on both parties.<sup>2</sup> While equity apparently requires a higher degree of fair dealing than law,<sup>3</sup> and while it insists on a closer approximation to adequacy of consideration,<sup>4</sup> the rule that mutuality of obligation is necessary in order to obtain specific performance, probably means nothing more, apart from these exceptions, than that the contract must have the common-law requisites of a valid contract, in order to be enforceable specifically in equity.<sup>5</sup>

According to the weight of authority, mutuality may arise after the original agreement is made.<sup>6</sup> No objection which has been eliminated before the suit for specific performance is brought, and possibly before the decree is rendered, can prevent the existence of so-called mutuality so as to defeat specific performance.<sup>7</sup> It will be noted, however, in the following sections, that some courts repudiate this view and hold that the facts existing when the contract is entered into must be relied upon to determine specific performance.

**§ 3309. Mutuality involving offer and acceptance.** In considering first the types of so-called contract in which mutuality of

<sup>2</sup>Robinson v. Appleton, 124 Ill. 276, 15 N. E. 761; Leathers v. Deloach, 140 Tenn. 259, 204 S. W. 633.

<sup>3</sup>See §§ 346 et seq., § 394, §§ 405 et seq., § 638 and §§ 3286 et seq.

<sup>4</sup>See § 638 and §§ 3292 et seq.

<sup>5</sup>Stutsman v. Crain, 185 Ia. 514, 170 N. W. 806.

<sup>6</sup>Alabama. Blackburn v. McLaughlin, 202 Ala. 434, 80 So. 818.

Arkansas. Ashcraft v. Tucker, 136 Ark. 447, 206 S. W. 896.

California. Hall v. Center, 40 Cal. 63; Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536.

Kansas. Topeka Water-Supply Co. v. Root, 56 Kan. 187, 42 Pac. 715.

Missouri. Tebeau v. Ridge, 261 Mo. 547, L. R. A. 1915C, 367, 170 S. W. 871; Starr v. Crenshaw, 279 Mo. 344, 213 S. W. 811.

Nebraska. Dickson v. Stewart, 71 Neb. 424, 115 Am. St. Rep. 596, 98 N. W. 1085.

New Jersey. Thommen v. Smith, 88 N. J. Eq. 476, 103 Atl. 25.

New York. Trustees of Hamilton College v. Roberts, 223 N. Y. 56, 119 N. E. 97.

England. Wilkinson v. Clements, L. R. 8 Ch. 96.

Iowa. Stutsman v. Crain, 185 Ia. 514, 170 N. W. 806.

Kansas. Peckham v. Lane, 81 Kan. 489, 25 L. R. A. (N.S.) 967, 19 Ann. Cas. 369, 106 Pac. 464.

Minnesota. First National Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084.

Nebraska. Rank v. Garvey, 66 Neb. 767, 92 N. W. 1025.

Ohio. Richards v. Doyle, 36 O. S. 37.

Washington. Roche v. Madar, 104 Wash. 21, 175 Pac. 314, 181 Pac. 857.

obligation is lacking, it is evident that if an offer has not been accepted there is really no contract, and hence no remedy will be given either in law or in equity.<sup>1</sup> If certain terms are left open for future negotiation the contract is not complete and no relief, least of all specific performance, can be given.<sup>2</sup>

Cases in which specific performance is refused for lack of proper offer and acceptance, including lack of certainty, are frequently explained on the theory of lack of mutuality. This is simply saying, in other words, that no contract exists, and that accordingly there is nothing which the defendant can be decreed specifically to perform.<sup>3</sup>

If an offer, by its terms, calls for acceptance by doing an act, which act is at the same time acceptance, consideration and performance, the offeree, upon accepting by doing such act, may have specific performance against the promisor,<sup>4</sup> if the other requisites for specific performance are present.

**§ 3310. Want of mutuality—Options—Failure to accept.** If an option has been given by the defendant to the plaintiff, and such option has not been accepted in such a way as to turn the option into a binding contract, specific performance will not be granted.<sup>1</sup> A promise to convey realty by the terms of which the vendee has the option to accept and pay for the property, or to refuse it and relieve himself from all liability, does not impose any

<sup>1</sup> Illinois. Tryce v. Dittus, 199 Ill. 180, 65 N. E. 220.

Iowa. Steltzer v. Compton, 167 Ia. 266, 149 N. W. 243.

Michigan. Hollingshead v. Morris, 172 Mich. 126, 41 L. R. A. (N.S.) 310, 137 N. W. 527.

Nebraska. Kennedy v. Parmelee (Neb.), 91 N. W. 490; Fisher v. Buchanan, 2 Neb. (Unofficial) 158, 96 N. W. 339.

West Virginia. Pollock v. Brookover, 60 W. Va. 75, 6 L. R. A. (N.S.) 403, 53 S. E. 795.

<sup>2</sup> Lasher v. Gardner, 124 Ill. 441, 16 N. E. 919.

See § 89.

<sup>3</sup> See §§ 3310 et seq.

<sup>4</sup> Spires v. Urbahn, 124 Cal. 110, 56 Pac. 794; Bigler v. Baker, 40 Neb. 325,

24 L. R. A. 255, 58 N. W. 1026; Le Vine v. Whitehouse, 37 Utah 260, 109 Pac. 2.

<sup>1</sup> Colorado. Rude v. Levy, 43 Colo. 482, 24 L. R. A. (N.S.) 91, 96 Pac. 560.

Illinois. Winter v. Trainor, 151 Ill. 191, 37 N. E. 869.

Pennsylvania. Strasburg Railroad Co. v. Echnernacht, 21 Pa. St. 220, 60 Am. Dec. 49.

Rhode Island. Besser v. Allen, — R. I. —, 111 Atl. 885.

Virginia. Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894, 21 L. R. A. 133, 17 S. E. 558.

West Virginia. Hissam v. Parrish, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600; Pollock v. Brookover, 60 W. Va. 75, 6 L. R. A. (N.S.) 403, 53 S. E. 795.

liability on the vendee, and hence none on the vendor.<sup>2</sup> A promise to buy corporate stock, which the vendor is not obliged to sell unless he wishes, is not binding on the vendor, and hence not on the vendee.<sup>3</sup> A contract of sale, by which the vendee is to pay for the property in fifteen days or give up his rights under the contract and permit the property to be resold, is not binding on the vendee, and hence not upon the vendor.<sup>4</sup> So an agreement to subscribe to corporate stock if a railroad should be incorporated, which imposes no obligation to incorporate, lacks mutuality.<sup>5</sup>

**§ 3311. Options—Attempted revocation.** If the option is gratuitous, the party who is not bound in terms can not compel specific performance against the adversary party, if the latter has repudiated the contract before definite acceptance by the former. If, however, such option is given for a valuable consideration, it can not be withdrawn during the time stipulated for, and on acceptance within the time limited, specific performance may be decreed in a proper case.<sup>1</sup> If the option is given for valuable consideration it is held that if accepted within the time limited, specific performance may be given, even if before acceptance the vendor has attempted to withdraw the offer by sale to a third person who has notice of the vendee's interests.<sup>2</sup> A nominal consideration has been held to be sufficient to prevent revocation of an option.<sup>3</sup>

<sup>2</sup> *Goodale v. Hill*, 42 Conn. 311; *Winter v. Trainor*, 151 Ill. 191, 37 N. E. 869; *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894, 21 L. R. A. 133, 17 S. E. 558.

See also, *Besser v. Allen*, — R. I. —, 111 Atl. 885.

<sup>3</sup> *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600.

<sup>4</sup> *Bodine v. Glading*, 21 Pa. St. 50, 59 Am. Dec. 749.

<sup>5</sup> *Strasburg Ry. v. Echternacht*, 21 Pa. St. 220, 60 Am. Dec. 49.

<sup>1</sup> *United States. Mathews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972.

*Arkansas. Ashcraft v. Tucker*, 136 Ark. 447, 206 S. W. 896.

*California. Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149.

*Indiana. Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535.

*Kansas. Irrigation Loan & Trust Co. v. Oswald*, 103 Kan. 676, 176 Pac. 135.

*Kentucky. Bacon v. Kentucky Central Ry.*, 95 Ky. 373, 25 S. W. 747.

*Michigan. Mier v. Hadden*, 148 Mich. 488, 118 Am. St. Rep. 586, 111 N. W. 1040.

*Missouri. Tebeau v. Ridge*, 261 Mo. 547, L. R. A. 1915C, 367, 170 S. W. 871; *Starr v. Crenshaw*, 279 Mo. 344, 213 S. W. 811.

*New Jersey. Thommen v. Smith*, 88 N. J. Eq. 476, 103 Atl. 25.

*New York. Hamilton College v. Roberts*, 223 N. Y. 56, 119 N. E. 97.

<sup>2</sup> *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

<sup>3</sup> *George v. Schuman*, 202 Mich. 241, 168 N. W. 486.

See §§ 645 and 646.

In some jurisdictions a seal is not sufficient to prevent an offer from being revoked in equity.<sup>4</sup> In other jurisdictions it seems to be held that, although a contract under seal can not be enforced specifically, in the absence of a valuable consideration,<sup>5</sup> an option under seal is irrevocable in equity as well as in law.<sup>6</sup> In some of these cases, however, the question was not presented as the basis of the decision, as there was a valuable consideration in addition to the seal, or the offer had been accepted before revocation.

**§ 3312. Options—Effect of acceptance.** If an option, whether given for value or gratuitously, is accepted before it lapses or is withdrawn, the original offer is turned into a contract which may be enforced specifically if it possesses the remaining requisite elements.<sup>1</sup> Election to exercise an option to purchase,<sup>2</sup> or to repur-

<sup>4</sup> *Rude v. Levy*, 43 Colo. 482, 127 Am. St. Rep. 123, 24 L. R. A. (N.S.) 91, 96 Pac. 560; *Corbett v. Cronkhite*, 239 Ill. 9, 87 N. E. 874.

See § 127.

<sup>5</sup> See §§ 537 et seq. and § 3313.

<sup>6</sup> *Willard v. Tayloe*, 75 U. S. (8 Wall.) 557, 19 L. ed. 501; *Matthews Slate Co. v. New Empire Slate Co.*, 122 Fed. 972; *Dunlop v. Baker*, 239 Fed. 193; *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. 602; *Watkins v. Robertson*, 105 Va. 269, 115 Am. St. Rep. 890, 5 L. R. A. (N.S.) 1194, 54 S. E. 33.

<sup>1</sup> *Alabama*. *Ross v. Parks*, 93 Ala. 153, 30 Am. St. Rep. 47, 11 L. R. A. 148, 8 So. 368.

*Arkansas*. *Ashcroft v. Tucker*, 136 Ark. 447, 206 S. W. 896.

*California*. *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44.

*Georgia*. *Black v. Maddox*, 104 Ga. 157, 30 S. E. 723.

*Iowa*. *Larson v. Smith*, 174 Ia. 619, 156 N. W. 813.

*Massachusetts*. *French v. National Bank*, 179 Mass. 404, 60 N. E. 793.

*Michigan*. *Mier v. Hadden*, 148 Mich. 488, 118 Am. St. Rep. 586, 111 N. W. 1040; *Standard Oil Co. v. Murray*, — Mich. —, 183 N. W. 55.

*Missouri*. *Warren v. Costello*, 109 Mo. 338, 32 Am. St. Rep. 669, 19 S. W. 29; *Starr v. Crenshaw*, 279 Mo. 344, 213 S. W. 811.

*Montana*. *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695.

*Nebraska*. *Bigler v. Baker*, 40 Neb. 325, 24 L. R. A. 255, 58 N. W. 1026; *Donahue v. Potter & George Co.*, 63 Neb. 128, 88 N. W. 171; *Tidball v. Chalburg*, 67 Neb. 524, 93 N. W. 679.

*New Jersey*. *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 1 L. R. A. 380, 16 Atl. 4.

*New York*. *Hamilton College v. Roberts*, 223 N. Y. 56, 119 N. E. 97.

*North Dakota*. *Horgan v. Russell*, 24 N. D. 490, 43 L. R. A. (N.S.) 1150, 140 N. W. 99.

*Tennessee*. *Cherry v. Smith*, 22 Tenn. (3 Humph.) 19, 39 Am. Dec. 150; *Bradford v. Foster*, 87 Tenn. 4, 9 S. W. 195.

*West Virginia*. *Weaver v. Burr*, 31 W. Va. 736, 3 L. R. A. 94, 8 S. E. 743; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220.

<sup>2</sup> *Betha v. McCullough*, 195 Ala. 480,

chase,<sup>3</sup> realty, or election to exercise an option to buy stock,<sup>4</sup> each makes the original unenforceable offer a valid contract and eliminates the want of mutuality. If an offer and acceptance can be shown from the entire contract between the parties, specific performance may be given, even if it is not embodied in one instrument.<sup>5</sup>

If the offer contemplates or permits acceptance by acts instead of a specific acceptance by words, such form of acceptance eliminates want of mutuality and makes the contract specifically enforceable.<sup>6</sup> A agreed to give to B a lease for producing oil and gas if B would drill a well upon the realty to be leased. By the terms of the agreement B was not required to drill such well, but he nevertheless did so. B was thereupon allowed specific performance against A.<sup>7</sup>

While the great weight of modern authority is in favor of this view, there is little authority against it, especially among the early cases;<sup>8</sup> and accordingly some of the courts which have granted specific performance have felt bound to place the decision on some additional ground,<sup>9</sup> as that the defendant was insolvent,<sup>10</sup> or that the plaintiff had entered into a contract to resell the property upon which such option was given.<sup>11</sup>

The view that acceptance of an option makes a contract which may be enforced specifically, assumes, of course, that, in this class

70 So. 680; *Blackburn v. McLaughlin*, 202 Ala. 434, 80 So. 818; *Standard Oil Co. v. Murray*, — Mich. —, 183 N. W. 55; *Tebeau v. Ridge*, 261 Mo. 547, L. R. A. 1915C, 367, 170 S. W. 871; *Bigler v. Baker*, 40 Neb. 325, 24 L. R. A. 255, 58 N. W. 1026.

<sup>3</sup> *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 1 L. R. A. 380, 16 Atl. 4.

<sup>4</sup> *Sayward v. Houghton*, 119 Cal. 545, 51 Pac. 853, 52 Pac. 44.

<sup>5</sup> *Gates v. Dudgeon*, 173 N. Y. 426, 93 Am. St. Rep. 608, 66 N. E. 116.

<sup>6</sup> *Storm v. United States*, 94 U. S. 76, 24 L. ed. 42; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 744; *Smith v. Gibson*, 25 Neb. 511, 41 N. W. 360; *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907.

"Want of mutuality is no defense even in an action of specific perform-

ance where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within its terms." Syllabus of *Bigler v. Baker*, 40 Neb. 325, 24 L. R. A. 255, 58 N. W. 1026; quoted in *Rank v. Garvey*, 66 Neb. 767, 92 N. W. 1025, 99 N. W. 666.

<sup>7</sup> *Boyd v. Brown*, 47 W. Va. 238, 34 S. E. 907.

<sup>8</sup> See note 13, this section.

<sup>9</sup> *Crawford v. Williams*, 149 Ga. 126, 99 S. E. 378; *Mier v. Hadden*, 148 Mich. 488, 118 Am. St. Rep. 586, 111 N. W. 1040.

<sup>10</sup> *Crawford v. Williams*, 149 Ga. 126, 99 S. E. 378.

<sup>11</sup> *Mier v. Hadden*, 148 Mich. 488, 118 Am. St. Rep. 586, 111 N. W. 1040.

of cases at least, original want of mutuality may be eliminated by subsequent acts of the parties at some time between the date of the original promise and the bringing of the suit. This view must necessarily be taken unless we are to hold that specific performance can be given only when acceptance occurs at the same time as the offer. Many courts which take this view go a little further and hold that the filing of a bill for specific performance is sufficient as an acceptance to make the option into an enforceable contract.<sup>12</sup>

In other cases it seems to be held that an option which was not originally enforceable against the plaintiff can not, by subsequent acceptance, become enforceable in a suit for specific performance.<sup>13</sup> If this result is to be upheld, it must mean that equity has reverted to what was possibly the original common-law theory, and that equity denies the possibility of a so-called continuing offer which can be accepted within a specified time or a reasonable time, as the case may be; and that on the other hand, equity recognizes only such contracts as are made by an acceptance which follows the offer without any appreciable delay.

Whether an option which is properly accepted can be enforced specifically if the purchaser does not intend to buy for himself, but to resell on speculation, is a question upon which there is a divergence of authority. Specific performance has been held proper as far as such objection was concerned,<sup>14</sup> on the theory

<sup>12</sup> Blackburn v. McLaughlin, 202 Ala. 434, 80 So. 818; Woodruff v. Woodruff, 44 N. J. Eq. 349, 1 L. R. A. 380, 16 Atl. 4.

"The filing of the bill for specific performance itself supplied the element of mutuality if it was theretofore wanting." Black v. Maddox, 104 Ga. 157, 165, 30 S. E. 723. "When such contracts come to be enforced in equity they cease to be unilateral, for upon the filing of the bill the party who was before unbound puts himself under the obligation of the contract. By his own act he makes the contract mutual and the other party is enabled to enforce it." Richards v. Green, 23 N. J. Eq. 536, 537; quoted in Woodruff v. Woodruff, 44 N. J. Eq. 349, 355, 1 L. R. A. 380, 16 Atl. 4; and in Blackburn v. McLaughlin, 202 Ala. 434, 80 So. 818.

<sup>13</sup> England. Bromley v. Jeffreys, Prec. Ch. 138, 2 Vern. 415.

Maryland. Ryan v. McLane, 91 Md. 175, 50 L. R. A. 501, 46 Atl. 340 (contract to be performed only at election of purchaser).

Michigan. Maynard v. Brown, 41 Mich. 298, 2 N. W. 30.

New York. Benedict v. Lynch, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec. 484.

West Virginia. Hissam v. Parrish, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600.

Wyoming. Merrill v. Rocky Mountain Cattle Co., 26 Wyom. 219, 181 Pac. 964 (obiter as express condition was not performed).

<sup>14</sup> Threlkeld v. Inglett, 289 Ill. 90, 124 N. E. 368 (specific performance denied since terms were uncertain).

that a valid contract is made when the offer is accepted and that the secret motives of the purchaser are immaterial. On the other hand, specific performance has been denied,<sup>15</sup> on the theory that such a transaction is "bare-faced gambling."<sup>16</sup> Whatever may be thought of the wisdom of such speculations, they do not present the elements which are ordinarily regarded as characteristic of wager contracts.<sup>17</sup>

**§ 3313. Mutuality involving want of consideration.** A promise not under seal is unenforceable unless supported by a valuable consideration.<sup>1</sup> No remedy for such promise is given, either at law or equity, and accordingly specific performance is denied.<sup>2</sup> Refusal to grant specific performance for this reason is sometimes explained on the theory that the contract is lacking in mutuality. Here, again, the ordinary rules of consideration are sufficient to explain the result without invoking an additional, unsatisfactory and ambiguous explanation.

If a contract for the exchange of realty is assigned to one who does not assume any of the obligations thereof, it has been held that such assignee can not have specific performance, since he has not incurred any obligation.<sup>3</sup> Specific performance should not be given in such a case unless the original party performs, or unless he can be compelled to perform at the same time that specific performance is claimed against the defendant, since the defendant should be secured in the performance of such concurrent covenants when he is compelled himself to perform. If a promisor can be thus protected, however, no good reason appears for denying specific performance.

**§ 3314. Mutuality involving personal incapacity of plaintiff.** One party to a contract may, by reason of personal incapacity, have the right of avoiding the contract, if he sees fit so to do. At law, as we have seen,<sup>1</sup> this is a privilege personal to such party and the defense of incapacity can not be set up by the party of

<sup>15</sup> Schmid v. Whitten, 114 S. Car. 245, 103 S. E. 553.

<sup>16</sup> Schmid v. Whitten, 114 S. Car. 245, 103 S. E. 553.

<sup>17</sup> See §§ 830 et seq.

<sup>1</sup> See §§ 537 et seq.

<sup>2</sup> Arkansas National Bank v. Stuckey, 121 Ark. 302, 181 S. W. 913; Warren

v. Costello, 109 Mo. 338, 32 Am. St. Rep. 669, 19 S. W. 29.

See also, Besser v. Allen, — R. I. —, 111 Atl. 885.

See § 3288.

<sup>3</sup> Lunt v. Lorscheider, 285 Ill. 589, 121 N. E. 237.

<sup>1</sup> See §§ 1609 and 1635.

full capacity. The only exception to this may be found in cases where the promise by the person of abnormal status is absolutely a nullity, and not merely voidable at his election.<sup>2</sup>

There is a conflict of authority in equity on the question whether the party of abnormal status may have specific performance against a party of normal status, if the former wishes to enforce the contract. In some states it is held that since the party of abnormal status could have avoided the contract could he have seen fit to do so, equity should not give the relief of specific performance to him as against the adversary party.<sup>3</sup> No specific performance can be given of covenants made in consideration of executory ultra vires promises by a corporation.<sup>4</sup> A corporation can not have specific performance of a contract to purchase realty which it is not authorized to purchase or to hold, by the terms of its charter.<sup>5</sup>

In other cases it is held that the party of full capacity can not set up the lack of capacity of the adversary party, if the latter wishes to enforce the contract.<sup>6</sup>

An additional complication is found in cases of this sort where the party who lacks capacity has performed all the terms of the contract on his part to be performed. In many jurisdictions performance by him is held to eliminate the question of a want of mutuality, and to make it proper for the court to enforce the contract specifically against the adversary party.<sup>7</sup> If a contract by husband and wife, by which they agree to sell land which is owned

<sup>2</sup> See §§ 1658, 1682 and 1687.

<sup>3</sup> *Infancy. Fight v. Bolland*, 4 Russ. 298. *Coverture. Warren v. Costello*, 100 Mo. 338, 32 Am. St. Rep. 669, 19 So. 29. (Want of acceptance and want of consideration are also facts preventing specific performance in this case); *Richards v. Green*, 23 N. J. Eq. 536; *Shenandoah Valley Ry. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239. If the married woman is bound by her contract under the statute in for., she may, of course, have specific performance. *Moore v. Baker*, 65 N. J. Eq. 104, 55 Atl. 106.

<sup>4</sup> *Kohlruss v. Zachery*, 139 Ga. 625, 46 L. R. A. (N.S.) 72, 77 S. E. 812; *Railroad Co. v. Telegraph Co.*, 38 O. S. 24.

A contract which was not let on competitive bidding can not be enforced by a public corporation. *Saginaw v. Consumers' Power Co.*, — Mich. —, 182 N. W. 146.

<sup>5</sup> *Kohlruss v. Zachery*, 139 Ga. 625, 46 L. R. A. (N.S.) 72, 77 S. E. 812 (obiter).

<sup>6</sup> *Smith v. Smith*, 36 Ga. 184, 91 Am. Dec. 761.

<sup>7</sup> *Infant. Lafollett v. Kyle*, 51 Ind. 446; *Yerkes v. Richards*, 153 Pa. St. 646, 34 Am. St. Rep. 721, 26 Atl. 221; *Asberry v. Mitchell*, 121 Va. 276, L. R. A. 1918A, 785, 93 S. E. 638; *Walker v. Owen*, 79 Mo. 563; *Richards v. Doyle*, 36 O. S. 37, 38 Am. Rep. 550; *Shenandoah Valley Ry. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239; *Rollyson v. Bourn*, 85 W. Va. 15, 100 S. E. 682.

by both, is not sealed or acknowledged, and accordingly is not binding against the married woman, such husband and wife may, nevertheless, have specific performance if they tender a conveyance to the purchaser, in accordance with the terms of the contract.<sup>8</sup> If a married woman can bind herself by a contract to buy land, she may of course have specific performance.<sup>9</sup>

If a contract is made by an agent in excess of his authority, and his principal subsequently ratifies, the question of his right to enforce specific performance against the adversary party is one on which there is a conflict of authority.<sup>10</sup> If an undisclosed principal has performed the covenants of the contract to be performed on his part, and has tendered a deed in due form, he may have specific performance.<sup>11</sup>

**§ 3315. Mutuality where performance optional.** If performance of a contract by one party is not compulsory, but is only to be made in case of his election so to do, specific performance can not be enforced against him as long as he has not made his election to perform, since this would be denying to him a right which, by the terms of the contract, he has reserved.<sup>1</sup> Specific performance of a contract, the performance of which is optional with both parties, can not be granted, since this would deny to the defendant the right which he has reserved by the terms of his contract.<sup>2</sup> If performance is optional at the election of one of the parties he can not, according to many authorities, have specific performance against the adversary party before such election is made by him, since he may afterward elect not to perform, and thus leave the

<sup>8</sup> *Rollyson v. Bourn*, 85 W. Va. 15, 100 S. E. 682.

<sup>9</sup> *Weidenbaum v. Raphael*, 83 N. J. Eq. 17, 90 Atl. 683.

<sup>10</sup> That the principal may have specific performance. *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *Rank v. Garvey*, 66 Neb. 767, 92 N. W. 1025, 99 N. W. 666. That he may have specific performance if he ratifies before the adversary party withdraws. *Stutsman v. Crain*, 185 Ia. 514, 170 N. W. 806. That the principal can not have specific performance. *Security*

*Loan & Trust Co. v. Powell*, 119 Va. 231, 89 S. E. 91; *Atlee v. Bartholomew*, 69 Wis. 43, 2 Am. St. Rep. 103, 33 N. W. 110.

<sup>11</sup> *Davidson v. Hurty*, 116 Minn. 280, 39 L. R. A. (N.S.) 324, 133 N. W. 862.

<sup>1</sup> *Express Co. v. Ry. Co.*, 90 U. S. 191, 25 L. ed. 319. (Election to end contract on repayment of twenty thousand dollars.)

<sup>2</sup> *Tryce v. Dittus*, 199 Ill. 189, 65 N. E. 220; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

adversary party without right or remedy.<sup>3</sup> Equity will not enforce specific performance of a contract to furnish heat if it is optional with the consumer to discontinue the use thereof at any time.<sup>4</sup> A party who has the right to end the contract on ten days' notice,<sup>5</sup> or a year's notice,<sup>6</sup> or who is bound to perform only as long as he is the agent of the Associated Press, no provision of the contract requiring him to act as such agent for any period of time,<sup>7</sup> can none of them have specific performance against the adversary party. Specific performance of a lease for oil, gas, and the like, which is treated by the court as a contract, is refused on the application of the lessee, if he has the option to terminate the lease at any time,<sup>8</sup> although it is sometimes said that such a contract is not void for want of mutuality.<sup>9</sup> It is said that specific performance will be refused in cases of this sort, unless the party who has the option to terminate the contract has either performed in full or has so acted, under the contract, that he is bound to perform in full.<sup>10</sup>

<sup>3</sup> *United States. Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339, 19 L. ed. 955; *Federal Oil Co. v. Oil Co.*, 121 Fed. 674, 57 C. C. A. 428 [affirming, 112 Fed. 373].

*Illinois. Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53.

*Indiana. Fowler Utilities Co. v. Gray*, 168 Ind. 1, 120 Am. St. Rep. 344, 7 L. R. A. (N.S.) 726, 79 N. E. 897 (injunction).

*North Carolina. Soloman v. Wilmington Sewerage Co.*, 142 N. Car. 439, 6 L. R. A. (N.S.) 391, 55 S. E. 300.

*Oklahoma. Kolachny v. Galbreath*, 26 Okla. 772, 38 L. R. A. (N.S.) 451, 110 Pac. 902; *Melton v. Cherokee Oil & Gas Co.*, — Okla. —, 170 Pac. 691 [certiorari denied, *Cherokee Oil & Gas Co. v. Melton*, 247 U. S. 507, 38 Sup. Ct. Rep. 427].

<sup>4</sup> *Fowler Utilities Co. v. Gray*, 168 Ind. 1, 120 Am. St. Rep. 344, 7 L. R. A. (N.S.) 726, 79 N. E. 897 (injunction).

A contract to furnish electricity to the inhabitants of a city will be enforced specifically, although they are

not bound to accept any specified amount. *Saginaw v. Consumers' Power Co.*, — Mich. —, 182 N. W. 146.

<sup>5</sup> *Brooklyn Baseball Club v. McGuire*, 116 Fed. 782. (Negative relief sought by injunction); *Weighman v. Killifer*, 215 Fed. 168 (injunction).

<sup>6</sup> *Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339, 19 L. ed. 955.

<sup>7</sup> *Iron Age Publishing Co. v. Western Union Telegraph Co.*, 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449.

<sup>8</sup> *Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674; *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Kolachny v. Galbreath*, 26 Okla. 772, 38 L. R. A. (N.S.) 451, 110 Pac. 902; *Melton v. Cherokee Oil & Gas Co.*, — Okla. —, 170 Pac. 691 [certiorari denied, *Cherokee Oil & Gas Co. v. Melton*, 247 U. S. 507, 38 Sup. Ct. Rep. 427].

<sup>9</sup> *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53.

<sup>10</sup> *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; *Hill Oil & Gas Co. v. White*, — Okla. —, 157 Pac. 710.

If one of the parties has reserved the option to terminate the contract, either without paying anything of value,<sup>11</sup> or on payment of a nominal amount,<sup>12</sup> such contract lacks consideration,<sup>13</sup> at least to such an extent that specific performance will be refused.

If the party who seeks specific performance had reserved an option to terminate the contract within a certain period or on certain contingencies, and such option has lapsed, it would seem that the former existence of such option should not be a reason for refusing specific performance; and this view has been adopted, in some cases,<sup>14</sup> on the theory that the rights of the parties are to be determined when such relief is sought. In a case of this sort, on the other hand, specific performance has been denied,<sup>15</sup> apparently on the theory that the rights of the parties are to be determined as of the making of the contract.

If the party at whose election performance is to be had as elected to perform, and has performed on his part or has tendered performance and has kept such tender good, the want of mutuality is thus eliminated, and in proper cases he may have specific performance against the adversary party.<sup>16</sup> If a contract for the sale of goods to be raised in the future, leaves the purchaser free to accept or reject such goods when produced, his act in accepting then eliminates want of mutuality.<sup>17</sup>

**§ 3316. Specific performance of conditional contracts.** If a contract is to be performed only on the happening of some event, specific performance will not be granted if such event does not take place.<sup>1</sup>

If A agrees to sell realty to X on condition that A's co-owner B shall sell his interest to X, X can not have specific performance against A if B refuses to sell.<sup>2</sup> If A and B enter into an agreement

<sup>11</sup> *Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339, 19 L. ed. 955.

<sup>12</sup> *Watford Oil & Gas Co. v. Shipman*, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53.

Contra, after part performance. *Rich v. Doneghey*, — Okla. —, 3 A. L. R. 352, 177 Pac. 86.

<sup>13</sup> See § 572.

<sup>14</sup> *Downey v. Gooch*, 240 Fed. 527.

<sup>15</sup> *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239.

<sup>16</sup> *Livesley v. Johnston*, 45 Or. 30, 106 Am. St. Rep. 647, 65 L. R. A. 783, 76 Pac. 13, 946.

<sup>17</sup> *Livesley v. Johnston*, 45 Or. 30, 106 Am. St. Rep. 647, 65 L. R. A. 783, 76 Pac. 13, 946.

<sup>1</sup> *Hector-Johnston Co. v. Billings*, 65 Neb. 214, 91 N. W. 183.

<sup>2</sup> *Hector-Johnson Co. v. Billings*, 65 Neb. 214, 91 N. W. 183.

which can not be performed unless A succeeds in buying a railroad at a sheriff's sale, A can not have specific performance against B.<sup>3</sup>

**§ 3317. Mutuality involving the Statute of Frauds.** By the Statute of Frauds, as it is worded in most jurisdictions, the contract or memorandum is to be signed by the party to be charged therewith. Nothing is said about signature by both parties. Accordingly, in most jurisdictions it is held that equity will give specific relief against the party who has signed the contract at the instance of the party who has not signed it. Some courts find it necessary to justify this result by the theory that the plaintiff has made the contract enforceable against himself by filing a bill for specific performance, which constitutes a memorandum of the contract signed by the plaintiff, and that the plaintiff has thus eliminated the original want of mutuality.<sup>1</sup> This theory is not

<sup>3</sup>Ballou v. March, 133 Pa. St. 64, 19 Atl. 304.

<sup>1</sup>England. Martin v. Mitchell, 2 Jac. & W. 413; Lever v. Koffler [1901], 1 Ch. 543.

United States. In re Neff, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N.S.) 349; Williams v. DeSoto Oil Co., 213 Fed. 194, 129 C. C. A. 538.

Alabama. Ross v. Parks, 93 Ala. 153, 30 Am. St. Rep. 47, 11 L. R. A. 148, 8 So. 368.

Arkansas. Vance v. Newman, 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574; Lee v. Vaughan's Seed Store, 101 Ark. 68, 37 L. R. A. (N.S.) 352, 141 S. W. 496.

California. Cavanaugh v. Casselman, 88 Cal. 543, 26 Pac. 515; Martin v. Ede, 103 Cal. 157, 37 Pac. 109; Bloom v. Hazzard, 104 Cal. 310, 37 Pac. 1037; Copple v. Aigeltinger, 167 Cal. 706, 140 Pac. 1073.

Connecticut. Hodges v. Kowing, 58 Conn. 12, 7 L. R. A. 87, 18 Atl. 979; Kilday v. Schanupp, 91 Conn. 29, L. R. A. 1917A, 151, 98 Atl. 335.

Georgia. Perry v. Paschal, 103 Ga. 134, 29 S. E. 703; Black v. Maddox, 104 Ga. 157, 30 S. E. 723.

Illinois. Perkins v. Hadsell, 50 Ill. 216; Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118; Ullsperger v. Meyer, 217 Ill. 262, 2 L. R. A. (N.S.) 221, 75 N. E. 482.

Indiana. Burke v. Mead, 159 Ind. 252, 64 N. E. 880.

Kentucky. Lloyd v. O'Rear (Ky.), 59 S. W. 483.

Louisiana. Broassard v. Verret, 43 La. Ann. 929, 9 So. 905.

Maine. Morrow v. Moore, 98 Me. 373, 99 Am. St. Rep. 410, 57 Atl. 81.

Maryland. Engler v. Garrett, 100 Md. 387, 59 Atl. 648.

Massachusetts. Old Colony Ry. v. Evans, 72 Mass. (6 Gray) 25, 66 Am. Dec. 394; Hunter v. Giddings, 97 Mass. 41, 93 Am. Dec. 54; Bruce v. Meserve, 228 Mass. 463, 117 N. E. 830.

Minnesota. Kessler v. Smith, 42 Minn. 494, 44 N. W. 794; Western Land Association v. Banks, 80 Minn. 317, 83 N. W. 192; Bowers v. Whitney, 88 Minn. 168, 92 N. W. 540.

Mississippi. Marqueeze v. Caldwell, 48 Miss. 23; Atkinson v. Whitney, 67 Miss. 655, 7 So. 644.

Missouri. Mastin v. Grimes, 88 Mo. 478; Cunningham v. Williams, 43 Mo.

necessary, however, to justify this result. The statute does not require the contract to be in writing, since it provides for a note or memorandum as well as for a contract; and by requiring such contract, note or memorandum to be signed by the party to be charged therewith, it impliedly excludes the necessity of a signature by the party who is seeking to enforce the contract.<sup>2</sup>

In other jurisdictions the courts have taken the liberty of adding to the terms of the statute, a liberty which they justify on the theory of mutuality; and they have refused to grant specific performance against the party who signed a written contract, note or memorandum, on the application of the party who did not sign, on the theory that the party who signed it could not have had specific performance against the party who did not sign it if the latter had refused to perform.<sup>3</sup> Under the usual form of the Stat-

App. 629; *Black v. Crowther*, 74 Mo. App. 480.

**Montana.** *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695.

**Nebraska.** *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767; *Ballou v. Sherwood*, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131; *Serhant v. Gooch Milling & Elevator Co.*, 96 Neb. 754, 148 N. W. 911.

**New Hampshire.** *Sabre v. Smith*, 62 N. H. 663; *Hickey v. Dole*, 66 N. H. 336, 49 Am. St. Rep. 614, 21 Atl. 792.

**New Jersey.** *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 1 L. R. A. 380, 16 Atl. 4; *Cohen v. Pool*, 84 N. J. Eq. 77, 189, 94 Atl. 37.

**North Carolina.** *Nicholson v. Dover*, 145 N. Car. 18, 13 L. R. A. (N.S.) 167, 58 S. E. 444; *Woodruff v. Piedmont Trust Co.*, 173 N. Car. 546, L. R. A. 1917E, 897, 92 S. E. 496; *Lewis v. Murray*, 177 N. Car. 17, 97 S. E. 750.

**Ohio.** *Thayer v. Luce*, 22 O. S. 62; *Wiedemann Brewing Co. v. Maxwell*, 78 O. S. 54, 84 N. E. 595.

**Oklahoma.** *Cameron Coal & Mercantile Co. v. Universal Metal Co.*, 26 Okla. 615, 31 L. R. A. (N.S.) 618, 110 Pac. 720.

**Pennsylvania.** *Witman v. Reading*, 191 Pa. St. 134, 43 Atl. 140; *Brodhead*

*v. Reinbold*, 200 Pa. St. 618, 86 Am. St. Rep. 735, 50 Atl. 229.

**Rhode Island.** *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500.

**South Dakota.** *McPherson v. Fargo*, 10 S. D. 611, 65 Am. St. Rep. 723, 74 N. W. 1057.

**Utah.** *Le Vine v. Whitehouse*, 37 Utah 260, 109 Pac. 2.

**Virginia.** *Mountain Park Land Co. v. Snidow*, — Va. —, 86 S. E. 915.

**Washington.** *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 6 L. R. A. (N.S.) 397, 7 Ann. Cas. 667, 85 Pac. 338; *Wright v. Seattle Grocery Co.*, 101 Wash. 266, 177 Pac. 818.

**West Virginia.** *Merchants' Coal Co. v. Billmeyer*, 54 W. Va. 1, 46 S. E. 121; *Mountain Park Land Co. v. Snidow*, 77 W. Va. 54, 86 S. E. 915.

<sup>2</sup> *Lexington Investment Co. v. Watson*, 98 Or. 379, 194 Pac. 172.

See § 1325.

<sup>3</sup> *Sykes v. Dixon*, 9 Ad. & El. 693; *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708, 26 N. W. 139; *Adams v. Harrington Hotel Co.*, 154 Mich. 198, 19 L. R. A. (N.S.) 919, 117 N. W. 551; *Willebrandt v. Sisters of Mercy*, 185 Mich. 366, 152 N. W. 85.

ute of Frauds, an oral contract is not void, voidable or illegal,<sup>4</sup> but it is merely unenforceable, since it can not be proved by the evidence which the statute requires.<sup>5</sup> There is, therefore, a mutuality of obligation, since the obligation does not depend on the ability to prove the contract. There is also mutuality of remedy except for the possible inability of the party who signed the contract to prove such contract against the party who did not sign it. If mutuality has any meaning in cases of this sort, it must mean that the defendant must have had as much evidence to enforce the contract against the plaintiff as the plaintiff had to enforce it against the defendant. Apart from the effect of the Statute of Frauds, this principle would probably not be suggested, or considered seriously.

In some jurisdictions in which the statute provides for signature by the party to be charged, the court has construed this phrase as meaning the vendor and not the party against whom specific performance is sought. Where this construction is placed upon the statute, the vendor can not enforce the contract which the vendor has not signed, but which the vendee has signed;<sup>6</sup> and if the vendor has signed it he may enforce it against the purchaser, although the purchaser has not signed it.<sup>7</sup>

If the statute provides expressly that the contract is to be signed by the vendor, a vendee who has not signed the contract may enforce it specifically against a vendor who has signed it.<sup>8</sup> The question of mutuality does not affect contracts of this sort, since, under such a statute, a vendor who has signed the contract can enforce it against the purchaser who has accepted the written offer which is signed by the vendor, but who has not signed it himself.<sup>9</sup>

<sup>4</sup> See §§ 1398 et seq.

<sup>5</sup> See §§ 1404 et seq.

<sup>6</sup> *Murray v. Crawford*, 138 Ky. 25, 28 L. R. A. (N.S.) 680, 127 S. W. 494.

<sup>7</sup> *Moore v. Chenault*, 16 Ky. Law Rep. 531, 29 S. W. 140; *Lewis v. Grimes*, 30 Ky. (7 J. J. Mar.) 336; *Evans v. Stratton*, 142 Ky. 615, 34 L. R. A. (N. S.) 393, 134 S. W. 1154.

<sup>8</sup> *Walsh v. Oakman*, 199 Mich. 688, 165 N. W. 737; *Krohn v. Dustin*, 142 Minn. 304, 172 N. W. 213; *Wall v.*

*Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 86 Wis. 48, 56 N. W. 367.

<sup>9</sup> *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767, 11 N. W. 732; *Lowber v. Connit*, 36 Wis. 176; *Hutchinson v. Chicago & Northwestern Ry. Co.*, 37 Wis. 582; *Heins v. Thompson & Flieth Lumber Co.*, 165 Wis. 563, 163 N. W. 173.

Part performance of an oral contract for the sale of realty renders it enforceable,<sup>10</sup> and this result is sometimes justified on the theory that such part performance renders the contract mutual.<sup>11</sup>

**§ 3318. Mutuality of remedy as ground for refusing specific performance—Where requisite.** Whether the plaintiff can have specific performance against the defendant where the defendant has no right to a similar remedy, against the plaintiff, is a question upon which there is some confusion, partly because of a conflict of authority and partly because of confusion as to the meaning of mutuality of remedy. If the so-called contract is one for which the defendant could not have had any remedy against the plaintiff, even if he had been able to prove the transaction, the real objection to granting specific performance is the fact that there is no mutuality of obligation.<sup>1</sup> In cases of this sort, the lack of a mutual remedy is merely the lack of obligation, stated in terms of procedure and remedies.

If the defendant could have maintained an action at law against the plaintiff, in which he could have recovered only nominal damages, the real objection to the contract is that the consideration is not merely grossly inadequate, which alone would be enough to defeat specific performance,<sup>2</sup> but it is merely nominal, which in many jurisdictions leaves the contract unenforceable, both at law and equity,<sup>3</sup> and which is so much less than a merely inadequate consideration that equity will not grant specific performance, since it will not grant this remedy in case of a grossly inadequate consideration.<sup>4</sup>

Up to this point the authorities are practically in accord. The difficulty arises in cases in which the defendant could have had an action at law against the plaintiff in which he could have recovered substantial damages, but for which he could not have had specific performance. In a number of jurisdictions, it was said that there must be mutuality of remedy; and by this was meant not merely that the defendant must have had an adequate remedy against the

<sup>10</sup> See §§ 1371 et seq.

<sup>11</sup> *Rugen v. Vaughan*, 142 Ark. 176, 218 S. W. 205; *Zelleken v. Lynch*, 80 Kan. 746, 46 L. R. A. (N.S.) 659, 104 Pac. 563; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *King v. Gant*, 77 Okla. 105, 186 Pac. 960.

<sup>1</sup> See §§ 3308 et seq.

<sup>2</sup> See §§ 637 et seq. and §§ 3292 et seq.

<sup>3</sup> See § 646.

<sup>4</sup> See §§ 637 et seq. and §§ 3292 et seq.

plaintiff if the plaintiff had broken the contract, but that he must have had the same remedy as that which the plaintiff is now asking; that is, specific performance. In cases of this sort, the original rule seems to have been that to have specific performance there must be mutuality both of obligation and of remedy, as long as the contract was executory on both sides.<sup>5</sup> This rule is often repeated by modern courts in substantially the same form.<sup>6</sup> It has been said that lack of "mutuality of remedy,"<sup>7</sup> "no matter from what cause,"<sup>8</sup> will defeat specific performance.

In many of the cases in which this view is expressed, the difficulty in granting specific performance is deeper than a mere want of mutual remedy, since the reason that the defendant could not have had a remedy against the plaintiff was because the contract was either voidable at the election of the plaintiff, or because there was no valid contract to enforce. In cases of this sort, the real

<sup>5</sup> *Smith v. McVeigh*, 11 N. J. Eq. 239; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 274, 7 Am. Dec. 427; *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 370, 7 Am. Dec. 484.

<sup>6</sup> *Alabama*. *Irwin v. Bailey*, 72 Ala. 467; *Welty v. Jacobs*, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723; *Iron Age Publishing Co. v. Western Union Telegraph Co.*, 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449; *Chadwick v. Chadwick*, 121 Ala. 580, 25 So. 631.

*California*. *Anson v. Townsend*, 73 Cal. 415, 15 Pac. 49; *Wakeham v. Baker*, 82 Cal. 46; *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 934; *Berry v. Moulie*, 180 Cal. 137, 179 Pac. 686.

*Colorado*. *Antero & Lost Park Reservoir Co. v. Lowe*, — Colo. —, 194 Pac. 945.

*Illinois*. *Lunt v. Lorscheider*, 285 Ill. 589, 121 N. E. 237.

*Iowa*. *Newman v. French*, 138 Ia. 482, 128 Am. St. Rep. 212, 18 L. R. A. (N.S.) 218, 116 N. W. 468.

*Massachusetts*. *Kansas Construction Co. v. Topeka, Salina & Western Ry.*, 135 Mass. 34, 46 Am. Rep. 439.

*New York*. *Levin v. Dietz*, 194 N. Y. 376, 20 L. R. A. (N.S.) 251, 87 N. E. 454.

*Pennsylvania*. *Ballou v. March*, 133 Pa. St. 64, 19 Atl. 304.

*Tennessee*. *Leathers v. Deloach*, 140 Tenn. 259, 204 S. W. 633.

*West Virginia*. *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600.

"The doctrine is well established as applicable to suits for specific performance, that though no difficulty attend the execution of the contract on the part of the defendant, yet, unless there be mutuality as to the remedy as well as the obligation, so that the complainant in case of his defection could be compelled to perform, the parties will be left to other remedies." *Chadwick v. Chadwick*, 121 Ala. 580, 583, 25 So. 631.

"It is settled law that a contract will not be specifically enforced unless its character be such that either party to it could have it specifically enforced as against the other." *Stanton v. Singleton*, 126 Cal. 657, 663, 47 L. R. A. 334, 59 Pac. 146.

<sup>7</sup> *Cooper v. Pena*, 21 Cal. 404.

<sup>8</sup> *Stanton v. Singleton*, 126 Cal. 657, 663, 59 Pac. 146.

lack of mutuality is in the obligation; and the lack of mutuality of remedy is due to the absence of a valid contract. In some cases, however, the obligation is mutual, if this unfortunate expression is to be employed; and the defendant would have had an action at law in which substantial damages could have been recovered against the plaintiff if the plaintiff had broken the contract; but specific performance is denied to the plaintiff because the defendant could not have had specific performance against the defendant, if the plaintiff had broken the contract.<sup>9</sup> A contract to furnish personal services can not be enforced by specific performance,<sup>10</sup> and accordingly it is held that specific performance will not be granted in favor of plaintiff who is bound, by executory covenants, to perform services of this sort.<sup>11</sup> Since a contract to furnish support can not be enforced, in most jurisdictions, by specific performance,<sup>12</sup> a plaintiff who has agreed to furnish support can not have specific performance of a covenant to convey property in consideration of such support.<sup>13</sup> If A has agreed to employ B in consideration of B's delivering certain secret formulas to A, A can not have specific performance against B, since B can not have specific performance against A.<sup>14</sup> A railway company contracted with a construction company to deliver certain stock certificates to the latter, in consideration whereof the latter was to build a railway line for the former in another state. It was held that as

<sup>9</sup> England. *Ogden v. Fossick*, 4 De G. F. & J. 426.

United States. *Karrick v. Hannaman*, 168 U. S. 328, 42 L. ed. 484.

Alabama. *Chadwick v. Chadwick*, 121 Ala. 580, 25 So. 631; *Bentley v. Barnes*, 171 Ala. 512, 55 So. 130.

California. *Berry v. Moulie*, 180 Cal. 137, 179 Pac. 686.

Illinois. *Welty v. Jacobs*, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723.

Iowa. *Newman v. French*, 138 Ia. 482, 128 Am. St. Rep. 212, 18 L. R. A. (N.S.) 218, 116 N. W. 468.

Massachusetts. *Kansas Construction Co. v. Topeka, Salina & Western Ry.*, 135 Mass. 34, 46 Am. Rep. 439.

Minnesota. *Alworth v. Seymour*, 42 Minn. 526, 44 N. W. 1030.

Oregon. *Deitz v. Stephenson*, 51 Or. 596, 95 Pac. 803.

<sup>10</sup> See § 3354.

<sup>11</sup> England. *Ogden v. Fossick*, 4 De G. F. & J. 426.

United States. *Karrick v. Hannaman*, 168 U. S. 328, 42 L. ed. 484.

Alabama. *Gardner v. Knight*, 124 Ala. 273, 27 So. 298.

California. *Berry v. Moulie*, 180 Cal. 137, 179 Pac. 686; *Roy v. Pos*, — Cal. —, 191 Pac. 542.

Minnesota. *Alworth v. Seymour*, 42 Minn. 526, 44 N. W. 1030.

<sup>12</sup> See § 3354.

<sup>13</sup> *Chadwick v. Chadwick*, 121 Ala. 580, 25 So. 631; *Gardner v. Knight*, 124 Ala. 273, 27 So. 298; *Newman v. French*, 138 Ia. 482, 128 Am. St. Rep. 212, 18 L. R. A. (N.S.) 218, 116 N. W. 468.

<sup>14</sup> *Berry v. Moulie*, 180 Cal. 137, 179 Pac. 686.

specific performance against the construction company would be impracticable, such company could not have specific performance against the railway.<sup>16</sup> Where A agreed to lease his theater to B for the production therein by B of a spectacular play, the receipts from admissions to be divided, it was held that as B could not be compelled to perform specifically, he could not have this remedy against A.<sup>16</sup> Since remaindermen alone could not have specific performance of a contract to sell the interest of a life tenant and remaindermen, the purchaser can not have specific performance against the remaindermen.<sup>17</sup>

**§ 3319. Mutuality of remedy as justifying specific performance.** The rule that mutuality of remedy is necessary sometimes works both ways. In some of the cases thus far discussed the inability of one party to obtain the remedy has caused it to be denied to the adversary party. This rule is, however, sometimes invoked to give the remedy of specific performance of terms of a contract which by themselves would not justify specific performance, on the ground that specific performance of the agreement of the adversary party which forms the consideration for such term sought to be enforced would be granted.<sup>1</sup> In most of the cases of specific performance of contracts for the sale of corporate stock,<sup>2</sup> the purchaser is seeking specific performance. Whether, in cases where the vendee might have specific performance, the doctrine of mutuality requires equity to grant the same relief to the vendor on his application, is a question on which there is some conflict of authority. In some cases it is held that even if the vendor can be compensated fully for the loss occasioned by the vendee's breach, by money damages given in an action at law, nevertheless the fact that the vendee could have specific performance requires equity to grant the same relief to the vendee.<sup>3</sup> Specific performance of a contract to sell a stock of goods has been given on the application of the seller, on the theory that the buyer might

<sup>16</sup> *Kansas Construction Co. v. Topeka, Salina & Western Ry.*, 135 Mass. 34, 46 Am. Rep. 439.

<sup>16</sup> *Welty v. Jacobs*, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723.

<sup>17</sup> *Leathers v. Deloach*, 140 Tenn. 259, 204 S. W. 633.

<sup>1</sup> *Blackburn v. McLaughlin*, 202 Ala. 434, 80 So. 818; *Wright v. Buchanan*,

287 Ill. 468, 123 N. E. 53; *Slattery v. Gross*, 96 Or. 554, 187 Pac. 300, 190 Pac. 577.

<sup>2</sup> See §§ 3333 et seq.

<sup>3</sup> *Bumgardner v. Leavitt*, 35 W. Va. 194, 12 L. R. A. 776, 13 S. E. 67. So of the sale of a stock dividend. *Withy v. Cottle*, 1 Sim. & St. 174.

have had such remedy.<sup>4</sup> It is very generally assumed that, under a contract for the sale of realty, the vendor may have specific performance, although the decree will be one for the payment of money.<sup>5</sup> In some cases, the right of the vendor to have specific performance against the purchaser of realty is placed on the ground that the vendor's remedy at law is not adequate, since it leaves the vendor the owner of the property and only gives him damages for the breach by the purchaser.<sup>6</sup> While there is much to be said in favor of this reasoning, the logical inference therefrom is that specific performance should always be granted, no matter what the subject-matter of the contract is, if it is practicable for the court to enforce its decree; and in many classes of cases, such as contracts for the sale of personalty, the courts have been unwilling to reach this result.<sup>7</sup>

**§ 3320. Mutuality of remedy—Where not requisite.** In many states the doctrine that the remedy of specific performance must be mutual has been abandoned. Where this view is taken the fact that the contract could not have been enforced specifically against the party seeking specific performance does not of itself prevent him from obtaining it.<sup>1</sup> Under a contract whereby a husband agrees to convey certain realty to his wife on consideration that she will waive a ground for divorce and live with him, specific performance may be decreed, although the husband has no means

<sup>4</sup> *Kipp v. Laun*, 146 Wis. 591, 131 N. W. 418. (The purchaser had also bought realty as a part of an entire transaction, but under a separate written contract; and he had taken possession thereof).

<sup>5</sup> *Wright v. Buchanan*, 287 Ill. 468, 123 N. E. 53; *Slattery v. Gross*, 96 Or. 554, 187 Pac. 300; *Lindholm v. Patrick*, 107 Wash. 243, 181 Pac. 876.

See § 3325.

See also, *A Vendor's Right to Specific Performance*, by William Draper Lewis, 41 American Law Register (N. S.) 65.

<sup>6</sup> *Hodges v. Kowing*, 58 Conn. 12, 7 L. R. A. 87, 18 Atl. 979.

<sup>7</sup> See §§ 3328 et seq.

<sup>1</sup> *Iowa. Minneapolis & St. Louis Ry. v. Cox*, 76 Ia. 306, 14 Am. St. Rep. 216, 41 N. W. 24.

*Kentucky. Moayon v. Moayon*, 114 Ky. 855, 102 Am. St. Rep. 303, 60 L. R. A. 415, 72 S. W. 33.

*Minnesota. Lamprey v. St. Paul & Chicago Ry.*, 89 Minn. 187, 94 N. W. 555.

*Montana. Burns v. Smith*, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742.

*New Hampshire. Hickey v. Dole*, 66 N. H. 336, 49 Am. St. Rep. 614, 29 Atl. 792.

*New Jersey. Madison Athletic Association v. Brittin*, 60 N. J. Eq. 160, 46 Atl. 652.

*Pennsylvania. Northern Central Ry. v. Walworth*, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

of compelling her to live with him always.<sup>2</sup> If when the contract was made the vendor could not have performed a minor stipulation of his contract specifically, but he has since acquired the property which he had agreed to deliver, and is in a position to perform specifically, and the vendee did not attempt to treat the contract as discharged for that reason, the vendor may have specific performance.<sup>3</sup> It has been held that under a contract by A to convey realty to B, in consideration of B's agreement to support A, B may have specific performance during A's life,<sup>4</sup> if the defendant could have recovered substantial damages against the plaintiff in an action at law.

In these jurisdictions, the sufficiency and adequacy of the remedy of the defendant, rather than its identity with the remedy of the plaintiff, is the test for granting or denying specific performance as far as the nature of the remedy is concerned.

If the defendant has reserved the right of re-entry in case of non-performance by the plaintiff, and he can either exercise this remedy or maintain an action at law for damages, specific performance will be given to the plaintiff, although the defendant could not have had specific performance.<sup>5</sup>

This principle, too, works both ways, and may be invoked to prevent one party from receiving the specific performance sought, even though the adversary party may have had such remedy.<sup>6</sup> A agreed to exchange certain stock for B's yacht. The stock could be bought readily in the open market. It was held that though A might, if he wished, have specific performance against B, B could not have such performance against A.<sup>7</sup>

**§ 3321. Mutuality of remedy after performance by plaintiff.** Even in jurisdictions in which lack of mutuality of remedy is a ground for refusing specific performance of a contract which is executory on both sides, this rule has no application to contracts in which the provisions which could not be enforced specifically,

<sup>2</sup>Moayon v. Moayon, 114 Ky. 855, 60 L. R. A. 415, 72 S. W. 33.

<sup>3</sup>Blanton v. Kentucky Distilleries & Warehouse Co., 120 Fed. 318.

<sup>4</sup>Whitney v. Hay, 181 U. S. 77, 45 L. ed. 758; Hackett v. Hackett, 67 N. H. 424, 40 Atl. 434.

<sup>5</sup>Des Moines University v. Polk County Homestead Co., 87 Ia. 36, 53 N. W. 1080.

<sup>6</sup>Eckstein v. Downing, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

<sup>7</sup>Eckstein v. Downing, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

have been performed fully.<sup>1</sup> While a contract for support, personal services, and the like, can not be enforced by a decree of specific performance;<sup>2</sup> and while specific performance is accordingly denied in many jurisdictions, where the plaintiff has not yet performed executory covenants of this sort,<sup>3</sup> nevertheless a plaintiff who has performed in full his covenants to furnish support or personal care and attention,<sup>4</sup> or a covenant to pay certain hospital expenses and to furnish support,<sup>5</sup> or to furnish personal services,<sup>6</sup> such as services as an attorney,<sup>7</sup> may have specific performance. Specific performance has been granted where the plaintiff has performed a material part of the covenants on his part, to be performed, although the contract on his part is, in part, still execu-

<sup>1</sup> England. *Wilkinson v. Clements*, 1 L. R. 8 Ch. 96.

California. *Brown v. Sebastopol*, 153 Cal. 704, 19 L. R. A. (N.S.) 178, 96 Pac. 363.

Georgia. *Landrum v. Rivers*, 148 Ga. 774, 98 S. E. 477.

Iowa. *Stutsman v. Crain*, 185 Ia. 514, 170 N. W. 806.

Kansas. *Peckham v. Lane*, 81 Kan. 489, 25 L. R. A. (N.S.) 967, 19 Ann. Cas. 369, 106 Pac. 464.

Michigan. *Reo Motor Car Co. v. Young*, 209 Mich. 578, 177 N. W. 249.

Nebraska. *Dickson v. Stewart*, 71 Neb. 424, 98 N. W. 1085.

South Dakota. *Case Threshing Machine Co. v. Farnsworth*, 28 S. D. 432, 134 N. W. 819.

Virginia. *Asberry v. Mitchell*, 121 Va. 276, L. R. A. 1918A, 785, 93 S. E. 638.

Washington. *Roche v. Madar*, 104 Wash. 21, 175 Pac. 314, 181 Pac. 857.

Wisconsin. *Dingman v. Hilberry*, 159 Wis. 170, 149 N. W. 761.

<sup>2</sup> See § 3354.

<sup>3</sup> See § 3318.

<sup>4</sup> Georgia. *Landrum v. Rivers*, 148 Ga. 774, 98 S. E. 477.

Illinois. *Clancy v. Flusky*, 187 Ill. 605, 52 L. R. A. 277, 58 N. E. 594 [following *Irwin v. Dyke*, 114 Ill. 302,

1 N. E. 913]; *Oswald v. Nehls*, 233 Ill. 438, 84 N. E. 619; *Aldrich v. Aldrich*, 287 Ill. 213, 122 N. E. 472.

Kansas. *James v. Lane*, 103 Kan. 540, 175 Pac. 387.

Maine. *Eastman v. Eastman*, 117 Me. 276, 104 Atl. 1.

Michigan. *Nickerson v. Nickerson*, 209 Mich. 134, 176 N. W. 456.

Minnesota. *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 43 L. R. A. 427, 78 N. W. 4; *Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 324.

New Hampshire. *Stillings v. Stillings*, 67 N. H. 584, 42 Atl. 271.

North Dakota. *Torgerson v. Hauge*, 34 N. D. 646, 3 A. L. R. 164, 159 N. W. 6.

Vermont. *Page v. Cave*, 93 Vt. 190, 106 Atl. 774.

Virginia. *Asberry v. Mitchell*, 121 Va. 276, L. R. A. 1918A, 785, 93 S. E. 638.

<sup>5</sup> *Asberry v. Mitchell*, 121 Va. 276, L. R. A. 1918A, 785, 93 S. E. 638.

<sup>6</sup> *Thurber v. Meves*, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; *Crawley v. Howe*, 291 Ill. 107, 125 N. E. 743.

<sup>7</sup> *Ballard v. Carr*, 48 Cal. 74; *Howard v. Throckmorton*, 48 Cal. 482; *Topeka Water-Supply Co. v. Root*, 56 Kan. 187, 42 Pac. 715; *Roche v. Madar*, 104 Wash. 21, 175 Pac. 314, 181 Pac. 857

tory.<sup>1</sup> Specific performance of a contract for a long-time mining lease has been granted to a lessee who is in possession and who has made valuable improvements, although a covenant to carry on such mining operations continuously and in a proper manner are necessarily still executory as to the remainder of such term.<sup>2</sup>

## IV

## ADEQUACY OF LEGAL REMEDIES

§ 3322. **Adequate remedy at law—General principles.** In theory, at least, the original test for the power of equity to grant relief in any class of cases was the absence of a plain, adequate and complete remedy at law. This principle applies with especial force to suits for specific performance of a contract. If the remedy at law in the shape of an action for money damages is plain, adequate and complete, specific performance will be denied, no matter if the contract in question possess all the other elements requisite to such relief.<sup>1</sup> Specific performance will be granted only

<sup>1</sup> *Zelleken v. Lynch*, 80 Kan. 746, 46 L. R. A. (N.S.) 659, 104 Pac. 563.

<sup>2</sup> *Zelleken v. Lynch*, 80 Kan. 746, 46 L. R. A. (N.S.) 659, 104 Pac. 563.

<sup>1</sup> *England. Cud v. Rutter*, 1 P. Williams 570.

**United States.** *Union Pacific Ry. v. Chicago, Minneapolis & St. Paul Ry.*, 163 U. S. 564, 41 L. ed. 265; *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 42 L. ed. 547; *Raton Water Works Co. v. Raton*, 174 U. S. 360, 43 L. ed. 1005; *American Fisheries Co. v. Lennen*, 118 Fed. 869.

**Alabama.** *Rushton v. McKee*, 201 Ala. 49, 77 So. 343; *Southern Iron & Equipment Co. v. Vaughan*, 201 Ala. 356, L. R. A. 1918E, 594, 78 So. 212.

**Arkansas.** *Starrett v. Dickson*, 136 Ark. 326, 206 S. W. 441.

**California.** *Herzog v. Atchison, Topeka & Sante Fe Ry.*, 153 Cal. 406, 17 L. R. A. (N.S.) 428, 95 Pac. 898.

**Connecticut.** *Andrew v. Babcock*, 63 Conn. 109, 26 Atl. 715.

**Florida.** *Le Noir v. McDaniel*, — Fla. —, 86 So. 435.

**Illinois.** *Canal Commissioners v. Chicago*, 191 Ill. 326, 61 N. E. 71; *Weir v. Weir*, 287 Ill. 495, 122 N. E. 868 (oral contract within statute of frauds).

**Iowa.** *Hull v. Hull*, 117 Ia. 63, 90 N. W. 496.

**Maryland.** *Maryland Clay Co. v. Simpers*, 96 Md. 1, 53 Atl. 424.

**Michigan.** *Toles v. Duplex Power Car Co.*, 202 Mich. 224, 168 N. W. 495; *Bradley v. May*, — Mich. —, 183 N. W. 64.

**Minnesota.** *Northern Trust Co. v. Markell*, 61 Minn. 271, 63 N. W. 735.

**Missouri.** *Reed v. Reed*, 94 Mo. App. 590, 68 S. W. 385.

**New Jersey.** *Rothholz v. Schwartz*, 46 N. J. Eq. 477, 19 Am. St. Rep. 409, 19 Atl. 312.

**Oregon.** *Johnson v. Wadsworth*, 24 Or. 494, 34 Pac. 13; *Cartwright v. Oregon Electric Ry.*, 88 Or. 596, 171 Pac. 1055.

**Pennsylvania.** *Rigg v. Reading & South Western Street Ry.*, 191 Pa. St. 298, 43 Atl. 212.

if injustice will be done to the plaintiff by requiring him to accept compensation in money for the breach on the part of the defendant.<sup>2</sup> In an early case,<sup>3</sup> this is based, in part, on the theory that the remedy at law is much more expeditious. Specific performance will be refused if it is of little or no advantage to the plaintiff, as compared with compensation in money.<sup>4</sup> On the other hand, it has been said that specific performance will be refused only where the circumstances are such that it is better to require the injured party to accept compensation in money than to grant specific performance.<sup>5</sup>

Specific performance of a contract to furnish a certain amount of freight tonnage, per annum, will not be enforced specifically,

**Texas.** Lone Star Salt Company, v. Texas Short Line Ry. Co., 99 Tex. 434, 3 L. R. A. (N.S.) 828, 90 S. W. 863.

**Washington.** Cahalan Investment Co. v. Yakima Central Heating Co., — Wash. —, 193 Pac. 210.

**West Virginia.** Hissam v. Parrish, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600.

Equity will not grant specific performance of a covenant to make payment for services. Bradley v. May, — Mich. —, 183 N. W. 64.

<sup>2</sup> Wisherd v. Bollinger, 293 Ill. 357, 127 N. E. 657.

<sup>3</sup> Buxton v. Lister, 3 Atk. 383.

<sup>4</sup> Rushton v. McKee, 201 Ala. 49, 77 So. 343.

<sup>5</sup> Brown v. Western Maryland Ry., — W. Va. —, 4 A. L. R. 522, 99 S. E. 457.

"Underlying every contract is the fundamental conception of exchange, one contracting party offering to exchange services or commodities which he possesses or can control in return for services or commodities not within his possession or control, but which he desires. At the time of entering upon the agreement, each expects to receive and render performance according to its express terms, and the contract can never be fully satisfied unless its execution is of that character.

Frequently, however, the circumstances are such that performance in kind is excused, and this is especially true when, with an award of damages, the disappointed party can easily obtain on the market, or elsewhere, the same or a substantially similar commodity or service that he contracted for. But when the remedy at law is not thus adequate, equity has full jurisdiction, and in its discretion may exert its inherent power to compel performance of the obligation on the part of the delinquent obligor. The normal end or termination of every contract is performance in accordance with the agreement, and such a consummation should be the presumptive one; resort to the legal remedy being had only when the circumstances are such that it is better to compel the obligee to accept damages in lieu of what he contracted for than to compel specific performance. Lightly to permit a contracting party to disregard his obligation and compel the obligee to accept not the thing contracted for, but money damages, is to place a premium upon contractual insincerity. Especially is this true where one party has fully performed his part of the agreement." Brown v. Western Maryland Ry., — W. Va. —, 4 A. L. R. 522, 99 S. E. 457.

on the theory that the remedy at law is adequate.<sup>6</sup> If A has conveyed land to a railroad in consideration of the agreement of the railroad to build a dike, A can not have specific performance, since his remedy is to construct the dike himself and to recover the cost thereof.<sup>7</sup> If payments are made on an overdue note under a contract to apply them on such note, equity will not enforce the application of such payments.<sup>8</sup> The mere fact of payment of the consideration in advance,<sup>9</sup> such as payment of rent in advance,<sup>10</sup> is not ground for this form of equitable relief, as the law gives an adequate remedy. If A has entered into a contract to support B for consideration furnished in advance, and A has then died, B can not have specific performance against A's estate as far as he seeks to recover the value of the consideration which he has furnished, since the remedy of proving his claim in the probate court against the estate of the decedent is adequate.<sup>11</sup>

Conversely, if the remedy at law is not plain, adequate and complete, specific performance will be granted if the contract possesses the remaining elements already discussed,<sup>12</sup> which make such remedy appropriate.<sup>13</sup> Specific performance of a contract to execute promissory notes for value, has been given, on the theory that an action at law for damages for breach of such contract would not be adequate, since performance would give to the holder of such note an advantage as to the burden of proof which he would not have had in an action on the contract.<sup>14</sup> If A has agreed

<sup>6</sup> *Lone Star Salt Company v. Texas Short Line Ry. Co.*, 99 Tex. 434, 3 L. R. A. (N.S.) 828, 90 S. W. 863.

<sup>7</sup> *Cartwright v. Oregon Electric Ry.*, 88 Or. 596, 171 Pac. 1055.

<sup>8</sup> *Reed v. Reed*, 94 Mo. App. 590, 68 S. W. 385.

<sup>9</sup> *Miller v. Bell*, 64 N. Y. 286; *Odell v. Montross*, 68 N. Y. 499; *Winchell v. Winchell*, 100 N. Y. 159, 2 N. E. 897; *Dunckel v. Dunckel*, 141 N. Y. 427, 36 N. E. 405; *Cooley v. Lobdell*, 153 N. Y. 506, 47 N. E. 783.

<sup>10</sup> *Charlton v. Columbia Real Estate Co.*, 64 N. J. Eq. 631, 54 Atl. 444.

<sup>11</sup> *Starrett v. Dickson*, 136 Ark. 326, 206 S. W. 441.

<sup>12</sup> See §§ 3279 et seq.

<sup>13</sup> *Kansas*. *Taylor v. Holyfield*, 104 Kan. 587, 180 Pac. 208.

*Kentucky*. *Moayon v. Moayon*, 114 Ky. 855, 60 L. R. A. 415, 72 S. W. 33.

*Michigan*. *Watkins v. Minor*, — Mich. —, 183 N. W. 186.

*Minnesota*. *Svanburg v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 43 L. R. A. 427, 78 N. W. 4; *Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 324.

*Oregon*. *O'Donnell v. Lebb*, 91 Or. 1, 178 Pac. 212.

*Pennsylvania*. *Ralston v. Ihmsen*, 204 Pa. St. 588, 54 Atl. 365.

*Wisconsin*. *Dells Paper & Pulp Co. v. Willow River Lumber Co.*, 170 Wis. 19, 173 N. W. 317; *Bassell v. West Virginia Central Gas Company*, — W. Va. —, 12 A. L. R. 1398, 103 S. E. 116.

<sup>14</sup> *Teschner v. Falkenwalde*, 135 Md. 114, 108 Atl. 467.

to sell timber to B, and has given to B a license to enter A's land and remove such timber, B's remedy of entering and removing such timber is not adequate if A has repudiated the contract and revoked the license.<sup>15</sup>

If the case is one within the ordinary jurisdiction of equity, equity will not be ousted by a subsequent statutory remedy, unless such remedy is made exclusive.<sup>16</sup> Specific performance of a public sale of land may be granted, although by statute the land may be resold and the purchaser may be charged with the difference.<sup>17</sup>

**§ 3323. Effect of covenant for payment of specified sum in case of breach.** If a contract contains a covenant to perform a certain act, together with a covenant to pay a certain sum of money if the former covenant is not performed, the effect of the covenant to pay money upon the right to have specific performance of the former covenant, depends on whether the covenant to pay money is a covenant for a penalty, or a covenant for liquidated damages, or whether the promisor has reserved the right to perform one of such covenants in the alternative at his election.<sup>1</sup> A penalty is unenforceable at modern law,<sup>2</sup> and accordingly the existence of such a covenant does not prevent specific performance of the other covenants of such contract.<sup>3</sup>

A covenant for the payment of liquidated damages is enforceable;<sup>4</sup> but, unless the contract reserves to the promisor the right to perform or to pay damages, the performance is the thing which is bargained for, and the covenant to pay damages is to take effect,

<sup>15</sup> *Dells Paper & Pulp Co. v. Willow River Lumber Co.*, 170 Wis. 19, 173 N. W. 317.

<sup>16</sup> *McCarty v. Wilson*, — Cal. —, 193 Pac. 578.

Apparently contra, *Tipson v. Jeannot*, 204 Mich. 403, 169 N. W. 874.

<sup>17</sup> *McCarty v. Wilson*, — Cal. —, 193 Pac. 578.

<sup>1</sup> See §§ 2113 et seq.

<sup>2</sup> See § 2118.

<sup>3</sup> *United States. Stewart v. Griffith*, 217 U. S. 323, 54 L. ed. 782.

*California. Whitney v. Stone*, 23 Cal. 275.

*Delaware. Kenyon v. Millard*, — Del. Ch. —, 104 Atl. 778.

*Massachusetts. Morgan v. Forbes*, — Mass. —, 128 N. E. 792.

*Michigan. Powell v. Dwyer*, 149 Mich. 141, 11 L. R. A. (N.S.) 978, 112 N. W. 499; *Buckhout v. Witwer*, 157 Mich. 406, 23 L. R. A. (N.S.) 506, 122 N. W. 184.

*Oklahoma. Dillon v. Ringleman*, 55 Okla. 331, 155 Pac. 563.

*Texas. Redwine v. Hudman*, 104 Tex. 21, 133 S. W. 426.

<sup>4</sup> See § 2119.

by its terms, only in case of breach. Accordingly, the existence of such a covenant is held not to prevent specific performance.<sup>5</sup>

If the contract reserves to the promisor the election to perform a specified act or to pay a specified amount of money, specific performance of the covenant to perform such act will not be granted, since, to give relief of this sort, would deprive the defendant of the right of election which he had reserved expressly.<sup>6</sup> In like manner, an express and exclusive provision as to the rights of the parties in case of breach, prevents specific performance.<sup>7</sup>

The difficulty which arises in cases of this sort is in distinguishing an alternative contract, on the one hand, from a covenant for a penalty or for liquidated damages, on the other.<sup>8</sup> A contract for the sale or exchange of land which provides that one of the parties may pay a certain sum and that thereupon the contract shall be null and void, has been held in some jurisdictions to be a contract for alternative performance, for which specific performance could not be given;<sup>9</sup> and in other jurisdictions, a contract for a penalty or liquidated damages for which specific performance could be given.<sup>10</sup>

**§ 3324. Adequacy of legal remedy—Insolvency.** Whether the adequacy of a remedy at law for damages is to be determined as an abstract proposition, or whether it is to be tested by the results that will be reached in the concrete instance, is a question upon which there is a divergence of authority. This question is ordinarily raised by cases in which the plaintiff has a right of action at law against the defendant, which would be a clear, adequate and complete remedy, but for the fact that the defendant is insolvent, and that little or nothing can be collected after judgment

<sup>5</sup> Long v. Bowring, 33 Beav. 585; Koch v. Streuter, 218 Ill. 546, 2 L. R. A. (N.S.) 210, 75 N. E. 1049; Gronowski v. Jozefowicz, 291 Ill. 266, 126 N. E. 108; Hedrick v. Firke, 169 Mich. 549, 135 N. W. 319; Brown v. Friedberg, 127 Va. 1, 102 S. E. 468.  
<sup>6</sup> Davis v. Isenstein, 257 Ill. 260, 45 L. R. A. (N.S.) 52, 100 N. E. 940; Gronowski v. Jozefowicz, 291 Ill. 266, 126 N. E. 108; Barker v. Critzer, 35 Kan. 459, 11 Pac. 382; In re Heckman, 236 Pa. St. 193, 84 Atl. 689.

<sup>7</sup> Bodine v. Glading, 21 Pa. St. 50, 59 Am. Dec. 749. (Seller to resell at expense of purchaser in case of default by the latter.)

<sup>8</sup> See §§ 2114 et seq.

<sup>9</sup> Davis v. Isenstein, 257 Ill. 260, 45 L. R. A. (N.S.) 52, 100 N. E. 940; Lunt v. Lorscheider, — Ia. —, 121 N. W. 237.

<sup>10</sup> Stewart v. Griffith, 217 U. S. 323, 54 L. ed. 782; Slattery v. Gross, 96 Or. 554, 187 Pac. 300, 190 Pac. 577.

has been rendered against him. Insolvency by itself has occasionally been regarded as a sufficient ground for granting specific performance, although such relief would have been denied if the defendant had been solvent.<sup>1</sup> In other cases, insolvency has been regarded as a material fact to be considered in connection with other facts,<sup>2</sup> although, apparently, not in itself sufficient. Specific performance has been given of a contract to give certain stock as security for an obligation,<sup>3</sup> or a contract to sell goods to be produced in the future, if the purchaser has made advances in reliance thereon,<sup>4</sup> if the defendant is insolvent so that an action for damages will be of little or no practical value. In some cases, this rule is stated in a negative form; and specific performance has been denied on the ground that the defendant was not shown to be insolvent.<sup>5</sup> Insolvency has been made a ground for specific performance by statute.<sup>6</sup> In some cases it has been said that uncertainty as to the insolvency of the defendant,<sup>7</sup> or the possibility that the defendant might take advantage of a provision authorizing him to substitute a corporation for himself, by forming a corporation with a very small capital so as to evade personal liability on the contract,<sup>8</sup> is not ground for granting specific performance.

In some cases it is said that the accident of insolvency does not affect the right of the plaintiff to specific performance, and that if specific performance can not be had against the defendant if solvent, it can not be had against him if insolvent.<sup>9</sup>

<sup>1</sup> *Clark v. Flint*, 39 Mass. (22 Pick.) 231, 33 Am. Dec. 733. (Contract for sale of personalty.)

See *Insolvency and Specific performance*, by H. C. Horack, 31 Harvard Law Review 702.

<sup>2</sup> *Ex parte Masterman*, 4 Deacon & C. 751; *Livesley v. Johnston*, 45 Or. 30, 106 Am. St. Rep. 647, 65 L. R. A. 783, 76 Pac. 13, 946; *Hogg v. McGuffin*, 67 W. Va. 456, 31 L. R. A. (N.S.) 491, 68 S. E. 41.

<sup>3</sup> *Ex parte Masterman*, 4 Deacon & C. 751.

<sup>4</sup> *Livesley v. Johnston*, 45 Or. 30, 106 Am. St. Rep. 647, 65 L. R. A. 783, 76 Pac. 13, 946.

<sup>5</sup> *Brown v. Van Winkle Gin & Ma-*

*chine Works*, 141 Ala. 580, 6 L. R. A. (N.S.) 585, 39 So. 243. (Contract to give a mortgage); *Southern Iron & Equipment Co. v. Vaughn*, 201 Ala. 356, L. R. A. 1918E, 594, 78 So. 212. (Contract for the sale of goods which could not be bought elsewhere.)

<sup>6</sup> *Neal v. Parker*, 98 Md. 254, 57 Atl. 213.

<sup>7</sup> *Black Diamond Coal Mining Co. v. Jones Coal Co.*, 200 Ala. 276, 76 So. 42.

<sup>8</sup> *Bushman v. Faltis*, 184 Mich. 172, 150 N. W. 848. (Contract to lease.)

<sup>9</sup> *Union Co-operative Co. v. Adolfson*, 103 Neb. 394, 171 N. W. 902; *Geo. E. Warren Co. v. A. L. Black Coal Co.*, 85 W. Va. 684, 102 S. E. 672. (Sale of personalty to be produced in the future.)

In other cases, the insolvency of the defendant seems to be regarded as a ground for denying specific performance, on the theory that specific performance will give to the plaintiff an unfair preference over the other creditors.<sup>10</sup>

**§ 3325. Contracts for conveyance of realty.** Every tract of realty is in a way unique. No amount of money will enable one to acquire a given tract for a private purpose without the consent of the owner thereof. It follows that a contract to convey realty is one the breach of which can not be compensated for adequately by money damages. Specific performance of such contracts is therefore regularly given by equity if the other elements of the contract are such as to make this remedy proper.<sup>1</sup> It is in con-

<sup>10</sup> *Chafee v. Sprague*, 16 R. I. 189, 13 Atl. 121.

<sup>1</sup> *United States. Willard v. Tayloe*, 75 U. S. (8 Wall.) 557, 19 L. ed. 501.

*Alabama. Morgan v. Lewis*, 203 Ala. 47, 82 So. 7.

*Arizona. Kimball v. Statler*, 20 Ariz. 81, 176 Pac. 843.

*Colorado. Speer v. Craig*, 16 Colo. 478, 27 Pac. 891.

*Florida. Murphy v. Hohne*, 73 Fla. 803, L. R. A. 1917F, 594, 74 So. 973; *Le Noir v. McDaniel*, — Fla. —, 86 So. 435.

*Illinois. Harding v. Gibbs*, 125 Ill. 85, 8 Am. St. Rep. 345, 17 N. E. 60; *Gronowski v. Jozefowicz*, 291 Ill. 266, 126 N. E. 108.

*Iowa. Throckmorton v. Davidson*, 68 Ia. 643, 27 N. W. 794.

*Kentucky. Moayon v. Moayon*, 114 Ky. 855, 60 L. R. A. 415, 72 S. W. 33.

*Maryland. Newbold v. Peabody Heights Co.*, 70 Md. 493, 3 L. R. A. 579, 17 Atl. 372.

*Michigan. Wilkinson v. Kneeland*, 125 Mich. 261, 84 N. W. 142; *Pearson v. Gardner*, 202 Mich. 360, 168 N. W. 485; *Watkins v. Minor*, — Mich. —, 183 N. W. 186.

*Minnesota. Svanburg, v. Fosseen*, 75 Minn. 350, 74 Am. St. Rep. 490, 43 L. R. A. 427, 78 N. W. 4.

*New York. Gates v. Dudgeon*, 173 N. Y. 426, 93 Am. St. Rep. 606, 66 N. E. 116.

*North Dakota. Langton v. Kops*, — N. D. —, 171 N. W. 334.

*Rhode Island. King v. Millard*, 15 R. I. 426, 7 Atl. 405.

*South Dakota. Lothrop v. Marble*, 12 S. D. 511, 76 Am. St. Rep. 626, 81 N. W. 885.

*Utah. Gledhill v. Malouf*, — Utah —, 197 Pac. 725.

*Virginia. Farrier v. Reynolds*, 88 Va. 141, 13 S. E. 393; *Brown v. Friedberg*, 127 Va. 1, 102 S. E. 468.

*West Virginia. Camden v. Dewing*, 47 W. Va. 310, 81 Am. St. Rep. 797, 34 S. E. 911; *Moore v. Ward*, 71 W. Va. 393, 43 L. R. A. (N.S.) 390, Ann. Cas. 1914C, 263, 76 S. E. 807; *Rollyson v. Bourn*, 85 W. Va. 15, 100 S. E. 682.

This is because damages is not an adequate remedy; and not because of the distinction between the legal nature of realty and personalty. *Le Noir v. McDaniel*, — Fla. —, 86 So. 435.

The fact that the purchaser is acquiring large interests in that locality and that the tract in question is essential to the success of his plans is an additional reason for granting specific performance. *Watkins v. Minor*, — Mich. —, 183 N. W. 186.

tracts of this sort that the courts of equity are most inclined to take the position that if the contract is not otherwise objectionable, specific performance is, contrary to the ordinary rule, a matter of right and not of grace.<sup>2</sup> Specific performance is given of a contract to exchange realty,<sup>3</sup> or to rescind an exchange already made,<sup>4</sup> or to lease realty.<sup>5</sup>

This remedy is not limited to contracts concerning corporeal realty, but extends also to contracts concerning easements,<sup>6</sup> such as contracts concerning the right of way of a railroad,<sup>7</sup> or a contract giving to one railroad the right to run trains over the road of another, subject to the orders of officers of the latter,<sup>8</sup> or to maintain and use a telegraph wire on the poles of another,<sup>9</sup> or to maintain a waterway.<sup>10</sup>

In most of the cases discussed specific performance has been given at the instance of the vendee. Specific performance is also

Specific performance of a contract to buy a tract of realty and divide it, will be granted. *Gledhill v. Malouf*, — Utah —, 197 Pac. 725.

<sup>2</sup> See § 3346.

Specific performance of such a contract is said to be a matter of discretion. *Richardson v. Varn*, — Fla. —, 36 So. 503; *Standard Oil Co. v. Murray*, — Mich. —, 183 N. W. 55 (obiter).

<sup>3</sup> *Purcell v. Miner*, 71 U. S. (4 Wall.) 513, 18 L. ed. 435; *Union Pacific Ry. v. McAlpine*, 129 U. S. 305, 32 L. ed. 673; *Cusack v. Budasz*, 187 Ill. 392, 58 N. E. 326; *Overstreet v. Rice*, 67 Ky. (4 Bush.) 1, 96 Am. Dec. 279; *Te Poel v. Shutt*, 57 Neb. 592, 78 N. W. 288.

<sup>4</sup> *Boggs v. Bodkin*, 32 W. Va. 566, 5 L. R. A. 245, 9 S. E. 891.

<sup>5</sup> *England*. *Hexter v. Pearce* (1900), 1 Ch. 341; *Moss v. Barton*, L. R. 1 Eq. 474.

*California*. *Clark v. Clark*, 49 Cal. 586.

*Kansas*. *Zelleken v. Lynch*, 80 Kan. 746, 46 L. R. A. (N.S.) 659, 104 Pac. 563.

*Maryland*. *Thompson v. Thomas & Thompson Co.*, 132 Md. 483, 104 Atl. 49.

*Michigan*. *Switzer v. Gardner*, 41 Mich. 164, 2 N. W. 191.

*New York*. *Smith v. St. Philip's Church*, 107 N. Y. 610, 14 N. E. 825.

*Oregon*. *Wallace v. Scoggins*, 17 Or. 476, 21 Pac. 558.

*Wisconsin*. *Seaman v. Aschermann*, 51 Wis. 678, 37 Am. Rep. 849, 8 N. W. 818.

See also, *Lockwood v. Carter Oil Co.*, 73 W. Va. 175, 52 L. R. A. (N.S.) 765, 80 S. E. 814; *Bassell v. West Virginia Central Gas Co.*, 86 W. Va. 198, 103 S. E. 116.

<sup>6</sup> *Puttman v. Haltey*, 24 Ia. 425.

<sup>7</sup> *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843; *Cornwall & Lebanon Ry. Co.'s Appeal*, 125 Pa. St. 232, 17 Atl. 427.

<sup>8</sup> *Union Pacific Ry. v. Chicago, Minneapolis & St. Paul Ry.*, 163 U. S. 564, 41 L. ed. 265; *Prospect Park & Coney Island Ry. v. Coney Island & Brooklyn Ry.*, 144 N. Y. 152, 26 L. R. A. 610, 39 N. E. 17.

<sup>9</sup> *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776.

<sup>10</sup> *Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Deck Co.*, 102 Wash. 608, 173 Pac. 508.

often given at the application of the vendor,<sup>11</sup> on the theory that the doctrine of mutuality requires that such remedy be given to the vendor, since it is given to the purchaser.<sup>12</sup> Accordingly, specific performance of covenants to maintain a station or a track,<sup>13</sup> or to permit lumber to be stored on railroad property,<sup>14</sup> or of covenants by a lessee under an oil and gas lease, to deliver a certain amount of the product to the lessor,<sup>15</sup> has been given.

Under the Torrens law, which requires contracts to be noted in the record of registration of land titles, and which requires the purchaser to file an affidavit of his claim, specific performance will not be given of a contract for the sale of land if the purchaser has not complied with these requirements of the statute.<sup>16</sup> This statute is thus construed as applying to the rights of the parties to the contract, and not merely protecting the rights of bona fide purchasers.

**§ 3326. Contract to make will or testament.** A contract to make a will can not be enforced in any way during the promisor's life if he has not repudiated the contract, since he has the whole of his life in which to perform.<sup>1</sup> If the promisor repudiates the

<sup>11</sup> *United States*. *Stewart v. Griffith*, 217 U. S. 323, 54 L. ed. 782.

*Alabama*. *Morgan v. Lewis*, 203 Ala. 47, 82 So. 7.

*Maryland*. *Maryland Clay Co. v. Siphers*, 96 Md. 1, 53 Atl. 424.

*Michigan*. *Pearson v. Gardner*, 202 Mich. 360, 168 N. W. 485.

*Minnesota*. *Abbott v. Moldestad*, 74 Minn. 293, 73 Am. St. Rep. 348, 77 N. W. 227.

*Washington*. *Anderson v. Wallace Lumber & Manufacturing Co.*, 30 Wash. 147, 70 Pac. 247.

<sup>12</sup> See § 3319.

<sup>13</sup> *Taylor v. Florida East Coast Ry.*, 54 Fla. 635, 16 L. R. A. (N.S.) 307, 14 Ann. Cas. 472, 45 So. 574; *Murray v. Northwestern Ry.*, 64 S. Car. 520, 42 S. E. 617; *Brown v. Western Maryland Ry.*, 82 W. Va. 511, 4 A. L. R. 522, 99 S. E. 457.

<sup>14</sup> *Brown v. Western Maryland Ry.*, 82 W. Va. 511, 4 A. L. R. 522, 99 S. E. 457.

<sup>15</sup> *Lockwood v. Carter Oil Co.*, 73 W. Va. 175, 52 L. R. A. (N.S.) 765, 80 S. E. 814; *Bassell v. West Virginia Central Gas Co.*, 86 W. Va. 198, 103 S. E. 116.

<sup>16</sup> *Dillon v. Broeker*, 178 N. Car. 65, 100 S. E. 191.

<sup>1</sup> *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46, 5 So. 572.

"Strictly speaking an agreement to dispose of property by will can not be specifically enforced, not in the lifetime of the party, because all testamentary papers are from their nature revocable; not after his death because it is no longer possible for him to make a will, yet courts of equity can do what is equivalent to a specific performance of such an agreement by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal rep-

contract in his lifetime, specific performance in the strict sense of the term will not be given, but analogous relief will be given by declaring the promisor a trustee for the promisee as to the property contracted for.<sup>2</sup>

If the promisor dies without making the will agreed upon, the contract is broken. Specific performance in the literal sense of the term can not, of course, be given, but the promisor can have substantially the same relief in equity by having the heirs, devisees, next of kin and legatees held as trustees of the property contracted for,<sup>3</sup> and equity may compel them to convey the legal title to the promisee.<sup>4</sup> Such a contract, like others, requires a

representative or purchaser with notice of the agreement as the case may be."

*Burdine v. Burdine*, 98 Va. 515, 519, 81 Am. St. Rep. 741, 36 S. E. 992.

<sup>2</sup> *Duval v. Duval*, 54 N. J. Eq. 581, 35 Atl. 750.

<sup>3</sup> *United States. Brown v. Sutton*, 129 U. S. 238, 32 L. ed. 664; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383.

*California. Owens v. McNally*, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710; *Wolfson v. Smyer*, 178 Cal. 775, 175 Pac. 10 (obiter).

*Illinois. Walters v. Walters*, 132 Ill. 467, 23 N. E. 1120.

*Iowa. Stewart v. Todd*, — Ia. —, 173 N. W. 619; *McInnery v. Graham*, — Ia. —, 174 N. W. 395.

*Kansas. Newton v. Lyon*, 62 Kan. 306, 62 Pac. 1000; affirmed on rehearing, 62 Kan. 651, 64 Pac. 592; *Schoonover v. Schoonover*, 86 Kan. 487, 38 L. R. A. (N.S.) 762, 121 Pac. 485; *Taylor v. Holyfield*, 104 Kan. 587, 180 Pac. 208.

*Massachusetts. Noyes v. Noyes*, 233 Mass. 55, 123 N. E. 395.

*Michigan. Carmichael v. Carmichael*, 72 Mich. 76, 16 Am. St. Rep. 528, 1 L. R. A. 596, 40 N. W. 173; *Nickerson v. Nickerson*, 209 Mich. 134, 176 N. W. 456.

*Minnesota. Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 324.

*Missouri. Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107;

*Signaigo v. Signaigo*, — Mo. —, 205 S. W. 23.

*Nebraska. Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, 25 L. R. A. 207, 59 N. W. 788; *Brown v. Webster*, 90 Neb. 591, 37 L. R. A. (N.S.) 1196, 134 N. W. 185.

*New Jersey. Tooker v. Vreeland*, — N. J. —, 112 Atl. 665.

*New York. Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832; *Morgan v. Sanborn*, 225 N. Y. 454, 122 N. E. 696.

*North Dakota. Torgerson v. Hauge*, 34 N. D. 646, 3 A. L. R. 154, 159 N. W. 6.

*Rhode Island. Spencer v. Spencer*, 25 R. I. 239, 55 Atl. 637.

*South Carolina. Turnipseed v. Sirrine*, 57 S. Car. 559, 578, 76 Am. St. Rep. 580, 584, 35 S. E. 757; rehearing denied, 35 S. E. 1035.

*Utah. Brinton v. Van Cott*, 8 Utah 480, 33 Pac. 218.

*Vermont. Page v. Cave*, — Vt. —, 106 Atl. 774.

*Virginia. Hale v. Hale*, 90 Va. 728, 19 S. E. 739; *Burdine v. Burdine*, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992; *Williams v. Williams*, 123 Va. 643, 96 S. E. 749.

<sup>4</sup> *Landrum v. Rivers*, 148 Ga. 774, 98 S. E. 477; *Eastman v. Eastman*, 117 Me. 276, 104 Atl. 1.

consideration.<sup>6</sup> While the surrender of the custody of a child is generally held to be a consideration,<sup>6</sup> it has been held that a contract to bequeath property will not be enforced by specific performance if the only consideration was the custody of a child which was taken from an orphan asylum and which remained with the promisor by whom it was supported.<sup>7</sup> Specific performance of a contract to make one an "heir" will be given if such contract is construed as a contract to devise or bequeath property.<sup>8</sup>

**§ 3327. Contract for adoption.** If a contract for the adoption of a child fairly implies a contract to bequeath property to such child, or fairly implies a contract that the child shall receive a distributive share of the promisor's estate, specific performance will be given.<sup>1</sup> It is not necessary that such contract should be executed as an instrument of adoption;<sup>2</sup> and it is not necessary that the promisor should have complied with the statute which regulates adoption.<sup>3</sup> Specific performance is given whether the contract is one to bequeath property to the child,<sup>4</sup> or to give it the same right of inheritance as the promisor's own child would have had.<sup>5</sup> It has been said, however, that a decree of the probate

<sup>6</sup> See §§ 537 et seq.

<sup>6</sup> See § 557.

<sup>7</sup> *Baumann v. Kusian*, 164 Cal. 582, 44 L. R. A. (N.S.) 756, 129 Pac. 986. See also, *Wallace v. Rappleye*, 103 Ill. 229.

<sup>8</sup> *Winne v. Winne*, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832.

<sup>1</sup> *Georgia*. *Crawford v. Wilson*, 139 Ga. 654, 44 L. R. A. (N.S.) 773, 78 S. E. 30; *Richardson v. Cade*, — Ga. —, 104 S. E. 207.

*Iowa*. *Chehak v. Battles*, 133 Ia. 107, 8 L. R. A. (N.S.) 1130, 12 Ann. Cas. 140, 110 N. W. 330.

*Kansas*. *Anderson v. Anderson*, 75 Kan. 117, 9 L. R. A. (N.S.) 229, 88 Pac. 743.

*Michigan*. *McCrilles v. Sutton*, 207 Mich. 58, 173 N. W. 333.

*Minnesota*. *Odenbreit v. Utheim*, 131 Minn. 56, L. R. A. 1916D, 421, 154 N. W. 741.

*Missouri*. *Nowack v. Berger*, 133 Mo. 24, 54 Am. St. Rep. 663, 31 L. R. A. 810, 34 S. W. 489; *Fisher v. Davidson*, 271 Mo. 195, L. R. A. 1917F, 692, 195 S. W. 1024; *Signaigo v. Signaigo*, — Mo. —, 205 S. W. 23; *Craddock v. Jackson*, — Mo. —, 223 S. W. 924.

*Nebraska*. *Milligan v. McLaughlin*, 94 Neb. 171, 46 L. R. A. (N.S.) 1134, 142 N. W. 675; *Tuttle v. Winchell*, — Neb. —, 178 N. W. 755.

<sup>2</sup> *Chehak v. Battles*, 133 Ia. 107, 8 L. R. A. (N.S.) 1130, 12 Ann. Cas. 140, 110 N. W. 330.

<sup>3</sup> *Richardson v. Cade*, — Ga. —, 104 S. E. 207; *McCrilles v. Sutton*, 207 Mich. 58, 173 N. W. 333; *Milligan v. McLaughlin*, 94 Neb. 171, 46 L. R. A. (N.S.) 1134, 142 N. W. 675; *Tuttle v. Winchell*, — Neb. —, 178 N. W. 755.

<sup>4</sup> *Anderson v. Anderson*, 75 Kan. 117, 9 L. R. A. (N.S.) 229, 88 Pac. 743.

<sup>5</sup> *Tuttle v. Winchell*, — Neb. —, 178 N. W. 755.

court in favor of the devisee will bar the right of such child if the contract did not contain an express provision for bequeathing property and the like; but that under an express provision of this sort, such decree would not be a bar.<sup>8</sup> If there is no statute by which a child can be adopted, a contract to adopt can not be performed literally; and it has been said that since equity can not create rights, but can only give remedies, specific performance will not be granted.<sup>7</sup>

**§ 3328. Contracts for sale of interest in personalty—General principles.** Contracts for the sale of personal property which has a market value, which is bought and sold in open market, and which has no special or unique value, are generally such as can be compensated adequately by an action at law. The remedy at law is adequate, since with the unpaid purchase money and the damages recovered by action the vendee can buy in open market property of the same character as that contracted for, if the vendor is the party in default; while the vendor can sell his property in the market and the purchase price thus obtained, together with the damages recovered by action, will place him in the same situation as he would have been in had the vendee performed, where the vendee is in default. Specific performance is therefore denied in such cases.<sup>1</sup>

There is, however, no arbitrary rule forbidding specific performance of contracts relating to personalty merely because it is personalty.<sup>2</sup> The reason for refusing in most cases to grant spe-

<sup>8</sup>Odenbreit v. Utheim, 131 Minn. 56, L. R. A. 1916D, 421, 154 N. W. 741.

<sup>7</sup>Wall v. McEnnery's Estate, 105 Wash. 445, 178 Pac. 631.

<sup>1</sup>United States. Javierre v. Central Altagracia, 217 U. S. 502, 54 L. ed. 859.

Alabama. Southern Iron & Equipment Co. v. Vaughn, 201 Ala. 356, L. R. A. 1918E, 594, 78 So. 212.

Arkansas. Cooper v. Roland, 95 Ark. 569, 130 S. W. 559.

California. McLaughlin v. Piatti, 27 Cal. 451.

Florida. Dorman v. McDonald, 47 Fla. 252, 36 So. 52.

Georgia. Carolee v. Handelis, 103 Ga. 299, 29 S. E. 935.

Kentucky. Madison v. Chinn, 26 Ky. (3 J. J. Mar.) 230.

Massachusetts. Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97.

Missouri. Ferguson v. Paschall, 11 Mo. 267.

Nebraska. Union Co-operative Co. v. Adolfson, 103 Neb. 394, 171 N. W. 902.

West Virginia. Geo E. Warren Co. v. A. L. Black Coal Co., — W. Va. —, 102 S. E. 672.

<sup>2</sup>"Notwithstanding this distinction between personal contracts for goods, and contracts for lands, is to be found

cific performance of contracts of this class is that the law gives an adequate remedy in damages, and wherever this reason fails, the rule, too, fails, and specific performance may be decreed.<sup>3</sup> The fact that the buyer has made advances and that the seller is insolvent,<sup>4</sup> or the fact that the buyer had agreed to give a negotiable instrument for the price, without which the seller will be deprived of the advantage of the burden of proof,<sup>5</sup> have been used as special grounds for allowing specific performance.

While the Uniform Sales Act provides that specific performance may be given on the application of the buyer, if the court thinks fit,<sup>6</sup> it seems to be assumed that this section does not add anything to the powers of a court of equity and that specific performance will be given only in cases in which it would have been given without such statute.<sup>7</sup> Accordingly, specific performance has been denied, although the contract was for the sale of stock,<sup>8</sup> if the buyer, who sought specific performance, alleged the actual value of the stock and the contract price.<sup>9</sup>

laid down in the books as a general rule, yet there are many cases to be found, where specific performance of contracts relating to personalty have been enforced in chancery; and courts will only weigh with greater nicety contracts of this description, than such as relate to lands." *Mechanics' Bank v. Seton*, 26 U. S. (1 Peters) 299, 304, 7 L. ed. 152.

<sup>3</sup> *United States. McNamara v. Home Land & Cattle Co.*, 105 Fed. 202.

*Alabama. Southern Iron & Equipment Co. v. Vaughn*, 201 Ala. 356, L. R. A. 1918E, 594, 78 So. 212 (obiter).

*Connecticut. Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60.

*Idaho. Brady v. Yost*, 6 Ida. 273, 55 Pac. 542.

*Illinois. Parker v. Garrison*, 61 Ill. 250.

*Massachusetts. Clark v. Flint*, 39 Mass. (22 Pick.) 231, 33 Am. Dec. 733; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 26 Am. St. Rep. 214, 12 L. R. A. 563, 27 N. E. 1005.

*Oregop. St. David's Church v. Wood*,

24 Or. 396, 41 Am. St. Rep. 860, 34 Pac. 18.

*Pennsylvania. Ralston v. Ihmsen*, 204 Pa. St. 588, 54 Atl. 365.

*Vermont. Fowler v. Sands*, 73 Vt. 236, 50 Atl. 1067.

*Virginia. Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509.

*Washington. Young v. Porter*, 27 Wash. 551, 68 Pac. 362.

*Wisconsin. Dells Paper & Pulp Co. v. Willow River Lumber Co.*, 170 Wis. 19, 173 N. W. 317.

A contract to sell an established business and the good-will thereof may be enforced specifically. *Miller v. Eller*, — Ia. —, 183 N. W. 498.

See §§ 3322 et seq. and 3354.

<sup>4</sup> *Livesley v. Johnston*, 45 Or. 30, 106 Am. St. Rep. 647, 65 L. R. A. 783, 76 Pac. 13, 946.

<sup>5</sup> *Teschner v. Falkenwalde*, 135 Md. 114, 108 Atl. 467 (action by the seller).

<sup>6</sup> See § 68 of the Uniform Sales Act.

<sup>7</sup> *Toles v. Duplex Power Car Co.*, 202 Mich. 224, 168 N. W. 495.

<sup>8</sup> See §§ 3333 et seq.

<sup>9</sup> *Toles v. Duplex Power Car Co.*, 202 Mich. 224, 168 N. W. 495.

**§ 3329. Difficulty in obtaining similar property.** Among the classes of cases in which it is held that the remedy at law for contracts for the sale of personalty is inadequate, the following are the more important. The property contracted for may be necessary to enable the vendee to carry on his business, and may be very limited in quantity,<sup>1</sup> or not to be obtained except from the vendor.<sup>2</sup> A contract to sell a certain quantity of wood pulp annually for a term of years has been enforced specifically, where the future price of the wood and the cost of obtaining it is uncertain, and it is difficult to estimate damages because of the chances of destruction of the timber by fire or possible action of the state in taking it by eminent domain.<sup>3</sup> On the other hand, specific performance has been denied in case of a contract to purchase iron rails, although the buyer has entered into a contract to resell them, and such rails can not be obtained elsewhere.<sup>4</sup>

**§ 3330. Stock of goods.** A stock of goods connected with an existing business has an especial and peculiar value in connection with the transfer of such business. A contract to sell an entire stock of goods,<sup>1</sup> or to sell an interest in a partnership,<sup>2</sup> has been

<sup>1</sup> Gloucester Isinglass & Glue Co. v. Russia Cement Co., 154 Mass. 92, 26 Am. St. Rep. 214, 12 L. R. A. 563, 27 N. E. 1005. (Fish-skins to make glue.) White Marble Lime Co. v. Consolidated Lumber Co., 205 Mich. 634, 172 N. W. 603. (Wood slabs for fuel.) Vail v. Osburn, 174 Pa. St. 580, 34 Atl. 315 (tan-bark); City Ice Co. v. Easton Merchants' Ice Co., — Pa. St. —, 110 Atl. 350 (ice); Dells Paper & Pulp Co. v. Willow River Lumber Co., 170 Wis. 19, 173 N. W. 317 (wood for pulp).

<sup>2</sup> Equitable Gas Light Co. v. Mfg. Co., 63 Md. 285; White Marble Lime Co. v. Consolidated Lumber Co., 205 Mich. 634, 172 N. W. 603; St. David's Parish v. Wood, 24 Or. 396, 41 Am. St. Rep. 860, 34 Pac. 18. (Sale of stone from quarry, some of which had been built into building, and which it was impossible to match.) Dells Paper & Pulp Co. v. Willow River Lumber Co., 170 Wis. 19, 173 N. W. 317.

<sup>3</sup> St Regis Paper Co. v. Santa Clara Lumber Co., 173 N. Y. 149, 65 N. E. 967. (In this case, however, the pulp was to be made from timber growing on a specific tract, and the contract was therefore looked upon as one involving an interest in realty.)

See also, Dells Paper & Pulp Co. v. Willow River Lumber Co., 170 Wis. 19, 173 N. W. 317.

<sup>4</sup> Southern Iron & Equipment Co. v. Vaughan, 201 Ala. 356, L. R. A. 1918E, 594, 78 So. 212.

<sup>1</sup> Raymond Syndicate v. Brown, 124 Fed. 80.

A covenant for the sale of good-will in connection with the sale of an established business will be enforced specifically. Miller v. Eller, — Ia. —, 183 N. W. 498.

See also, Kipp v. Laun, 146 Wis. 591, 131 N. W. 418.

<sup>2</sup> Ralston v. Ihmsen, 204 Pa. St. 588, 54 Atl. 365.

specifically enforced. Specific performance of a contract by a partnership to convey its property to a corporation organized to continue its business has been given against a member of such firm.<sup>3</sup> Specific performance of a contract to sell a stock of goods belonging to a corporation has been given against the purchaser.<sup>4</sup>

**§ 3331. Unique chattels.** The personalty contracted for may have unique associations,<sup>1</sup> as objects of historical interest,<sup>2</sup> as the Pusey Horn, which had gone with the estate of the plaintiff from time immemorial and by which such estate was held,<sup>3</sup> or an altar piece, which had been part of the estate of the Percys, and which the Duke of Somerset had acquired as treasure-trove,<sup>4</sup> or family heirlooms.<sup>5</sup> A work of art is unique, and money damages will not give adequate compensation for its loss. Specific performance is, therefore, granted.<sup>6</sup> A specific race-horse is, in a sense, unique, and specific performance for such a contract of sale has been granted.<sup>7</sup>

A patent, if valid, is necessarily unique; and an invention is very likely, if of any value, to be more or less unique. Specific performance may, therefore, be granted in cases of this sort.<sup>8</sup>

**§ 3332. Chattel of evidentiary value.** The personalty may have special value for evidentiary purposes, such as documents of

<sup>3</sup>Cogswell Boulter Co. v. Cogswell (N. J. Eq.), 40 Atl. 213.

<sup>4</sup>Kipp v. Laun, 146 Wis. 591, 131 N. W. 418. (The purchaser had also bought realty, as a part of the same transaction; but under a separate written instrument and he was in possession thereof.)

<sup>1</sup>Lowther v. Lowther, 13 Ves. Jr. 95; Caldwell v. Myers, Hard. (Ky.) 551; Womack v. Smith, 30 Tenn. (11 Humph.) 478, 54 Am. Dec. 51.

<sup>2</sup>Pusey v. Pusey, 1 Vern. 273.

<sup>3</sup>Pusey v. Pusey, 1 Vern. 273.

<sup>4</sup>(Duke of) Somerset v. Cookson, 3 P. Wms. 389.

<sup>5</sup>Arundell v. Phipps, 10 Ves. Jr. 139; Macclesfield v. Davis, 3 Ves. & B. 16.

See also, as to relief by injunction, not involving performance of a contract. Sloane v. Clauss, 64 O. S. 125, 59 N. E. 884.

<sup>6</sup>Lowther v. Lowther, 13 Ves. Jr. 95. See also, Adams v. Messenger, 147

Mass. 185, 9 Am. St. Rep. 679, 17 N. E. 491.

<sup>7</sup>Elliott v. Jones, — Del. —, 101 Atl. 872.

<sup>8</sup>Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 462; Thibodeau v. Hildreth, 124 Fed. 892, 60 C. C. A. 78, 63 L. R. A. 480; Thompson v. Automatic Fire Protection Co., 211 Fed. 120, 128 C. C. A. 22; Wege v. Safe Cabinet Co., 249 Fed. 696, 161 C. C. A. 606; Telegraphone Corporation v. Canadian Telegraphone Co., 103 Me. 444, 69 Atl. 767; Fuller & Johnson Manufacturing Co. v. Bartlett, 68 Wis. 73, 60 Am. Rep. 838, 31 N. W. 747; Valley Iron Works Mfg. Co. v. Goodrick, 103 Wis. 436, 78 N. W. 1096.

different kinds.<sup>1</sup> Deeds and muniments of title are the commonest examples of this class.<sup>2</sup> This form of relief "that coerces the delivery of the instruments" has, however, been held to be of "nature dissimilar and separate" from specific performance.<sup>3</sup>

**§ 3333. Contracts for sale of corporate stock.** In some of the earlier cases it seems to be assumed that the fact that law can not give the specific stock, but only money damages, is sufficient to justify equity in granting specific performance.<sup>1</sup> At modern law, contracts for the sale of corporate stock are controlled by the same general principles as those applying to sales of other kinds of personal property. If the stock is one which is regularly bought and sold, it is easy to estimate in money the damages sustained from the breach. The vendee can then with the unpaid purchase money and the damages thus recovered purchase in open market an amount of stock equal to that contracted. In such cases the remedy at law is adequate, and in the absence of special circumstances specific performance will not be decreed.<sup>2</sup> If the plaintiff

<sup>1</sup> *Clarke v. White*, 37 U. S. (12 Pet.) 178, 9 L. ed. 1046; *McGowin v. Remington*, 12 Pa. St. 56, 51 Am. Dec. 584.

<sup>2</sup> *Colorado. Williams v. Carpenter*, 14 Colo. 477, 24 Pac. 558.

*Connecticut. Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60.

*New Hampshire. Hill v. Bank*, 44 N. H. 567.

*New Jersey. Pattison v. Skillman*, 34 N. J. Eq. 344.

*Pennsylvania. Baum's Appeal*, 113 Pa. St. 58, 4 Atl. 461.

*Virginia. Kelly v. Lehigh Mining & Manufacturing Co.*, 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511.

<sup>3</sup> *Clarke v. White*, 37 U. S. (12 Pet.) 178, 187, 9 L. ed. 1046.

<sup>1</sup> *Doloret v. Rothschild*, 1 Sim & St. 590, 2 L. J. Ch. 125; *Colt v. Netervill*, 2 P. Williams 304.

<sup>2</sup> *England. Cud v. Rutter*, 1 P. Wms. 570, 1 White & Tud. Cas. 907; *Cappur v. Harris*, Bumbury 135.

*Connecticut. Treat v. Richardson*, 47 Conn. 582.

*Illinois. Pierce v. Plumb*, 74 Ill. 326; *Cohn v. Mitchell*, 115 Ill. 124, 3 N. E. 420.

*Maryland. Ryan v. McLane*, 91 Md. 175, 80 Am. St. Rep. 438, 50 L. R. A. 501, 46 Atl. 340.

*Michigan. Toles v. Duplex Power Car Co.*, 202 Mich. 224, 168 N. W. 496.

*Nevada. Nielser v. Rebard*, — Nev. —, 183 Pac. 984.

*New Jersey. Kimball v. Morton*, 5 N. J. Eq. 26, 43 Am. Dec. 621.

*Pennsylvania. Foll's Appeal*, 91 Pa. St. 434, 36 Am. Rep. 671.

*Virginia. Ewing v. Litchfield*, 91 Va. 575, 22 S. E. 362.

*Wisconsin. Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317.

See *The Specific Performance of Contracts for the Sale of Shares in Corporations*, by A. G. Bullock, 16 *American Law Review* 606; and *Specific Enforcement of Contracts to transfer stocks*, by A. Hamilton, 22 *American Law Register (N.S.)* 489.

in his bill alleges the market value of the stock, together with the contract price, it is said that he can not have specific performance, since, on his own showing, the remedy at law is adequate.<sup>3</sup> To obtain specific performance it must be shown further that special circumstances exist which make the remedy at law inadequate.<sup>4</sup>

What these facts are is a question upon which the courts are not entirely harmonious. There is a tendency at modern law to a considerable liberality in granting specific performance.<sup>5</sup>

The provision in the Uniform Sales Act, which authorizes courts to grant specific performance of contracts for the sale of personal property on the application of the buyer, if the court sees fit,<sup>6</sup> does not seem to be construed as extending the power of a court of equity to enforce contracts for the sale of stock.<sup>7</sup>

**§ 3334. Unique value of stock.** If the specific stock contracted for has a special and unique value to the purchaser for which money damages will not compensate him, it is said that specific performance will be given.<sup>1</sup>

The motive which often gives a unique value to a certain stock is the desire to control the corporation; and equity holds that this is not such a circumstance as to make specific performance proper.<sup>2</sup> Indeed, this fact has been said to negative the propriety of specific performance on the ground that such a contract is contrary to public policy.<sup>3</sup> However, a contract intended to give the vendee one-half the entire stock of the corporation has been enforced

<sup>3</sup> *Toles v. Duplex Power Car Co.*, 202 Mich. 224, 168 N. W. 495.

<sup>4</sup> *Williamson v. Krohn*, 66 Fed. 655, 13 C. C. A. 668 [affirming, *Krohn v. Williamson*, 62 Fed. 869]; *Nielsen v. Rebard*, — Nev. —, 183 Pac. 984; *Goodwin Gas Stove & Meter Co.'s Appeal*, 117 Pa. St. 514, 2 Am. St. Rep. 696, 12 Atl. 736; *Manton v. Ray*, 18 R. I. 672, 49 Am. St. Rep. 811, 29 Atl. 998.

<sup>5</sup> *Krohn v. Williamson*, 62 Fed. 869; *Cape Girardeau-Jackson Interurban Ry. v. Light & Development Co.*, 277 Mo. 579, 210 S. W. 361; *Wallace v. Eclipse Pocahontas Coal Co.*, 83 W. Va. 321, 98 S. E. 293.

<sup>6</sup> See § 68 of the Uniform Sales Act.

<sup>7</sup> *Toles v. Duplex Power Car Co.*, 202 Mich. 224, 168 N. W. 495.

<sup>1</sup> *Model Clothing House v. Dickinson*, — Minn. —, 178 N. W. 957; *Cushman v. Thayer Manufacturing Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Bomeisler v. Forster*, 154 N. Y. 229, 39 L. R. A. 240, 48 N. E. 534; *Bumgardner v. Leavitt*, 35 W. Va. 194, 12 L. R. A. 776, 13 S. E. 67; *Wallace v. Eclipse Pocahontas Coal Co.*, 83 W. Va. 321, 98 S. E. 293.

<sup>2</sup> *Gage v. Fisher*, 5 N. D. 297, 31 L. R. A. 557, 65 N. W. 809; *Foll's Appeal*, 91 Pa. St. 434, 36 Am. Rep. 671.

<sup>3</sup> *Foll's Appeal*, 91 Pa. St. 434, 36 Am. Rep. 671 (national bank stock).

specifically,<sup>4</sup> as has a contract for the sale of stock of no ascertained value which will give to the vendee the control of the corporation.<sup>5</sup> A contract by which each stockholder agrees to offer stock to the corporation if he desires to sell it, will be enforced specifically;<sup>6</sup> and if he has sold such stock to a competitor in business who has notice of such contract, such sale will be canceled and the original contract will be enforced by injunction and specific performance.<sup>7</sup>

**§ 3335. Difficulty in estimating damages.** Practicability in ascertaining damages has been suggested in many cases as a sufficient test, specific performance being refused if it is practicable to estimate the damages in money,<sup>1</sup> while if impracticable, specific performance is given.<sup>2</sup> If the value of the stock is uncertain,<sup>3</sup> as where it has never been sold on the market,<sup>4</sup> specific performance will be given. Other courts are less willing to grant specific performance, and it has been held that the fact that the stock is seldom offered for sale,<sup>5</sup> or has no market value and is not quoted in commercial circles,<sup>6</sup> or that it has no market value and can not

<sup>4</sup> O'Neil v. Webb, 78 Mo. App. 1.

<sup>5</sup> Doherty v. Rice, 186 Fed. 204; Whiting v. Enterprise Land & Sheep Co., 265 Mo. 374, 177 S. W. 589; Rumsey v. New York & Pennsylvania Ry., 203 Pa. St. 579, 53 Atl. 495.

<sup>6</sup> Model Clothing House v. Dickinson, — Minn. —, 178 N. W. 957.

<sup>7</sup> Model Clothing House v. Dickinson, — Minn. —, 178 N. W. 957.

<sup>1</sup> Barton v. De Wolf, 108 Ill. 195; Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735; Rigg v. Reading & South Western Street Ry., 191 Pa. St. 283, 43 Atl. 212; Hissam v. Parish, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600.

<sup>2</sup> United States. Newton v. Wooley, 105 Fed. 541.

California. Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276.

Kentucky. Baldwin v. Commonwealth, 74 Ky. (11 Bush.) 417.

Pennsylvania. Northern Central Ry. v. Walworth, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253.

Rhode Island. Manton v. Ray, 18 R. I. 672, 49 Am. St. Rep. 811, 29 Atl. 998.

West Virginia. Morgan v. Bartlett, 75 W. Va. 293, L. R. A. 1915D, 300, 83 S. E. 1001; Hubbard v. George, 81 W. Va. 538, L. R. A. 1918C, 835, 94 S. E. 974.

<sup>3</sup> Nason v. Barrett, 140 Minn. 366, 168 N. W. 581; Meisenheimer v. Alexander, 162 N. Car. 226, 78 S. E. 161 (obiter); Manton v. Ray, 18 R. I. 672, 49 Am. St. Rep. 811, 29 Atl. 998; Hogg v. McGuffin, 67 W. Va. 456, 31 L. R. A. (N.S.) 491, 68 S. E. 41 (together with insolvency of seller); Morgan v. Bartlett, 75 W. Va. 293, L. R. A. 1915D, 300, 83 S. E. 1001. (Suit by seller.) Hubbard v. George, 81 W. Va. 538, L. R. A. 1918C, 835, 94 S. E. 974.

<sup>4</sup> New England Trust Co. v. Abbott, 162 Mass. 148, 27 L. R. A. 271, 38 N. E. 432.

<sup>5</sup> Barton v. De Wolf, 108 Ill. 195.

<sup>6</sup> Moulton v. Warren Manufacturing Co., 81 Minn. 259, 83 N. W. 1082.

be procured readily,<sup>7</sup> is not of itself ground for specific performance if it is in fact easy to ascertain the damages. A mere dispute as to the value of the stock is not sufficient to show that its value is so uncertain that damages can not be estimated.<sup>8</sup> Even if the stock is rarely offered for sale or sold, and if the vendee may not be able to buy it, it must be further shown that he wishes the specific stock.<sup>9</sup> The fact that the value of the stock fluctuates is a circumstance strongly tending to show that its value is uncertain, and hence that specific performance should be given.<sup>10</sup>

**§ 3336. Difficulty in obtaining stock in same corporation.** The facility with which the vendee can buy the stock contracted for, in the open market, is an important element in determining the propriety of granting specific performance. The fact that the amount of the stock for sale is limited and that it will be impossible or difficult for the vendee to buy the specific stock in open market, even if he receives money damages, is a circumstance often relied upon in granting this relief.<sup>1</sup>

**§ 3337. Protection of existing equitable interest.** Circumstances apart from the nature of the stock contracted for may make specific performance proper. Thus if the party who agrees to transfer the stock holds it in trust for the party to whom he agrees to transfer it,<sup>1</sup> as where the transferee has furnished the money with which the transferor bought the stock,<sup>2</sup> or where the transferee originally transferred the stock to the transferor gratuitously under his agreement to reconvey on demand,<sup>3</sup> or where

<sup>7</sup> *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 42 L. ed. 547.

<sup>8</sup> *Rigg v. Reading & South Western Street Ry.*, 191 Pa. St. 298, 43 Atl. 212.

<sup>9</sup> *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 626.

<sup>10</sup> *Treasurer v. Commercial Coal Mining Co.*, 23 Cal. 390; *Morgan v. Bartlett*, 75 W. Va. 293, L. R. A. 1915D, 300, 83 S. E. 1001.

<sup>1</sup> *Duncuft v. Albrecht*, 12 Sim. 189; *Leach v. Fobes*, 77 Mass. (11 Gray) 506, 71 Am. Dec. 732; *Nason v. Barrett*, 140 Minn. 366, 168 N. W. 581; *Hogg v. McGuffin*, 67 W. Va. 456, 31 L. R. A. (N.S.) 491, 68 S. E. 41; *Morgan v.*

*Bartlett*, 75 W. Va. 293, L. R. A. 1915D, 300, 83 S. E. 1001 (obiter); *Hubbard v. George*, 81 W. Va. 538, L. R. A. 1918C, 835, 94 S. E. 974.

<sup>2</sup> *United States. Kohn v. Williamson*, 66 Fed. 655, 13 C. C. A. 668.

*Connecticut. Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60.

*New Jersey. Kimball v. Morton*, 5 N. J. Eq. 26.

*Ohio. Hager v. Reed*, 11 O. S. 626.  
*Pennsylvania. Goodwin Gas Stove & Meter Co.'s Appeal*, 117 Pa. St. 514, 2 Am. St. Rep. 696, 12 Atl. 736.

<sup>3</sup> *Johnson v. Brooks*, 93 N. Y. 337.

*Draper v. Stone*, 71 Me. 175.

the stock was originally acquired by the transferrer under a contract to transfer it to the transferee on the payment by him of the amount agreed upon,<sup>4</sup> specific performance will be granted, even apart from considerations of the difficulty of estimating damages or of obtaining the stock.

**§ 3338. Sale of stock with other property.** The contract for the transfer of stock may involve the transfer of other property, by reason whereof equity may grant specific performance without reference to the question whether the nature of the stock itself is such as to make specific performance proper, as where the stock is to be exchanged for specific realty and specific performance is given because of the land involved.<sup>1</sup> A contract to convey all the corporate stock of a corporation has been enforced specifically on the theory that it was really a contract for the purchase of all the property of such corporation.<sup>2</sup>

**§ 3339. Contracts for sale of personalty connected with realty.** A contract to sell personal property may be so closely connected with a contract with reference to some interest in realty, that specific performance of the entire contract will be given, although the provisions with reference to the personal property would not have been enforced by specific performance if they had not been a part of a contract which involved such interest in realty.<sup>1</sup> An entire contract to sell realty and personalty together,<sup>2</sup> such as a contract to sell a farm, together with stock and the implements thereon,<sup>3</sup> or a contract to sell a furnished house,<sup>4</sup> or a contract to

<sup>4</sup> *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Hager v. Reed*, 11 O. S. 626.

<sup>1</sup> *Burton v. Shotwell*, 76 Ky. (13 Bush.) 271; *Leach v. Fobes*, 77 Mass. (11 Gray) 506, 71 Am. Dec. 732.

<sup>2</sup> *Perin v. Megibben*, 53 Fed. 86, 3 C. C. A. 443; *Cape Girardeau-Jackson Interurban Ry. v. Light & Development Co.*, 277 Mo. 579, 210 S. W. 361.

See also, *Kipp v. Laun*, 146 Wis. 591, 131 N. W. 418.

<sup>1</sup> *Fowler v. Sands*, 73 Vt. 236, 50 Atl. 1067; *Clarke v. Curtis*, 38 Va. (11 Leigh) 559, 37 Am. Dec. 625; *Young*

*v. Porter*, 27 Wash. 551, 68 Pac. 362; *Jones v. Pease*, 21 Wis. 644; *Kipp v. Laun*, 146 Wis. 591, 131 N. W. 418.

<sup>2</sup> *Fleischman v. Woods*, 135 Cal. 256, 67 Pac. 276; *Fowler v. Sands*, 73 Vt. 236, 50 Atl. 1067; *Clarke v. Curtis*, 38 Va. (11 Leigh) 559, 37 Am. Dec. 625; *Hopfensperger v. Bruehl*, — Wis. —, 183 N. W. 171.

<sup>3</sup> *Clarke v. Curtis*, 38 Va. (11 Leigh) 559, 37 Am. Dec. 625; *Hopfensperger v. Bruehl*, — Wis. —, 183 N. W. 171.

<sup>4</sup> *Fowler v. Sands*, 73 Vt. 236, 50 Atl. 1067.

sell land together with stock in a water company,<sup>5</sup> may be enforced specifically. A contract to cut trees on a certain tract of realty and to sell them,<sup>6</sup> or to saw them into lumber and sell them,<sup>7</sup> or to cut trees on a specified tract of realty, manufacture them into wood-pulp, and sell the wood-pulp to the party seeking relief,<sup>8</sup> or to sell tan-bark from certain land,<sup>9</sup> may be enforced specifically. In some cases, specific performance of a contract for the sale of standing timber is given on the theory that the contract is one for the sale of realty, rather than of personalty.<sup>10</sup> In accordance with the theory of mutuality of remedy,<sup>11</sup> specific performance of a contract for the sale of personalty has been given if such personalty is to be paid for by a conveyance of realty.<sup>12</sup>

**§ 3340. Contracts to lend money.** Specific performance of a contract to lend money will not be granted,<sup>1</sup> whether such loan is to be made on security or not.<sup>2</sup> Relief of this sort is denied, in part, because such a decree would be for the payment of money only, and in part, on the theory that the action at law for damages is an adequate remedy. Since an action at law for damages is likely to result in a judgment for nominal damages only,<sup>3</sup> a contract to lend money, important as it is, and far reaching as the consequences of its breach may be, seems to be without practical remedy in most jurisdictions.

<sup>5</sup> *Fleischman v. Woods*, 135 Cal. 256, 67 Pac. 276.

<sup>6</sup> *Neal v. Parker*, 98 Md. 254, 57 Atl. 213 (under a statute which provided that an adequate remedy in damages would not prevent specific performance unless solvency were shown or a bond given). *Strause v. Berger*, 220 Pa. St. 367, 69 Atl. 818.

<sup>7</sup> *Bomer v. Canaday*, 79 Miss. 222, 89 Am. St. Rep. 593, 55 L. R. A. 328, 30 So. 638. (This relief was here refused, however, for another reason: namely, that its performance by the receiver who had been appointed to take charge of the property would be an undue tax upon the superintendence of the court.)

<sup>8</sup> *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149, 65 N. E. 967.

<sup>9</sup> *Vail v. Osburn*, 174 Pa. St. 580, 34 Atl. 315 (such bark not being obtainable readily on the open market).

<sup>10</sup> *Omaha Lumber Co. v. Co-operative Investment Co.*, 55 Colo. 271, 133 Pac. 1112; *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509.

<sup>11</sup> See § 3319.

<sup>12</sup> *Hurd v. Groch*, — N. J. Eq. —, 51 Atl. 278.

<sup>1</sup> *South African Territories v. Wallington* [1898], A. C. 309; *Leach v. Fuller*, 65 Colo. 68, 173 Pac. 427; *Bradford, Eldred & Cuba Ry. v. New York, Lake Erie & Western Ry.*, 123 N. Y. 316, 11 L. R. A. 116, 25 N. E. 499; *Norwood v. Crowder*, 177 N. Car. 469, 99 S. E. 345.

<sup>2</sup> *Leach v. Fuller*, 65 Colo. 68, 173 Pac. 427.

<sup>3</sup> See § 3230.

**§ 3341. Contract for mortgage, pledge, etc.** Specific performance is generally given of a contract to give a mortgage on realty,<sup>1</sup> or a mortgage or pledge of personalty.<sup>2</sup> Specific performance has been given of a contract to mortgage growing crops.<sup>3</sup> Relief will be given to one who has a contract for a mortgage or pledge of stock, as well as to one who has a contract for the purchase thereof.<sup>4</sup> This relief is given for the reason that the creditor was not willing to rely upon the personal security of the debtor; and if specific performance were denied, and the creditor were left to his action at law, he would be obliged to rely upon the personal liability of the debtor in spite of the terms of such contract. It has been held, however, that, where the mortgage is for a short time, and the delay is given for the benefit of the debtor, solely, equity will not give specific performance but will leave the creditor to his remedy at law, unless it is shown that the debtor is insolvent.<sup>5</sup> This result is based on the theory that the refusal of the debtor to give the mortgage is renunciation of the contract, and the creditor can bring an action thereon at once;<sup>6</sup> and the amount of the debt with interest can be recovered in such action; and that such remedy is adequate if the debtor is solvent, since the creditor was not bargaining for investment but for payment as soon as it could be had.<sup>7</sup>

**§ 3342. Ante-nuptial contracts.** At common law, intermarriage of the parties to a contract operated as a discharge thereof;<sup>1</sup> and accordingly, equity would give specific performance of exec-

<sup>1</sup> England. *Hermann v. Hodges*, L. R. 16 Eq. 18.

Iowa. *Vigars v. Hewins*, 184 Ia. 683, 169 N. W. 119.

Michigan. *Hicks v. Turck*, 72 Mich. 311, 40 N. W. 339.

Minnesota. *Irvine v. Armstrong*, 31 Minn. 216, 17 N. W. 343.

Ohio. *Ogden v. Ogden*, 4 O. S. 182.

Pennsylvania. *Morris v. McCutcheon*, 213 Pa. St. 349, 62 Atl. 982.

<sup>2</sup> Ex parte Masterman, 4 Deacon & C. 751; *Sporer v. McDermott*, 69 Neb. 533, 96 N. W. 232, 659.

<sup>3</sup> *Sporer v. McDermott*, 69 Neb. 533, 96 N. W. 232, 659; *Ryan v. Donley*, 69 Neb. 623, 96 N. W. 234.

<sup>4</sup> Ex parte Masterman, 4 Deacon & C. 751; *Oden v. Vaughn*, — Ala. —, 85 So. 779.

<sup>5</sup> *Brown v. E. Van Winkle Gin & Machine Works*, 141 Ala. 580, 6 L. R. A. (N.S.) 585, 39 So. 243.

<sup>6</sup> See § 2885.

<sup>7</sup> *Brown v. E. Van Winkle Gin & Machine Works*, 141 Ala. 580, 6 L. R. A. (N.S.) 585, 39 So. 243.

<sup>1</sup> See § 2571.

utory ante-nuptial contracts,<sup>2</sup> since the parties thereto would otherwise be without legal remedy. While this theory justifies relief in a suit between husband and wife, or those claiming under them,<sup>3</sup> there are other reasons to justify this relief in suits between other parties. The remedy at law, in the form of an action at law for damages, is frequently inadequate; and the only method of giving force to such a contract is to give specific performance thereof. Accordingly, this relief is given in suits between parties other than husband and wife or those claiming under them;<sup>4</sup> as in a suit by a son-in-law against the executor of his father-in-law to enforce a promise by the latter to divide his property equally among his children.<sup>5</sup>

**§ 3343. Separation Contracts.** If a contract for separation is otherwise valid, 'specific performance thereof will be given,'<sup>2</sup> since the remedy at law is inadequate, and of no practical value. If a contract for separation provides that the mother shall have the custody of the child, and shall support it, and as part consideration thereof, the father has made a settlement of property upon the mother, specific performance of such contract will be given.<sup>3</sup>

**§ 3344. Insurance contracts.** Specific performance is given of a contract to issue a policy of insurance,<sup>1</sup> including a contract to renew a policy of insurance.<sup>2</sup> Equity will enforce an ante-nuptial contract by which the wife is to be made the beneficiary in an insurance policy.<sup>3</sup>

<sup>2</sup> Offutt v. Offutt, 106 Md. 236, 124 Am. St. Rep. 491, 12 L. R. A. (N.S.) 232, 67 Atl. 138; Sullings v. Richmond, 87 Mass. (5 All.) 187, 81 Am. Dec. 742; Eaton v. Eaton, 233 Mass. 351, 124 N. E. 37; Thompson v. Tucker-Osborn, 111 Mich. 470, 69 N. W. 730; Bland v. Bland, — Mich. —, 180 N. W. 445.

<sup>3</sup> Offutt v. Offutt, 106 Md. 236, 124 Am. St. Rep. 491, 12 L. R. A. (N.S.) 232, 67 Atl. 138; Eaton v. Eaton, 233 Mass. 351, 124 N. E. 37.

<sup>4</sup> Phalen v. United States Trust Co., 186 N. Y. 178, 7 L. R. A. (N.S.) 734, 9 Ann. Cas. 595, 78 N. E. 943.

<sup>5</sup> Phalen v. United States Trust Co., 186 N. Y. 178, 7 L. R. A. (N.S.) 734, 9 Ann. Cas. 595, 78 N. E. 943.

<sup>1</sup> See §§ 938 et seq.

<sup>2</sup> Gibbs v. Harding, L. R. 5 Ch. A. C. 336; Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625.

<sup>3</sup> Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625.

<sup>1</sup> Tayloe v. Merchants' Fire Insurance Co., 50 U. S. (9 How.) 390, 13 L. ed. 187; National Life Insurance Co. v. Beck & Gregg Hardware Co., 148 Ga. 757, 98 S. E. 266; Palm v. Medina County Mutual Fire Insurance Co., 20 Ohio 529; Tucker v. Farmers' Mutual Fire Association, 71 W. Va. 690, 77 S. E. 279.

<sup>2</sup> National Life Insurance Co. v. Beck & Gregg Hardware Co., 148 Ga. 757, 98 S. E. 266.

<sup>3</sup> Bland v. Bland, — Mich. —, 180 N. W. 445.

**§ 3345. Compromises and adjustments of rights.** Unless an agreement for a compromise can be used as a bar to an action at law upon the original right of action or claim, the only means of enforcing it at law is by an action for the breach thereof; this remedy is inadequate. Even if it is possible to recover substantial damages, the defendant in such action is exposed to the litigation from which he was to have been relieved by the terms of such contract. For these reasons equity frequently gives specific performance of contracts of compromise.<sup>1</sup> In the case of compromise of family disputes, including those which grow out of the estate of a deceased ancestor, considerations of expediency have induced courts of equity to grant specific performance of contracts of this sort, far more willingly than of other contracts.<sup>2</sup>

It is said that a post-nuptial agreement between husband and wife, by which they adjust their property rights, is one of which equity will not grant specific performance;<sup>3</sup> if such contract can be given effect by a court of probate powers, which has jurisdiction to administer the estate of the deceased promisor, against which it is sought to enforce such contract.<sup>4</sup>

Equity will not give specific performance of a contract to waive damages,<sup>5</sup> such as damages to land,<sup>6</sup> including damages caused by the obstruction of a highway.<sup>7</sup>

<sup>1</sup> England. *Hart v. Hart*, 18 Ch. Div. 670.

Illinois. *Hall v. Hall*, 125 Ill. 95, 16 N. E. 896.

Massachusetts. *Blount v. Wheeler*, 199 Mass. 330 [sub nomine, *Blount v. Dillaway*, 17 L. R. A. (N.S.) 1036, 85 N. E. 477]; *Capen v. Capen*, 234 Mass. 355, 125 N. E. 692.

Michigan. *Engle v. Engle*, — Mich. —, 176 N. W. 547.

Minnesota. *Slingerland v. Slingerland*, 39 Minn. 197, 39 N. W. 146.

West Virginia. *Kennedy v. Davison*, 46 W. Va. 433, 33 S. E. 291.

<sup>2</sup> England. *Stockley v. Stockley*, 1 Ves. & B. 23.

United States. *Riggles v. Erney*, 154 U. S. 244, 38 L. ed. 976.

Massachusetts. *Blount v. Wheeler*, 199 Mass. 330 [sub nomine, *Blount v.*

*Dillaway*, 17 L. R. A. (N.S.) 1036, 85 N. E. 477]; *Capen v. Capen*, 234 Mass. 355, 125 N. E. 692.

Michigan. *Sigler v. Sigler*, 108 Mich. 591, 66 N. W. 489; *Engle v. Engle*, — Mich. —, 176 N. W. 547.

New Jersey. *Bullis v. Pitman*, 90 N. J. Eq. 88, 105 Atl. 589.

<sup>3</sup> *Tipson v. Jeannot*, 204 Mich. 403, 169 N. W. 874.

<sup>4</sup> *Knapp v. Knapp*, 95 Mich. 474, 55 N. W. 353; *Tipson v. Jeannot*, 204 Mich. 403, 169 N. W. 874.

<sup>5</sup> *Darst v. Ft. Dodge, D. M. & S. Ry.*, — Iowa —, 179 N. W. 61.

<sup>6</sup> *Darst v. Ft. Dodge, D. M. & S. Ry.*, — Iowa —, 179 N. W. 61.

<sup>7</sup> *Darst v. Ft. Dodge, D. M. & S. Ry.*, — Iowa —, 179 N. W. 61.

## V

## DISCRETION OF CHANCELLOR TO DECREE SPECIFIC PERFORMANCE

**§ 3346. Discretionary nature of specific performance—General principles.** The fact that the contract for which specific performance is sought is enforceable at law is not always of itself sufficient to warrant specific performance.<sup>1</sup> Specific performance is said to be discretionary with the chancellor and not a matter of course or a matter of right.<sup>2</sup> This means, however, that the dis-

<sup>1</sup> **Arizona.** *Kimball v. Statler*, 20 Ariz. 81, 176 Pac. 843; *Pauley v. Hadlock*, — Ariz. —, 188 Pac. 263.

**California.** *Kelly v. Central Pacific Ry.*, 74 Cal. 557, 5 Am. St. Rep. 470, 16 Pac. 386.

**Florida.** *Murphy v. Hohne*, 73 Fla. 803, L. R. A. 1917F, 594, 74 So. 973; *Dixie Naval Stores Co. v. German-American Lumber Co.*, 76 Fla. 339, 79 So. 836; *Richardson v. Varn*, — Fla. —, 86 So. 503.

**Illinois.** *Thackaberry v. Kibbe*, 284 Ill. 199, 119 N. E. 897; *Andrews v. Mohrenstecher*, 295 Ill. 109, 128 N. E. 729; *Andrews v. Mohrenstecher*, — Ill. —, 128 N. E. 729.

**Iowa.** *Origer v. Kuyper*, 183 Ia. 1395, 168 N. W. 119.

**Kentucky.** *Lexington & Eastern Ry v. Williams*, 183 Ky. 343, 209 S. W. 59.

**Maryland.** *Henneke v. Cooke*, 135 Md. 417, 109 Atl. 113.

**Michigan.** *Harrison v. Eassom*, 208 Mich. 685, 176 N. W. 460; *Slatkin v. Schumer*, — Mich. —, 177 N. W. 947.

**Nebraska.** *Evans v. Kelly*, — Neb. —, 178 N. W. 630.

**New Jersey.** *Pinner v. Sharp*, 23 N. J. Eq. 274.

**North Dakota.** *Beebe v. Hanson*, 40 N. D. 559, 169 N. W. 31.

**Pennsylvania.** *Friend v. Lamb*, 152 Pa. St. 529, 34 Am. St. Rep. 672, 25 Atl. 577.

**South Carolina.** *Bull v. Fallaw*, 109 S. Car. 306, 96 S. E. 147.

**Virginia.** *Adams v. Hazen*, 123 Va. 304, 96 S. E. 741.

**West Virginia.** *Kennedy v. Burns*, — W. Va. —, 101 S. E. 156.

<sup>2</sup> **England.** *Mason v. Armitage*, 13 Ves. Jr. 25.

**United States.** *Willard v. Tayloe*, 75 U. S. (8 Wall.) 557, 19 L. ed. 501; *Cheney v. Libby*, 134 U. S. 68, 33 L. ed. 818; *Washington Irrigation Co. v. Krutz*, 119 Fed. 279.

**Alabama.** *Boylan v. Wilson*, 202 Ala. 26, 79 So. 364; *Blackburn v. McLaughlin*, 202 Ala. 434, 80 So. 818.

**Arizona.** *Kimball v. Statler*, 20 Ariz. 81, 176 Pac. 843; *Pauley v. Hadlock*, — Ariz. —, 188 Pac. 263.

**California.** *Kelly v. Central Pacific Ry.*, 74 Cal. 557, 5 Am. St. Rep. 470, 16 Pac. 386.

**Colorado.** *Long v. Wright*, — Colo. —, 197 Pac. 1016.

**Connecticut.** *Patterson v. Bloomer*, 35 Conn. 57, 95 Am. Dec. 218.

**Florida.** *Murphy v. Hohne*, 73 Fla. 803, L. R. A. 1917F, 594, 74 So. 973; *Dixie Naval Stores Co. v. German-American Lumber Co.*, 76 Fla. 339, 79 So. 836; *Richardson v. Varn*, — Fla. —, 86 So. 503; *Richardson v. Varn*, — Fla. —, 86 So. 503.

**Georgia.** *Potts v. Mathis*, 149 Ga. 367, 100 S. E. 110; *Shropshire v. Rainey*, — Ga. —, 104 S. E. 414.

cretion spoken of is a judicial discretion controlled by the rules of equity, and not the mere arbitrary whim of the individual chan-

**Illinois.** Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019; Ebert v. Arends, 190 Ill. 221, 60 N. E. 211; Thackaberry v. Kibbe, 284 Ill. 199, 119 N. E. 897; Keating v. Frint, 291 Ill. 423, 126 N. E. 136; Andrews v. Mohrenstecher, 295 Ill. 109, 128 N. E. 729; Compton v. Weber, 296 Ill. 412, 129 N. E. 764.

**Indiana.** Boldt v. Early, 33 Ind. App. 434, 104 Am. St. Rep. 255, 70 N. E. 371.

**Iowa.** Minneapolis & St. Louis Ry. v. Cox, 76 Ia. 306, 14 Am. St. Rep. 216, 41 N. W. 24; Origer v. Kuyper, 183 Ia. 1395, 168 N. W. 119; Carter v. Schrader, — Ia. —, 175 N. W. 329; Wright v. Pirie, — Iowa —, 176 N. W. 982.

**Kansas.** Reid v. Mix, 63 Kan. 745, 55 L. R. A. 706, 66 Pac. 1021; Young v. Schwint, — Kan. —, 195 Pac. 614.

**Kentucky.** Jenkins v. Dawes, 183 Ky. 25, 207 S. W. 689; Lexington & Eastern Ry. v. Williams, 183 Ky. 343, 209 S. W. 59; Clifton Land Co. v. Reister, 186 Ky. 155, 216 S. W. 342.

**Maine.** Rogers v. Saunders, 16 Me. 92, 33 Am. Dec. 635.

**Maryland.** Teschner v. Falkenwalde, 135 Md. 114, 108 Atl. 467; Henneke v. Cooke, 135 Md. 417, 109 Atl. 113; Geise v. Packendorf, — Md. —, 112 Atl. 3.

**Massachusetts.** Graves v. Goldthwait, 153 Mass. 268, 10 L. R. A. 763, 26 N. E. 860.

**Michigan.** Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265; Harrison v. Eassom, 208 Mich. 685, 176 N. W. 460; Slatkin v. Schumer, — Mich. —, 177 N. W. 947; Standard Oil Co. v. Murray, — Mich. —, 183 N. W. 55; Watkins v. Minor, — Mich. —, 183 N. W. 186.

**Minnesota.** Baker v. Polydisky, 144 Minn. 72, 174 N. W. 526; Bredeson v. Nickolay, — Minn. —, 180 N. W. 547.

**Missouri.** Pomeroy v. Fullerton, 131 Mo. 581, 33 S. W. 173.

**Montana.** Interior Securities Co. v. Campbell, 55 Mont. 459, 178 Pac. 582; Babcock v. Engel, — Mont. —, 194 Pac. 137.

**Nebraska.** Hoctor-Johnson Co. v. Billings, 65 Neb. 214, 91 N. W. 183; Evans v. Kelly, — Neb. —, 178 N. W. 630; Davis v. Murphy, — Neb. —, 182 N. W. 365 (obiter).

**New Jersey.** Johnson v. Hubbell, 10 N. J. Eq. 332, 66 Am. Dec. 773.

**New York.** Stokes v. Stokes, 155 N. Y. 581, 50 N. E. 342; Winne v. Winne, 166 N. Y. 263, 82 Am. St. Rep. 647, 59 N. E. 832.

**North Carolina.** Whitted v. Fuquay, 127 N. Car. 68, 37 S. E. 141.

**North Dakota.** Beebe v. Hanson, 40 N. D. 559, 169 N. W. 31.

**Ohio.** Tiffin v. Shawhan, 43 O. S. 178, 1 N. E. 581.

**Pennsylvania.** Datz v. Phillips, 137 Pa. St. 203, 21 Am. St. Rep. 864, 20 Atl. 426; In re Kutz's Estate, 259 Pa. St. 548, 103 Atl. 293.

**South Carolina.** Alexander v. McDaniel, 56 S. Car. 252, 34 S. E. 405; Anthony v. Eve, 109 S. Car. 255, 95 S. E. 513; Bull v. Fallaw, 109 S. Car. 306, 96 S. E. 147.

**Tennessee.** Howard v. Moore, 36 Tenn. (4 Sneed) 317; Leathers v. DeLoach, 140 Tenn. 259, 204 S. W. 633.

**Virginia.** Gish v. Jamison, 96 Va. 312, 31 S. E. 521; Adams v. Hazen, 123 Va. 304, 96 S. E. 741.

**Washington.** Menger v. Schulz, 28 Wash. 329, 68 Pac. 875.

**West Virginia.** Knott v. Shepherds-town Manufacturing Co., 30 W. Va. 790, 5 S. E. 266; Kennedy v. Burns, — W. Va. —, 101 S. E. 156; Wellman v. Virginian Ry., — W. Va. —, 101 S. E. 252.

cellor.<sup>3</sup> It has been said that "a decree for the specific performance of a contract for the sale of real estate does not go as a matter of course, but is granted or withheld according as equity and justice seem to demand, in view of all the circumstances of the case."<sup>4</sup>

**Wisconsin.** Engberry v. Rousseau, 117 Wis. 52, 93 N. W. 824; Woldenberg v. Riphan, 166 Wis. 433, 166 N. W. 21; Merrill v. Rocky Mountain Cattle Co., 26 Wyom. 219, 181 Pac. 964.

"This discretion, of course, is not an unlimited discretion, to be exercised without regard to those principles of equity by which the rights of the parties are to be determined, and a decree is not to be given or withheld arbitrarily and capriciously at the mere will of the judge who may be presiding in the cause; but it is a judicial discretion, to be controlled and governed by the principles and rules of equity." Hoctor-Johnson Co. v. Billings, 65 Neb. 214, 218, 91 N. W. 183.

<sup>3</sup> **Alabama.** Rushton v. McKee, 201 Ala. 49, 77 So. 343; Boylan v. Wilson, 202 Ala. 26, 79 So. 364; Blackburn v. McLaughlin, 202 Ala. 434, 80 So. 818; Penney v. Norton, 202 Ala. 690, 81 So. 666.

**Arizona.** Pauley v. Hadlock, — Ariz. —, 188 Pac. 263.

**Arkansas.** Sims v. Best, 140 Ark. 384, 215 S. W. 519.

**Florida.** Murphy v. Hohne, 73 Fla. 803, L. R. A. 1917F, 594, 74 So. 973; Dixie Naval Stores Co. v. German-American Lumber Co., 76 Fla. 339, 79 So. 836; Richardson v. Varn, — Fla. —, 86 So. 503.

**Illinois.** Ullsperger v. Meyer, 217 Ill. 262, 2 L. R. A. (N.S.) 221, 3 Ann. Cas. 1032, 75 N. E. 482; Riemenschneider v. Tortoriello, 287 Ill. 482, 122 N. E. 799; Miedema v. Wormhoudt, 288 Ill. 537, 123 N. E. 596; Gronowski v. Jozefowicz, 291 Ill. 266, 126 N. E. 108;

Woodrow v. Quaid, 292 Ill. 27, 126 N. E. 583; Andrews v. Mohrenstecher, 295 Ill. 109, 128 N. E. 729; Moore v. Machinery Sales Co., — Ill. —, 131 N. E. 141.

**Iowa.** Griffin v. Nash, — Ia. —, 174 N. W. 233; Rourke v. Peterson, 187 Ia. 1155, 174 N. W. 945; Carter v. Schrader, 187 Ia. 1245, 175 N. W. 329; Wright v. Pirie, — Ia. —, 176 N. W. 982.

**Michigan.** Hager v. Rey, — Mich. —, 176 N. W. 443; Slatkin v. Schumer, — Mich. —, 177 N. W. 947; Baller v. Spivack, — Mich. —, 182 N. W. 70.

**Minnesota.** Baker v. Polydisky, 144 Minn. 72, 174 N. W. 526.

**Montana.** Interior Securities Co. v. Campbell, 55 Mont. 459, 178 Pac. 582. **Ohio.** Tiffin v. Shawhan, 43 O. S. 178, 1 N. E. 581.

**Pennsylvania.** In re Kutz's Estate, 259 Pa. St. 548, 103 Atl. 293.

**Tennessee.** Leathers v. Deloach, 140 Tenn. 259, 204 S. W. 633.

**West Virginia.** Rollyson v. Bourn, — W. Va. —, 100 S. E. 682; Wellman v. Virginian Ry., — W. Va. —, 101 S. E. 252.

**Wisconsin.** Woldenberg v. Riphan, 166 Wis. 433, 166 N. W. 21.

<sup>4</sup> **United States.** Pratt v. Carroll, 12 U. S. (8 Cranch) 471, 3 L. ed. 627; Holt v. Rogers, 33 U. S. (8 Pet.) 420, 8 L. ed. 995; Willard v. Tayloe, 75 U. S. (8 Wall.) 557, 19 L. ed. 501; Marble Co. v. Ripley, 77 U. S. (10 Wall.) 339, 19 L. ed. 955; McCabe v. Matthews, 155 U. S. 550, 553, 39 L. ed. 256 (citing Hennessey v. Woolworth, 128 U. S. 438, 32 L. ed. 500).

**California.** Sturgis v. Galindo, 59 Cal. 28, 43 Am. Rep. 239.

In other words, in order to be enforced by specific performance, a contract must possess certain elements which give jurisdiction to equity, and which make this remedy appropriate. It must be fair and reasonable, definite, of such nature that compensation for breach can not be made in money, and the party seeking relief must have acted promptly in seeking this relief.<sup>5</sup> If these elements are present, it is said that the party who seeks specific performance is entitled thereto as a matter of right,<sup>6</sup> or that specific performance is as much a matter of course in equity under such circum-

**Florida.** Richardson v. Varn, — Fla. —, 86 So. 503.

**Illinois.** Maltby v. Thews, 171 Ill. 264, 49 N. E. 486.

**Indiana.** Mather v. Simonton, 73 Ind. 595.

**Kansas.** Young v. Schwint, — Kan. —, 195 Pac. 614.

**Kentucky.** Grundy v. Edwards, 30 Ky. (7 J. J. Mar.) 368, 23 Am. Dec. 409.

**Massachusetts.** Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97.

**New Hampshire.** Eckstein v. Downing, 64 N. H. 248, 10 Am. St. Rep. 404, 9 Atl. 628.

**New York.** Hayes v. Nourse, 114 N. Y. 595, 11 Am. St. Rep. 700, 22 N. E. 40.

**Pennsylvania.** Friend v. Lamb, 152 Pa. St. 529, 34 Am. St. Rep. 672, 25 Atl. 577.

**South Carolina.** Davenport v. Latimer, 53 S. Car. 563, 31 S. E. 630.

**Tennessee.** Cocke v. Evans, 15 Tenn. (9 Yerg.) 287.

**Wisconsin.** Dewey v. Spring Valley Land Co., 98 Wis. 83, 73 N. W. 565.

See to the same effect:

**Florida.** Murphy v. Hohne, 73 Fla. 803, L. R. A. 1917F, 594, 74 So. 973.

**Georgia.** Potts v. Mathis, 149 Ga. 367, 100 S. E. 110.

**Illinois.** Keating v. Frint, 291 Ill. 423, 126 N. E. 136.

**Kentucky.** Jenkins v. Dawes, 183 Ky. 25, 207 S. W. 689; Clifton Land Co. v. Reister, 186 Ky. 155, 216 S. W. 342.

**Maryland.** Teschner v. Falkenwalde,

135 Md. 114, 108 Atl. 467; Henneke v. Cooke, 135 Md. 417, 109 Atl. 113.

**Nebraska.** Evans v. Kelly, — Neb. —, 178 N. W. 630.

**Ohio.** Tiffin v. Shawhan, 43 O. S. 178, 1 N. E. 581.

**South Carolina.** Anthony v. Eve, 109 S. Car. 255, 95 S. E. 513.

**Wyoming.** Merrill v. Rocky Mountain Cattle Co., 26 Wyom. 219, 181 Pac. 964.

<sup>5</sup> See §§ 3279 et seq.

<sup>6</sup> **Arizona.** Kimball v. Statler, 20 Ariz. 81, 176 Pac. 843.

**Arkansas.** Sims v. Best, 140 Ark. 384, 215 S. W. 519.

**Georgia.** Clark v. Cagle, 141 Ga. 703, L. R. A. 1915A, 317, 82 S. E. 21; Tolbert v. Short, — Ga. —, 104 S. E. 245.

**Illinois.** Riemenschneider v. Tortoriello, 287 Ill. 482, 122 N. E. 799; Miedema v. Wormhoudt, 288 Ill. 537, 123 N. E. 596; Gronowski v. Jozefowicz, 291 Ill. 266, 126 N. E. 108; Woodrow v. Quaid, 292 Ill. 27, 126 N. E. 583.

**Iowa.** Rourke v. Peterson, — Ia. —, 174 N. W. 945; Carter v. Schrader, — Ia. —, 175 N. W. 329.

**Michigan.** Hager v. Rey, — Mich. —, 176 N. W. 443.

**Missouri.** Campbell v. McLaughlin, — Mo. —, 205 S. W. 18.

**New Hampshire.** Orestes v. Galanis, 78 N. H. 514, 102 Atl. 759.

**West Virginia.** Moore v. Ward, 71 W. Va. 393, 43 L. R. A. (N.S.) 390, Ann. Cas. 1914C, 263, 76 S. E. 807; Rollyson v. Bourn, — W. Va. —, 100 S. E. 682.

stances as a right of action for damages is a matter of course at law.<sup>7</sup> In such cases the chancellor is said to have no legal discretion to refuse specific performance.<sup>8</sup> While a contract for the sale of realty is the one which the courts of equity are most ready to enforce by a decree of specific performance,<sup>9</sup> there is, however, no arbitrary rule which requires equity to ignore the remaining requisites for specific performance, even in a contract of this sort.<sup>10</sup>

### § 3347. Specific performance denied—Hardship to defendant.

The discretionary nature of the power of the chancellor in granting or denying specific performance is illustrated by the principle that if specific performance will work great hardship to the party against whom such relief is sought, and such hardship was not contemplated when the contract was made, specific performance will be denied even if the other circumstances are such that it would ordinarily be granted.<sup>1</sup> If there is a sudden and unforeseen depreciation in paper money, after a contract is made, specific performance will be granted only if payment is made in coin.<sup>2</sup> Specific performance will not be granted of a contract by a railroad to maintain an underground crossing which will be very expensive to the railroad and of little benefit to the owner;<sup>3</sup> nor of a contract

<sup>7</sup> *Clark v. Cagle*, 141 Ga. 703, L. R. A. 1915A, 317, 82 S. E. 21; *Miedema v. Wormhoudt*, 288 Ill. 537, 123 N. E. 596; *Campbell v. McLaughlin*, — Mo. —, 205 S. W. 18.

<sup>8</sup> *Tiffin v. Shawhan*, 43 O. S. 178, 1 N. E. 581.

<sup>9</sup> *Richardson v. Varn*, — Fla. —, 86 So. 503.

See § 3325.

<sup>10</sup> *Keating v. Frint*, 291 Ill. 423, 126 N. E. 136.

See §§ 3347 et. seq.

<sup>1</sup> *United States. Federal Oil Co. v. Western Oil Co.*, 121 Fed. 674, 57 C. C. A. 428 [affirming, 112 Fed. 373]; *Marks v. Gates*, 154 Fed. 481, 14 L. R. A. (N.S.) 317, 12 Ann. Cas. 120, 83 C. C. A. 321.

*Florida. Murphy v. Hohne*, 73 Fla. 803, L. R. A. 1917F, 594, 74 So. 973.

*Iowa. Hapwood v. McCausland*, 120 Ia. 218, 94 N. W. 469.

*Kentucky. Lexington & Eastern Ry. v. Williams*, 183 Ky. 343, 209 S. W. 59.

*Maryland. Whalen v. Baltimore & Ohio Ry.*, 108 Md. 11, 17 L. R. A. (N.S.) 130, 69 Atl. 390.

*Massachusetts. Richardson Shoe Machinery Co. v. Essex Machine Co.*, 207 Mass. 219, 93 N. E. 650.

*New York. Globe Woolen Co. v. Utica Gas & Electric Co.*, 224 N. Y. 483, 121 N. E. 378. (Contract between corporation, made by common officer, disastrous to one of them.)

*West Virginia. Starcher v. Duty*, 61 W. Va. 373, 123 Am. St. Rep. 990, 9 L. R. A. (N.S.) 913, 56 S. E. 524.

<sup>2</sup> *Willard v. Tayloe*, 75 U. S. (8 Wall.) 557, 19 L. ed. 501.

<sup>3</sup> *Clarke v. Rochester, Lockport & Niagara Falls Ry.*, 18 Barb. (N. Y.) 350.

to construct and operate a side-track after the railroad has changed its main line in good faith, the cost of performance being out of all proportion to the benefits to the plaintiff.<sup>4</sup> Specific performance of a contract to work a mine which will cause a great loss to both parties will not be granted.<sup>5</sup> Specific performance of a land contract was denied where the vendee was to survey the land at his own expense and pay a certain sum per acre therefor, and his surveyors had been stopped forcibly and his own life threatened.<sup>6</sup>

Facts which were within the contemplation of the parties when the contract was made can not be invoked, as a rule, to show that a decree of specific performance will work a hardship upon the defendant,<sup>7</sup> if the contract is otherwise one for which specific performance would be given. If a contract for sale, lease, and the like, extends over a considerable period of time, a possible change of value within such time must have been a possibility which the parties contemplated when they made the contract; and accordingly such change of value is not a reason for refusing specific performance.<sup>8</sup> The fact that the value of realty on which an option for valuable consideration has been given has increased greatly does not prevent specific performance, where the option fixed the purchase price, if exercised in ten years, at some fifty per cent more than the value of the property when it was given;

<sup>4</sup> *Whalen v. Baltimore & Ohio Ry.*, 108 Md. 11, 17 L. R. A. (N.S.) 130, 69 Atl. 390. (The railway had performed for sixty years.)

<sup>5</sup> *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294, 28 N. E. 281.

<sup>6</sup> *Williamson v. Dils*, 114 Ky. 962, 72 S. W. 292.

<sup>7</sup> *England. Adams v. Weare*, 1 Brown Ch. 567.

*United States. La Follette v. La Follette Water, Light & Telephone Co.*, 252 Fed. 762, 164 C. C. A. 602.

*Idaho. Fox v. Spokane International Ry.*, 28 Ida. 60, 140 Pac. 1103.

*Iowa. Larson v. Smith*, 174 Ia. 619, 156 N. W. 813; *Mitchell v. Mutch*, 180 Ia. 1281, 164 N. W. 212.

*Washington. Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 159 Pac. 1077.

<sup>8</sup> *England. Haywood v. Cope*, 25 Beav. 140.

*United States. Willard v. Tayloe*, 75 U. S. (8 Wall.) 557, 19 L. ed. 501; *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776.

*Illinois. Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265.

*Iowa. Tuttle v. King*, 181 Ia. 288, 164 N. W. 616.

*Kansas. Niquette v. Green*, 81 Kan. 569, 106 Pac. 270.

*Kentucky. Schmitz v. Louisville, & Nashville Ry.*, 101 Ky. 441, 38 L. R. A. 809, 41 S. W. 1015.

*Michigan. Kerwin Machine Co. v. Baker*, 199 Mich. 122, 165 N. W. 625.

*Virginia. Southern Ry. v. Franklin & Pittsylvania Ry.*, 96 Va. 693, 44 L. R. A. 297, 32 S. E. 485.

thus showing that the chance of an increase in value was contemplated by the parties.<sup>1</sup>

**§ 3348. "Balance of convenience" theory.** In most of these cases the original contract was upon an inadequate consideration, or was harsh, oppressive and unconscionable, or there was unfair dealing, and the like.<sup>1</sup> The hardship, therefore, inhered in the contract from the beginning; and the refusal of the court to grant specific performance in cases of this sort, is really based on the unwillingness of equity to enforce such contracts.

Unfortunately, the courts have justified the refusal of specific performance, in some of these cases, on the theory of balance of convenience.<sup>2</sup> The expression "balance of convenience" is misleading. It seems to imply that the interests of the plaintiff who has performed, and the interests of the defendant, who has broken the contract, are regarded as of equal value; and that, being of equal value, the relative convenience or inconvenience will turn the scale. The fact that the defendant has failed to perform is nearly always an indication that it is inconvenient for him to comply with the terms of a contract; and if his inconvenience is to be considered primarily, or balanced against that of the plaintiff, it will generally result in denying specific performance. For practical purposes it means that specific performance will be refused in cases in which it would have been proper otherwise, if the decree will work a great hardship upon the defendant, and will be of relatively little advantage to the plaintiff.<sup>3</sup> The fact that the de-

<sup>1</sup> Willard v. Tayloe, 75 U. S. (8 Wall.) 557, 19 L. ed. 501.

<sup>2</sup> See §§ 3279 et seq.

<sup>3</sup> "Although you can not define what may be considered unreasonable, by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." Wedgwood v. Adams, 6 Beav. 600.

<sup>4</sup> England. London v. Nash, 3 Atk. 512.

California. Herzog v. Atchison, Topeka & Santa Fe Ry., 153 Cal. 496, 17 L. R. A. (N.S.) 428, 95 Pac. 898.

Illinois. Chicago Sanitary District v. Martin, 227 Ill. 260, 81 N. E. 417.

Maine. Brown v. Boston & Maine Ry., 106 Me. 248, 76 Atl. 692.

Maryland. Whalen v. Baltimore & Ohio Ry., 108 Md. 11, 17 L. R. A. (N.S.) 130, 69 Atl. 390; Linthicum v. Washington, Baltimore & Annapolis Electric Ry., 124 Md. 263, 92 Atl. 917.

Montana. Interior Securities Co. v. Campbell, 55 Mont. 459, 178 Pac. 582.

New York. Clarke v. Rochester, Lockport & Niagara Falls Ry., 18 Barb. (N. Y.) 350; Murdfeldt v. New York, West Shore & Buffalo Ry., 102 N. Y. 703, 7 N. E. 404; Conger v. New York,

fendant's breach has not inflicted serious loss upon the plaintiff is not, of itself, a reason for refusing specific performance.<sup>4</sup> The doctrine of the balance of convenience seems to have been repudiated in England, and the cases in which it has been invoked has been explained as being either cases in which the plaintiff had acted in an unfair or unconscionable manner or in which the defendant had made an innocent mistake to which the plaintiff had not contributed, but which would inflict a great and unforeseen hardship upon the defendant if specific performance were granted.<sup>5</sup> In other cases it is said, the question of convenience or inconvenience is for the parties when they make the contract, and not for the court of equity when it enforces it.<sup>6</sup> Accordingly, specific performance of a lease of an undivided half interest of clay in situ will be granted.<sup>7</sup>

**§ 3349. Specific performance denied—Hardship to third person.** If a decree of specific performance would operate as a hardship upon an innocent third person, such decree will be denied,<sup>1</sup> since such third person is not a party to the contract, and accordingly is not guilty of breach thereof. The reasons for considering his interests as against those of the plaintiff are much stronger than in the cases in which the inconvenience is to the party to the contract who is in default.

**West Shore & Buffalo Ry.**, 120 N. Y. 29, 23 N. E. 983.

**Pennsylvania.** *Pennsylvania Gas Coal Co. v. Greensboro Gas Co.*, 238 Pa. St. 97, 85 Atl. 1093.

**Rhode Island.** *Bochterle v. Saunders*, 36 R. I. 39, 88 Atl. 803.

<sup>4</sup>*Orestes v. Galanis*, 78 N. H. 514, 102 Atl. 759.

<sup>5</sup>*Hexter v. Pearce* [1900], 1 Ch. 341.

<sup>6</sup>**England.** *Adams v. Weare*, 1 Brown Ch. 567.

**United States.** *La Follette v. La Follette Water, Light & Telephone Co.*, 252 Fed. 762, 164 C. C. A. 602.

**Idaho.** *Fox v. Spokane International Ry.*, 26 Ida. 60, 140 Pac. 1103.

**Iowa.** *Larson v. Smith*, 174 Ia. 619, 156 N. W. 813; *Mitchell v. Mutch*, 180 Ia. 1281, 164 N. W. 212.

**Washington.** *Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 159 Pac. 1077.

<sup>7</sup>*Hexter v. Pearce* [1900], 1 Ch. 341.

<sup>1</sup>**California.** *Stanton v. Singleton*, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146.

**Michigan.** *Booth v. Murdock*, 132 Mich. 608, 94 N. W. 177; *Rathbone v. Groh*, 137 Mich. 373, 100 S. W. 588.

**Missouri.** *Henry v. Adkins*, — Mo. —, 194 S. W. 264.

**Montana.** *Interior Securities Co. v. Campbell*, 55 Mont. 459, 178 Pac. 582.

**Pennsylvania.** *Caveny v. Curtis*, 257 Pa. St. 575, 101 Atl. 853.

**Washington.** *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 106 Pac. 439.

Specific performance of a contract made by a receiver for the sale of property in satisfaction of a mortgage will not be granted, if the effect of such contract will be to deprive a mortgage creditor of ample security and to substitute therefor insufficient security and a personal obligation of doubtful value.<sup>2</sup> Specific performance will not be granted against one tenant in common, if such decree will injure the remaining tenants.<sup>3</sup> If the contract does not appportion the purchase price between the life tenant and the remaindermen, and an unfair advantage was taken of the life tenant in making such contract, specific performance will not be granted even as against one of the remaindermen who is willing to perform.<sup>4</sup> On the other hand, specific performance of a contract to sell a tract of land which includes a homestead will be enforced as against the husband who executed the contract as to all the land except the homestead, although the contract as to the homestead is not enforceable, since the wife did not execute the contract.<sup>5</sup> A agreed to transfer a patent to B. Subsequently, before such transfer was made, and while A's experiments were in progress, A agreed to transfer an interest therein to X, in consideration of X's furnishing ten thousand dollars to complete the patent. It was held that B could not have specific performance so as to defeat X's rights.<sup>6</sup> If A has made a contract with B, and A subsequently makes a contract with C which can not be performed if A performs his contract with B, B's interest, if he is acting in good faith, will be protected by refusing specific performance to C as against A.<sup>7</sup> If A has made a contract with B for the sale of certain property, and A has subsequently conveyed the legal title thereto to B, who takes it for value in good faith and without notice, C's interest will be

<sup>2</sup> *Interior Securities Co. v. Campbell*, 55 Mont. 459, 178 Pac. 582.

<sup>3</sup> *Stanton v. Singleton*, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146.

See also, *Pauley v. Hadlock*, — Ariz. —, 188 Pac. 263 and *Caveny v. Curtis*, 257 Pa. St. 575, 101 Atl. 853.

<sup>4</sup> *Leathers v. Deloach*, 140 Tenn. 259, 204 S. W. 633.

<sup>5</sup> *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817; *Davis v. Merson*, 103 Neb. 397, 172 N. W. 50.

See also, *Hudgins v. Thompson*, 109 Tex. 433, 211 S. W. 586.

<sup>6</sup> *Booth v. Murdock*, 132 Mich. 608, 94 N. W. 177.

<sup>7</sup> *Abbott v. Baldwin*, 61 N. H. 583.

This is true even though such prior contract was unenforceable because of the Statute of frauds. *Patterson v. Martz*, 8 Watts. (Pa.) 374, 34 Am. Dec. 474; *Maguire v. Heraty*, 163 Pa. St. 381, 43 Am. St. Rep. 800, 30 Atl. 151.

See § 1399.

protected by refusing specific performance to A as against B.<sup>8</sup> If the vendor has entered into a subsequent contract with an innocent purchaser for the sale of the same premises, equity will not compel the vendor to break such second contract.<sup>9</sup> In the latter case, the refusal of specific performance is sometimes explained on the theory that such performance is impossible;<sup>10</sup> but it is really the protection to the interest of the bona fide purchaser which prevents equity from granting specific performance and holding such purchaser as a trustee.

The chance that the use of the property by the purchaser will not be as advantageous to a third person as its use by the seller is not a reason for refusing specific performance.<sup>11</sup>

**§ 3350. Specific performance denied—Hardship to public.** If specific performance will result in hardship or serious inconvenience to the public it will be refused, although the contract is one which would have otherwise been enforced by specific performance.<sup>1</sup> Specific performance of a contract by a city to erect a public building on a given tract of ground will not be granted;<sup>2</sup> nor of a contract to sell stock for the purpose of obtaining control of a public utility;<sup>3</sup> nor of a contract by a railroad to maintain

<sup>8</sup> *United States*. *Kennedy v. Hazelton*, 128 U. S. 667, 32 L. ed. 576; *Halsell v. Renfrow*, 202 U. S. 287, 52 L. ed. 1032.

*Illinois*. *Boone v. Graham*, 215 Ill. 511, 74 N. E. 559.

*Kansas*. *Pessemier v. Genn*, 104 Kan. 287, 178 Pac. 426 (obiter).

*North Carolina*. *Morris v. Basnight*, 179 N. Car. 298, 102 S. E. 389.

*Oklahoma*. *Telford v. Ring*, — Okla. —, 191 Pac. 179; *Barnard v. Akers*, — Okla. —, 193 Pac. 738.

<sup>9</sup> *Saperstein v. Mechanics' & Farmers Saving Bank*, 228 N. Y. 257, 126 N. E. 708.

<sup>10</sup> See §§ 3351 et seq.

<sup>11</sup> *Carnation Lumber & Shingle Co. v. Tolt Land Co.*, 103 Wash. 633, 175 Pac. 331.

<sup>1</sup> *United States*. *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 42 L. ed. 547.

*California*. *Herzog v. Atchison, Topeka & Santa Fe Ry.*, 153 Cal. 496, 17 L. R. A. (N.S.) 428, 95 Pac. 898.

*Maryland*. *Ryan v. McLane*, 91 Md. 175, 80 Am. St. Rep. 438, 50 L. R. A. 501, 46 Atl. 340.

*New York*. *Conger v. New York, West Shore & Buffalo Ry.*, 120 N. Y. 29, 23 N. E. 983.

*Oregon*. *Ford v. Oregon Electric Ry.*, 60 Or. 278, 117 Pac. 809.

*Wisconsin*. *Kendall v. Frey*, 74 Wis. 26, 42 N. W. 466.

<sup>2</sup> *Kendall v. Frey*, 74 Wis. 26, 42 N. W. 466.

<sup>3</sup> *Ryan v. McLane*, 91 Md. 175, 80 Am. St. Rep. 438, 50 L. R. A. 501, 46 Atl. 340.

stations or side-tracks,<sup>4</sup> if the performance of such contracts will be injurious to the public. This principle has been repeated in obiter in which specific performance was granted, since the contract was not prejudicial to the public interest.<sup>5</sup> Specific performance of a contract for an interest in a franchise will not be decreed if the welfare of the public requires that it be granted to one alone.<sup>6</sup>

## VI

## ABILITY OF EQUITY TO ENFORCE DECREE

**§ 3351. Specific performance denied if decree unenforceable—General principles.** In accordance with the general principle that equity will not decree a vain thing, and will not make an order which can not be enforced, equity will not grant a decree of specific performance, if such performance is impossible.<sup>1</sup> If a vendor has agreed to sell property which he does not own, or of which he does not own the interest or the title which he has agreed to sell,<sup>2</sup>

<sup>4</sup> *Herzog v. Atchison, Topeka & Santa Fe Ry.*, 153 Cal. 496, 17 L. R. A. (N.S.) 428, 95 Pac. 898; *Ford v. Oregon Electric Ry.*, 60 Or. 278, 117 Pac. 809; *Conger v. New York, West Shore & Buffalo Ry.*, 120 N. Y. 29, 23 N. E. 983.

<sup>5</sup> *Taylor v. Florida East Coast Ry.*, 54 Fla. 635, 127 Am. St. Rep. 155, 16 L. R. A. (N.S.) 307, 14 Ann. Cas. 472, 45 So. 574; *Brown v. Western Maryland Ry.*, — W. Va. —, 4 A. L. R. 522, 99 S. E. 457.

There is a conflict of authority on the validity of contracts to locate railroad stations, side tracks, and the like.

See §§ 909 et seq.

The question which is here discussed can arise only where such contracts are held to be valid generally.

<sup>6</sup> *Hyer v. Richmond Traction Co.*, 168 U. S. 471, 42 L. ed. 547.

<sup>1</sup> *England. Birmingham v. Sheridan*, 33 Beav. 660.

*United States. Kennedy v. Hazelton*, 128 U. S. 667, 32 L. ed. 576.

*Illinois. Thackaberry v. Kibbe*, 284 Ill. 199, 119 N. E. 897.

*Kentucky. Jenkins v. Dawes*, 183 Ky. 25, 207 S. W. 689.

*Minnesota. Petrich v. Berkner*, 142 Minn. 451, 172 N. W. 770.

*North Carolina. Morris v. Basnight*, 179 N. Car. 298, 102 S. E. 389.

*Oklahoma. Telford v. Ring*, — Okla. —, 191 Pac. 179; *Barnard v. Akers*, — Okla. —, 193 Pac. 738.

*Washington. Smith v. Flathead River Coal Co.*, 64 Wash. 642, 117 Pac. 475.

<sup>2</sup> *United States. Kennedy v. Hazelton*, 128 U. S. 667, 32 L. ed. 576; *Hildreth v. Thibodeau*, 117 Fed. 146.

*California. Smith v. Bangham*, 156 Cal. 359, 104 Pac. 689.

*Iowa. Ormsby v. Graham*, 123 Ia. 202, 98 N. W. 724.

*Kentucky. Jenkins v. Dawes*, 183 Ky. 25, 207 S. W. 689.

*Michigan. Laubergayer v. Rohde*, 167 Mich. 605, 133 N. W. 535.

as where the vendor has only an option upon the property for which he has not paid the purchase price,<sup>3</sup> or if such property is not in existence,<sup>4</sup> no decree for specific performance will be rendered.

If the promisor agrees to convey property which he does not own at the time that the contract is entered into, but which he afterwards acquires, specific performance may be decreed.<sup>5</sup>

On the other hand, a court of equity will render a decree which is necessary to preserve the rights of the parties, although the enforcement of such decree may prove impracticable.<sup>6</sup> Specific performance of a contract to give a lease will be decreed, even if the case is not tried until after the expiration of the term, if such decree is necessary to protect the interest of the tenant in possession, in case the lessor brings an action against him for taking possession of such realty.<sup>7</sup>

**§ 3352. Rights of bona fide purchaser.** If the vendor has sold the property to a bona fide purchaser against whom such decree can not be enforced, equity will not decree specific performance in a suit against the original vendor,<sup>1</sup> especially if the original purchaser had refused the offer of the vendor to acquire the title of such property.<sup>2</sup> If the original vendor has entered into a valid

**New Jersey.** *Du Bois v. Bormann*, 65 N. J. Eq. 207, 55 Atl. 634.

**Pennsylvania.** *Roach v. Irvin*, 245 Pa. St. 162, 91 Atl. 243.

**West Virginia.** *Neill v. McClung*, 71 W. Va. 458, 76 S. E. 878.

<sup>3</sup> *Wright v. Suydam*, 59 Wash. 530, 108 Pac. 610, 110 Pac. 8.

<sup>4</sup> *Kennedy v. Hazelton*, 128 U. S. 667, 32 L. ed. 576; *Smith v. Bank*, 137 Cal. 363, 70 Pac. 184.

<sup>5</sup> *Price v. Immel*, 48 Colo. 163, 109 Pac. 941; *Heller v. McGuin*, 261 Ill. 588, 104 N. E. 158; *Coleridge Creamery Co. v. Jenkins*, 66 Neb. 129, 92 N. W. 123; *Brown v. Pinniger*, 81 N. J. Eq. 229, 86 Atl. 541.

*Contra*, *Murray Bros. & Ward Land Co. v. Keesey*, 183 Ia. 739, 166 N. W. 460.

<sup>6</sup> *Booher v. Slathar*, 167 Wis. 196, 167 N. W. 261.

<sup>7</sup> *Booher v. Slathar*, 167 Wis. 196, 167 N. W. 261.

<sup>1</sup> *Halsell v. Renfrow*, 202 U. S. 287, 50 L. ed. 1032; *Summerlin v. Front-eriza Silver Mining & Milling Co.*, 41 Fed. 249; *Birmingham National Bank v. Roden*, 97 Ala. 404, 11 So. 883; *Morris v. Basnight*, 179 N. Car. 298, 102 S. E. 389; *Telford v. Ring*, — Okla. —, 191 Pac. 179; *Barnard v. Akers*, — Okla. —, 193 Pac. 738.

See § 3370.

<sup>2</sup> *Henry v. Adkins*, — Mo. —, 194 S. W. 264.

For specific performance against a subsequent purchaser who is not a bona fide purchaser, see § 3370.

contract with a third person, equity will not compel him to break such contract and to convey the land to the first purchaser.<sup>3</sup>

This principle has been applied to contracts to issue stock to a subscriber, when the corporation has issued to bona fide purchasers all the stock at its disposal,<sup>4</sup> or to contracts to sell stock when the vendor has sold to bona fide purchasers the stock contracted for.<sup>5</sup> If the original contract provided for payment for land in stock in a corporation, and the purchaser is unable to deliver such stock, it is improper for equity to order the conveyance of such property on payment of the purchase price.<sup>6</sup> If the vendor has shares of the corporation enough to fill the contract, specific performance will be decreed, even if he has sold the identical shares owned by him when he made the contract of sale.<sup>7</sup> Conversely, if the vendee receives the proper number of shares in the same corporation he can not complain because he does not receive the specific shares contracted for.<sup>8</sup>

### § 3353. Consent of third persons necessary to enforce decree.

If a contract between A and B can not be performed without the consent of a third person, and such third person does not give such consent, specific performance can not be had.<sup>1</sup> For this reason specific performance will not be given of a contract to assign a lease, which can not be assigned without the consent of the original lessor,<sup>2</sup> or of a contract to exchange property which can not be performed unless lien holders consent,<sup>3</sup> or of a contract which provides that a third person shall enter satisfaction of a mortgage

<sup>3</sup> *Saperstein v. Mechanics' & Farmers' Savings Bank*, 228 N. Y. 257, 126 N. E. 708.

<sup>4</sup> *Summerlin v. Fronteriza Silver Mining & Milling Co.*, 41 Fed. 249; *Chaffee v. Middlesex Ry.*, 146 Mass. 224, 16 N. E. 34.

<sup>5</sup> *Birmingham National Bank v. Roden*, 97 Ala. 404, 11 So. 883; *Sewall v. Eastern Ry.*, 63 Mass. (9 Cush.) 5; *Wonsen v. Fenno*, 129 Mass. 405.

<sup>6</sup> *Powell v. Adler*, — Okla. —, 172 Pac. 55.

<sup>7</sup> *Draper v. Stone*, 71 Me. 175.

<sup>8</sup> *Hardenbergh v. Bacon*, 33 Cal. 356.

<sup>1</sup> *Alabama. Burgin v. Suggs*, — Ala. —, 85 So. 533.

*Illinois. Hurlbut v. Kantzler*, 112 Ill. 482.

*Iowa. Laubscher v. Mixell*, 171 Ia. 88, 153 N. W. 335 (obiter).

*Massachusetts. Ellis v. Small*, 209 Mass. 147, 95 N. E. 79.

*New Jersey. Cleveland v. Bergen Building & Improvement Co.* (N. J. Eq.), 55 Atl. 117.

*North Carolina. Sills v. Bethea*, 178 N. Car. 315, 100 S. E. 593.

*Virginia. Aetna Insurance Co. v. Aston*, 123 Va. 327, 96 S. E. 772.

<sup>2</sup> *Hurlbut v. Kantzler*, 112 Ill. 482; *Ellis v. Small*, 209 Mass. 147, 95 N. E. 79.

<sup>3</sup> *Aetna Insurance Co. v. Aston*, 123 Va. 327, 96 S. E. 772.

on record,<sup>4</sup> or of a contract by a married woman to sell property, if the written consent of the husband is necessary to such conveyance,<sup>5</sup> or of a contract by which one of the parties undertakes to sell a mortgage to third persons.<sup>6</sup> If the realty is contracted for as bounded by a street, and the owner of the land on which such street is to be located refuses to dedicate it, the vendor can not have specific performance.<sup>7</sup>

### § 3354. Contract for continuous duties or personal services.

A common illustration of the denial of specific performance in cases where, though the remaining facts are sufficient to justify such equitable relief, the decree can not be enforced is found in the cases of contracts involving continuous duties, or services of a personal nature, or involving personal taste, discretion and skill.<sup>1</sup> A contract which can be performed only by rendering personal services,<sup>2</sup> as a contract to furnish care and support,<sup>3</sup> or to act as an

<sup>4</sup> *Burgin v. Sugg*, — Ala. —, 85 So. 533.

<sup>5</sup> *Sills v. Bethea*, 178 N. Car. 315, 100 S. E. 593.

<sup>6</sup> *Petrich v. Berkner*, 142 Minn. 451, 172 N. W. 770.

<sup>7</sup> *Cleveland v. Bergen Building & Improvement Co.* (N. J. Eq.), 55 Atl. 117.

<sup>1</sup> *England*. *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411.

*United States*. *Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339, 19 L. ed. 955.

*Alabama*. *Chadwick v. Chadwick*, 121 Ala. 580, 25 So. 631; *Bromberg v. Eugenotto Construction Co.*, 158 Ala. 323, 19 L. R. A. (N.S.) 1175, 48 So. 60.

*Arkansas*. *Warmack v. Major Stave Co.*, 132 Ark. 173, 200 S. W. 799.

*California*. *Magee v. Magee*, 174 Cal. 276, 162 Pac. 1023 (obiter).

*District of Columbia*. *Roller v. Weigle*, 261 Fed. 250, 49 D. C. App. 102.

*Georgia*. *Atlanta & West Point Ry. v. Speer*, 32 Ga. 550; *Rosenkrantz v. Chattahoochee Brick Co.*, 147 Ga. 730, 95 S. E. 225.

*Indiana*. *Hoppes v. Hoppes*, — Ind. —, 129 N. E. 629.

*Iowa*. *Richmond v. Dubuque & Sioux City Ry.*, 33 Ia. 422.

*Maine*. *Brown v. Boston & Maine Ry.*, 106 Me. 248, 76 Atl. 692.

*Michigan*. *Caswell v. Gibbs*, 33 Mich. 331.

*New Jersey*. *Mowers v. Fogg*, 45 N. J. Eq. 120, 17 Atl. 296.

*Ohio*. *Port Clinton Ry. v. Cleveland & Toledo Ry.*, 13 O. S. 544.

<sup>2</sup> *Roquemore v. Mitchell*, 167 Ala. 475, 52 So. 423; *Greer v. Pope*, 140 Ga. 743, 79 S. E. 846; *Hoppes v. Hoppes*, — Ind. —, 129 N. E. 629; *H. W. Gossard Co. v. Crosby*, 132 Ia. 155, 6 L. R. A. (N.S.) 1115, 109 N. W. 483.

See *Equitable Relief in Contracts Involving Personal Services*, by J. Lewis Parks, 66 *University of Pennsylvania Law Review* 251.

It is held that breach of such contract can not be made a crime by statute, since it is involuntary servitude if labor is thus coerced. *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191 [reversing, *Bailey v. State*, 161 Ala. 75, 49 So. 886].

<sup>3</sup> *Chadwick v. Chadwick*, 121 Ala. 580, 25 So. 631; *Hoppes v. Hoppes*, — Ind. —, 129 N. E. 629; *Bumpus v. Bumpus*, 53 Mich. 346, 19 N. W. 29; *Bourget v. Monroe*, 58 Mich. 563, 25

employee,<sup>4</sup> or agent,<sup>5</sup> as a clerk,<sup>6</sup> or a manager of a theater,<sup>7</sup> or to render services as a teacher,<sup>8</sup> or a painter,<sup>9</sup> to open, develop or operate a mine,<sup>10</sup> as to quarry and deliver for a considerable period of time marble blocks of specified size, shape and quality,<sup>11</sup> or to sell and load gravel,<sup>12</sup> or to operate a saw-mill,<sup>13</sup> or to secure a right of way for another,<sup>14</sup> or to furnish news for a term of years,<sup>15</sup> or to operate a railway line,<sup>16</sup> or to construct a railway line,<sup>17</sup> or to furnish telephone service,<sup>18</sup> or electricity,<sup>19</sup> or to construct a

N. W. 514; *Mowers v. Fogg*, 45 N. J. Eq. 120, 17 Atl. 296.

"The court of equity will not undertake to regulate or control the performance of such continuous duties and it would be powerless to do so by any of its process." *Chadwick v. Chadwick*, 121 Ala. 580, 582, 25 So. 631.

<sup>4</sup> *Wood v. Iowa Building & Loan Association*, 126 Ia. 464, 102 N. W. 410; *Heth v. Smith*, 175 Mich. 328, 141 N. W. 583.

<sup>5</sup> *Ogden v. Fossick*, 4 De G. F. & J. 426; *Alworth v. Seymour*, 42 Minn. 526, 44 N. W. 1030.

<sup>6</sup> *H. W. Gossard Co. v. Crosby*, 132 Ia. 155, 6 L. R. A. (N.S.) 1115, 109 N. W. 483.

<sup>7</sup> *Welty v. Jacobs*, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723.

<sup>8</sup> *Schwieb v. Zitike*, 136 Ind. 210, 36 N. E. 30.

<sup>9</sup> *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131.

A covenant in a gas lease to furnish gas to the lessor without charge has been enforced specifically. *Bassell v. West Virginia Central Gas Company*, — W. Va. —, 12 A. L. R. 1398, 103 S. E. 116.

A covenant to furnish electricity has been enforced specifically. *Saginaw v. Consumers' Power Co.*, — Mich. —, 182 N. W. 146.

<sup>10</sup> *Dominion Coal Co. v. Dominion Iron & Steel Co.* [1909], A. C. 293; *Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339, 19 L. ed. 955; *Stanton v.*

*Singleton*, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146.

<sup>11</sup> *Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339, 19 L. ed. 955.

<sup>12</sup> *Roquemore v. Mitchell*, 167 Ala. 475, 52 So. 423.

<sup>13</sup> *Tombigbee Valley Ry. v. Fairfield Lumber Co.*, 155 Ala. 575, 47 So. 88.

<sup>14</sup> *Dukes v. Bash*, 29 Ind. App. 103, 64 N. E. 47.

<sup>15</sup> *Iron Age Publishing Co. v. Western Union Telegraph Co.*, 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449.

<sup>16</sup> *Powell Duffryn Steam Coal Co. v. Taff Vale Ry.*, L. R. 9 Ch. 331; *Pacific Electric Ry. v. Campbell-Johnson*, 153 Cal. 106, 94 Pac. 623; *Sims v. Vanmeter Lumber Co.*, 96 Miss. 449, 51 So. 459; *Port Clinton Ry. v. Cleveland & Toledo Ry.*, 13 O. S. 544.

<sup>17</sup> *Kansas & Eastern Railroad Construction Co. v. Topeka, Salina & Western Ry.*, 135 Mass. 34, 46 Am. Rep. 439. (Especially if in another state.)

<sup>18</sup> *Keith v. National Telephone Co.* [1894], 2 Ch. 147 (injunction against cutting wires will be granted).

<sup>19</sup> *Warmack v. Major Stave Co.*, 132 Ark. 173, 200 S. W. 799.

Specific performance of such a contract has been granted against a public service corporation. *Oconto Electric Co. v. Oconto Service Co.*, 168 Wis. 165, 169 N. W. 293.

Injunction against shutting off the current will be granted. *Mobile Electric Co. v. Mobile*, 201 Ala. 607, L. R. A. 1918F, 667, 79 So. 39.

building or other improvement on plaintiff's land,<sup>20</sup> or to remove a specified building,<sup>21</sup> are all of them contracts of which specific performance will not be given, since decrees to perform them can not be enforced by the courts without an expenditure of time and energy which may seem to the court to be excessive.

As far as contracts involve services of a personal nature or involve personal taste, and the like, there may be sufficient reason for the refusal of a court of equity to attempt to enforce specific performance, especially if the test for determining whether such contract has been performed or not is the personal feeling of the party to whom such performance is to be furnished, as distinct from the satisfaction of the ordinary reasonable man. If the contract is one which does not involve personal taste, and the like, and the only objection to granting specific performance is the fact that enforcement of such decree may take a considerable amount of the court's time and energy, different considerations exist. The ideas of the dignity and leisure of a court of equity which obtained in England when equity was taking shape, are out of place in a system of government in which service to the public rather than personal comfort is the test of the dignity of the courts. While it is possible that contracts may be found which could not be enforced specifically, without interfering with the orderly administration of justice, the greater number of contracts of continuous character could be enforced specifically in less time than the question of the fact of breach and the amount of damages could be determined in a jury trial. Even if there is a chance of repeated breach, the power of a court of equity to punish for contempt is sufficient to prevent wilful breaches; and other breaches can be determined by equity fully as easily as by a court of law. Whether these are the controlling reasons or not, there is a tendency in some jurisdictions to give specific performance of contracts for the

<sup>20</sup> *England*. *Errington v. Aynesly*, 2 Brown Ch. 341 (obiter).

*Arkansas*. *Caldwell v. Donaghey*, 108 Ark. 60, 45 L. R. A. (N.S.) 721, Ann. Cas. 1915B, 133, 156 S. W. 839.

*Iowa*. *Robinson v. Luther*, 134 Ia. 463, 109 N. W. 775.

*Maryland*. *Ward v. Newbold*, 115 Md. 689, 81 Atl. 793.

*Mississippi*. *Sims v. Vanmeter Lum-ber Co.*, 96 Miss. 449, 51 So. 459.

*New Jersey*. *Atlantic & Suburban Ry. v. Board of Chosen Freeholders*, 84 N. J. Eq. 618, 94 Atl. 602.

*Wisconsin*. *McDougal v. Racine County*, 156 Wis. 663, 146 N. W. 794 (obiter: as suit was to enjoin performance of prior contract to construct court-house).

<sup>21</sup> *Armour v. Connolly*, — N. J. Eq. —, 49 Atl. 1117.

operation of railroads of long periods of years.<sup>22</sup> In these cases the nature of such services on the part of the corporation, and the serious character of the injury that would follow if specific performance were refused, has induced the courts to grant specific performance in spite of the fact that it might prove possibly that repeated breaches might make it necessary for the court to give a great amount of time and energy to enforcing its decrees; and the subsequent history of such remedy does not seem to indicate that an excessive amount of the time or energy of the court has thus been consumed. If a contract for the construction of a building is entered into by a lessor, the lessee has been allowed to have specific performance.<sup>23</sup> However, a contract to lease a certain amount of floor space in a building which is to be constructed in the future, has not been enforced specifically, as it would be necessary for the court to supervise the method of constructing the building in order to secure performance of such covenant.<sup>24</sup> If A has conveyed land or an interest therein to B, in consideration of B's covenant to construct a specified improvement thereon, specific performance of such contract has been granted,<sup>25</sup> as in case of a contract by a railway to construct a track or station,<sup>26</sup> or a contract by a street railway or an interurban railway to pave a part

<sup>22</sup> *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843; *Union Pacific Ry. v. Chicago, Rock Island & Pacific Ry.*, 163 U. S. 564, 41 L. ed. 265; *Prospect Park & Coney Island Ry. v. Coney Island & Brooklyn Ry.*, 144 N. Y. 152, 26 L. R. A. 610, 39 N. E. 17; *New River Lumber Co. v. Tennessee Ry.*, 136 Tenn. 661, 191 S. W. 334; *Southern Ry. v. Franklin & Pittsylvania Ry.*, 96 Va. 693, 44 L. R. A. 297, 32 S. E. 485.

See also, *Harper v. Virginian Ry.*, 76 W. Va. 788, 86 S. E. 919, and *Texas Co. v. Central Fuel Oil Co.*, 194 Fed. 1, 114 C. C. A. 21.

<sup>23</sup> *London v. Nash*, 3 Atk. 512, 1 Ves. Jr. 12.

<sup>24</sup> *Bromberg v. Eugenotto Construction Co.*, 158 Ala. 323, 19 L. R. A. (N.S.) 1175, 48 So. 60.

<sup>25</sup> *England. Wilson v. Furness Ry.*, L. R. 9 Eq. 28.

*United States. Wheeling Traction Co. v. Belmont County*, 248 Fed. 205.

*Florida. Taylor v. Florida East Coast Ry.*, 54 Fla. 635, 16 L. R. A. (N.S.) 307, 14 Ann. Cas. 472, 45 So. 574.

*Pennsylvania. Patton Township v. Monongahela Street Ry.*, 226 Pa. St. 372, 75 Atl. 589.

*West Virginia. Brown v. Western Maryland Ry.*, — W. Va. —, 4 A. L. R. 522, 99 S. E. 457.

<sup>26</sup> *Taylor v. Florida East Coast Ry.*, 54 Fla. 635, 16 L. R. A. (N.S.) 307, 14 Ann. Cas. 472, 45 So. 574.

A covenant by a railway to construct buildings along a viaduct to improve its appearance has been enforced specifically. *Columbus v. Cleveland, Cincinnati, Chicago & St. Louis Ry.*, 79 O. S. 473, 87 N. E. 1132; *Brown v. Western Maryland Ry.*, — W. Va. —, 4 A. L. R. 522, 99 S. E. 457.

of the street or road.<sup>27</sup> Where such remedy is denied in cases of this sort, it is because of other considerations of public policy, hardship, and the like.<sup>28</sup>

The attitude of equity towards specific performance of contracts for the sale of land, the purchase price of which is to be determined by subsequent appraisal or arbitration, has been discussed elsewhere.<sup>29</sup> As was there pointed out, the feeling that such decree is impracticable, which prevents specific performance while the contract is executory on both sides, vanishes if one of the parties has performed so far that he will suffer a serious financial loss over and above the value of his bargain, if specific performance is refused.<sup>30</sup>

**§ 3355. Contracts of partnership.** A contract to form a partnership is one for the breach of which compensation can not be made by awarding money damages; and the damages which arise from such breach are difficult to estimate. Accordingly, specific performance of such a contract should be awarded unless the other facts make specific performance impracticable or impossible. A contract of partnership is, however, one in which the personality of the partners is material, and without mutual trust, good will, and co-operation, success is not to be expected. The latter reasons over-balance the former, if the relief which is sought is true specific performance by which it is sought to compel the parties to enter into the partnership relation and to continue it,<sup>1</sup> even if the contract is for a fixed period of time.<sup>2</sup> If the duration of the partnership is not fixed and if the contract of partnership is therefore terminable at will, an additional reason for denying specific performance of such contract exists,<sup>3</sup> since equity is unwilling to decree the performance of a contract which either or both of the parties may avoid at will.<sup>4</sup>

<sup>27</sup> *Wheeling Traction Co. v. Belmont County*, 248 Fed. 205; *Patton Township v. Monongahela Street Ry.*, 226 Pa. St. 372, 75 Atl. 589.

<sup>28</sup> *Kendall v. Frey*, 74 Wis. 26, 17 Am. St. Rep. 118, 42 N. W. 466 (action by adjoining property owner for specific performance of contract by the city to construct a city hall).

See § 3350.

<sup>29</sup> See § 2615.

<sup>30</sup> See § 2615.

<sup>1</sup> *Scott v. Rayment*, L. R. 7 Eq. 112; *Lucopoulos v. Sotriopoulos*, — Wash. —, 191 Pac. 149.

<sup>2</sup> *Scott v. Rayment*, L. R. 7 Eq. 112.

<sup>3</sup> *Herey v. Birch*, 9 Ves. Jr. 357; *Morris v. Peckham*, 51 Conn. 128; *Clark v. Truitt*, 183 Ill. 239, 55 N. E. 683; *Buck v. Smith*, 29 Mich. 166, 18 Am. Rep. 84.

<sup>4</sup> See § 3238.

There is no arbitrary rule, however, apart from the foregoing considerations which prevents equity from granting proper relief in the case of partnership contracts. If a party who seeks relief has altered his position in reliance upon the contract to form a partnership, so that he will suffer serious or irreparable injury if the partnership is not formed and he will receive substantial relief if the partnership is formed, even though it is ended immediately, equity will decree specific performance of the contract to enter into the partnership, or it will enter a decree by which the rights of the party who is not in default can be protected adequately,<sup>6</sup> as by fixing the interests of the parties as they would have existed if the partnership had been formed.<sup>6</sup>

Shares of stock in a joint stock company which is by statute not a corporation have been treated as analogous to interests in a partnership, and specific performance has been denied,<sup>7</sup> though in other cases such shares have been treated as analogous to corporate stock and specific performance has been given.<sup>8</sup>

## VII

### COMPENSATION AND RESTITUTION; AND CONDITIONAL DECREES

#### § 3356. Damages in addition to complete specific performance.

If the case is one in which specific performance is a proper remedy and the party who seeks such relief obtains it, equity regularly decrees an award for such damages which he has sustained by reason of the breach on the part of the party against whom such relief is awarded.<sup>1</sup> An award of damages is made in cases of this

<sup>6</sup> *England*. *England v. Curling*, 8 Beav. 129.

*United States*. *Karrick v. Hannaman*, 168 U. S. 328, 42 L. ed. 484 (obiter).

*Illinois*. *Wilson v. Campbell*, 10 Ill. 383.

*Indiana*. *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665, 59 N. E. 995.

*Massachusetts*. *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459.

*Virginia*. *Birchett v. Bolling*, 19 Va. (5 Munf.) 442.

<sup>6</sup> *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459.

<sup>7</sup> *Sheffield Gas Consumers' Co. v. Harrison*, 17 Beav. 294.

<sup>8</sup> *Oriental Inland Steam Co. v. Briggs*, 4 De G. F. & J. 191; *New Brunswick & Canada Ry. & Land Co. v. Muggeridge*, 4 Drew. 686.

<sup>1</sup> *United States*. *Taylor v. Merchants' Fire Insurance Co.*, 50 U. S. (9 How.) 390, 13 L. ed. 187.

*New Jersey*. *Lyle v. Addicks*, 62 N. J. Eq. 123, 49 Atl. 1121.

sort in order to prevent a multiplicity of actions; that is, to make it unnecessary for the injured party to bring an action at law for specific performance, and an action at law to recover damages. Indeed, under the rules which forbid splitting a cause of action, a decree in specific performance may operate as a merger of the right of action at law for damages.<sup>2</sup> Since equity will give specific performance of a contract to issue a policy of insurance,<sup>3</sup> it will retain such suit if the loss has taken place before such suit is brought, and render a decree for the amount thereof, in order to avoid a multiplicity of actions.<sup>4</sup>

**§ 3357. Compensation in equity in place of specific performance—General rule.** If the relief which is sought amounts essentially to the recovery of money damages for invasion of a legal contractual right, equity has of course no jurisdiction, so-called, since the case is one for which there is a plain, adequate and complete remedy at law.<sup>1</sup> If the plaintiff knows facts which make specific performance impracticable and with such knowledge brings a suit for specific performance, some courts hold that neither specific performance nor compensation can be given.<sup>2</sup> Constructive

**New York.** *Worrall v. Munn*, 38 N. Y. 137.

**North Dakota.** *Smith v. Bradley*, 27 N. D. 613, 147 N. W. 784.

**Wisconsin.** *Dells Paper & Pulp Co. v. Willow River Lumber Co.*, 170 Wis. 19, 173 N. W. 317.

<sup>2</sup> See § 2562.

<sup>3</sup> See § 3344.

<sup>4</sup> *Tayloe v. Merchants' Fire Insurance Co.*, 50 U. S. (9 How.) 390, 13 L. ed. 187; *Security Fire Insurance Co. v. Kentucky Marine & Fire Insurance Co.*, 70 Ky. (7 Bush) 81, 3 Am. Rep. 301; *Palm v. Medina County Mutual Fire Insurance Co.*, 20 Ohio 529; *Croft v. Hanover Fire Insurance Co.*, 40 W. Va. 508, 52 Am. St. Rep. 902, 21 S. E. 854.

<sup>1</sup> **Alabama.** *Bromberg v. Eugenotto Construction Co.*, 158 Ala. 323, 19 L. R. A. (N.S.) 1175, 48 So. 60.

**Florida.** *Freeman v. Tucker*, — Fla. —, 84 So. 174.

**Illinois.** *Pierce v. Plumb*, 74 Ill. 326.

**Iowa.** *Dow v. McVey*, 174 Ia. 553, 156 N. W. 706.

**Minnesota.** *Baumgartner v. Corliass*, 115 Minn. 11, 131 N. W. 638.

**New York.** *Bradford Eldred & Cuba Ry. v. New York, Lake Erie & Western Ry.*, 123 N. Y. 316, 11 L. R. A. 116, 25 N. E. 499.

**North Dakota.** *Knudtson v. Robinson*, 18 N. D. 12, 118 N. W. 1061.

**Oregon.** *Cartwright v. Oregon Electric Ry.*, 88 Or. 596, 171 Pac. 1055.

**Washington.** *Morgan v. Bell*, 3 Wash. 554, 16 L. R. A. 614, 28 Pac. 925.

<sup>2</sup> **Alabama.** *Bromberg v. Eugenotto Construction Co.*, 158 Ala. 323, 19 L. R. A. (N.S.) 1175, 48 So. 60.

**Illinois.** *Mack v. McIntosh*, 181 Ill. 633, 54 N. E. 1019.

**Iowa.** *Dow v. McVey*, 174 Ia. 553, 156 N. W. 706.

**Minnesota.** *Baumgartner v. Corliass*, 115 Minn. 11, 131 N. W. 638.

notice of facts which make specific performance impracticable has been held to prevent the plaintiff from obtaining compensation in equity.<sup>3</sup> If specific performance is refused because the contract is uncertain, it has been said that compensation can not be awarded.<sup>4</sup>

**§ 3358. Special circumstances justifying compensation in place of specific performance.** Special facts and circumstances may, however, authorize equity to award money damages either in lieu of specific performance or in addition thereto.<sup>1</sup> If the case is one in which specific performance would have been awarded but for the fact that by reason of circumstances unknown to the plaintiff enforcement of the decree has become impossible, equity may award compensation in damages to the plaintiff.<sup>2</sup> If an owner of corporate stock has agreed to sell it,<sup>3</sup> or a corporation has agreed to issue stock,<sup>4</sup> and when specific performance is sought, the seller or the corporation has disposed of all his stock, equity may decree compensation in lieu of specific performance.

If the defendant has voluntarily made specific performance on his part impracticable, either after the suit for specific performance has been begun, or before such suit has been begun, or with-

**New York.** Sternberger v. McGovern, 56 N. Y. 12; Hatch v. Cobb, 4 Johns. Ch. (N. Y.) 559.

**North Dakota.** Knudtson v. Robinson, 18 N. D. 12, 118 N. W. 1051.

**Oregon.** Cartwright v. Oregon Electric Ry., 88 Or. 596, 171 Pac. 1055.

**Washington.** Morgan v. Bell, 3 Wash. 554, 16 L. R. A. 614, 28 Pac. 925; Cunningham v. Duncan, 4 Wash. 506, 30 Pac. 647.

<sup>3</sup> Van Keuren v. Siedler, 73 N. J. Eq. 239, 66 Atl. 920.

<sup>4</sup> Heron v. Peisch, 240 Mo. 221, 144 S. W. 413 (against heirs of promisor).

Contra, see obiter in McMahon v. Plumb, 90 Conn. 281, 96 Atl. 958; and for a former opinion in a suit for specific performance, see McMahon v. Plumb, 88 Conn. 547, 92 Atl. 113.

<sup>1</sup> Columbus & Toledo Ry. v. Steinfeld, 42 O. S. 449.

<sup>2</sup> United States. Pratt v. Law, 13 U. S. (9 Cranch) 456, 3 L. ed. 791.

**Alabama.** Birmingham National Bank v. Roden, 97 Ala. 404, 11 So. 883.

**Connecticut.** Thresher v. Stonington Savings Bank, 68 Conn. 201, 36 Atl. 38.

**Florida.** Freeman v. Tucker, — Fla. —, 84 So. 174.

**Iowa.** Cornell v. Rodabaugh, 117 Ia. 287, 94 Am. St. Rep. 298, 90 N. W. 599.

**Massachusetts.** Milkman v. Ordway, 106 Mass. 232; Chaffee v. Middlesex Ry., 146 Mass. 224, 16 N. E. 34; Wentworth v. Manhattan Market Co., 218 Mass. 91, 106 N. E. 118.

**New York.** Woodcock v. Bennet, 1 Cow. (N. Y.) 711, 13 Am. Dec. 568.

**Oklahoma.** Ball v. White, 50 Okla. 429, 150 Pac. 901.

<sup>3</sup> Wonson v. Fenno, 129 Mass. 405; Chaffee v. Middlesex Ry., 146 Mass. 224, 16 N. E. 34.

<sup>4</sup> Birmingham National Bank v. Roden, 97 Ala. 404, 11 So. 883.

out the knowledge of the plaintiff, compensation will be granted in place of specific performance.<sup>5</sup> If a vendor has sold realty to a third person, after the purchaser has brought a suit for specific performance of a contract for the sale thereof, equity will retain such case for compensation.<sup>6</sup> An action was brought to enforce specific performance of a contract to maintain and operate a railroad on a given route. Before final decree was rendered the original line of the railroad was permitted to decay so that it could not be used, the business of the road being transferred to a new line. It was held that, while specific performance had become impracticable, compensation should be decreed.<sup>7</sup>

If the court of equity has discretion in the particular case to grant specific performance or to deny it,<sup>8</sup> and equity refuses specific performance on the ground that the decree would work a hardship on the defendant out of proportion to the benefit conferred upon the plaintiff,<sup>9</sup> or on the ground that it would be impracticable to enforce performance specifically,<sup>10</sup> as in case of a contract to furnish support, where the disposition of the parties thereto makes specific performance impracticable,<sup>11</sup> compensation may be awarded in place of specific performance.

**§ 3359. Effect of reformed procedure.** If equity is administered by a court which has no common-law powers and which is limited to equity cases, the expression "jurisdiction" is not misleading, when used in the discussion of the question of the power of equity to grant compensation in place of specific performance, since the court would not have had jurisdiction even in the limited sense of the term, to entertain an action for the recovery of money only, although based on the same facts as those which are used as a ground for specific performance. In jurisdictions in which law and equity are administered by the same court, and especially in jurisdictions in which the plaintiff need only set up the facts which

<sup>5</sup> *Chapman v. Mad River & Lake Erie Ry.*, 6 O. S. 119; *Fleming v. Ellison*, 124 Wis. 36, 102 N. W. 398.

<sup>6</sup> *Fleming v. Ellison*, 124 Wis. 36, 102 N. W. 398.

<sup>7</sup> *Chapman v. Mad River & Lake Erie Ry.*, 6 O. S. 119.

<sup>8</sup> See §§ 3346 et seq.

<sup>9</sup> *Chicago Sanitary District v. Martin*, 227 Ill. 260, 81 N. E. 417; *Linthicum v.*

*Washington, Baltimore & Annapolis Electric Ry.*, 124 Md. 263, 92 Atl. 917.

<sup>10</sup> *Hathaway v. Hathaway*, 161 Mich. 13, 125 N. W. 683; *Bryant Timber Co. v. Wilson*, 151 N. Car. 154, 65 S. E. 932.

<sup>11</sup> *Hathaway v. Hathaway*, 161 Mich. 13, 125 N. W. 683 (order to pay money in lieu of support).

constitute his cause of action, whether such provision is found in the code of civil procedure or in legislation of a more limited scope, a somewhat different question arises. In cases of this sort, the court has jurisdiction of an action for the recovery of money only; and if the plaintiff has set up his cause of action in ordinary language, he has complied with the terms of the statute, and the court should give him the relief to which his pleading and his evidence shows that he is entitled. The only practical question that can arise is as to the right of the defendant to a trial by jury; and in a court which has both common-law and equity powers, this is merely a matter of procedure. In accordance with these principles, it has been said that the plaintiff may seek relief in the alternative, whether in law or in equity;<sup>1</sup> that the rule that damages could not be recovered in a suit which was brought originally for specific performance if the plaintiff knew, when he brought such suit, that specific performance could not be had, is abrogated by the Code;<sup>2</sup> and that equity may grant compensation in an action for specific performance, even though plaintiff may have had reason to know, when he brought the suit for specific performance, that he could not have obtained such relief.<sup>3</sup> Compensation has been given even to a party guilty of laches, which prevents him from obtaining specific performance, where the period of limitations has elapsed pending the suit in equity.<sup>4</sup>

In some cases, however, it has been held that equity will not give compensation in cases of this sort, although the court had common-law powers as well as equity powers, and although the rules of pleading merely required the plaintiff to set up the facts in ordinary language.<sup>5</sup> As this result has been reached where the question was presented by demurrer to the petition or complaint, and where, accordingly, the question of right to a jury trial was

<sup>1</sup> *Stramel v. Hawes*, 97 Kan. 120, 154 Pac. 232; *Sternberger v. McGovern*, 56 N. Y. 12; *Mitchell v. Sheppard*, 13 Tex. 484.

<sup>2</sup> *Stramel v. Hawes*, 97 Kan. 120, 154 Pac. 232.

<sup>3</sup> *Connecticut. McMahon v. Plumb*, 90 Conn. 281, 96 Atl. 958 (obiter: as facts entitling plaintiff to damages were not pleaded).

<sup>4</sup> *Kansas. Stramel v. Hawes*, 97 Kan. 120, 154 Pac. 232.

*New York. Sternberger v. McGovern*, 56 N. Y. 12.

*Texas. Mitchell v. Sheppard*, 13 Tex. 484.

*Wisconsin. Hopkins v. Gilman*, 22 Wis. 476; *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532.

<sup>5</sup> *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532.

<sup>6</sup> *Horn v. Ludington*, 32 Wis. 73; *Park v. Minneapolis, St. Paul & Sault St. Marie Ry.*, 114 Wis. 347, 89 N. W. 532.

not involved,<sup>6</sup> the court must have applied the doctrine on the theory of the case in its most rigid form; and it must have held that, since the plaintiff had thought that he was suing in equity for specific performance, he could not be entitled to any relief in that action; but that such action should be dismissed and the plaintiff should be compelled to institute another action based on the theory of the recovery of a money judgment.

Even the courts which have, in the past, been most unwilling to retain the case for compensation if the plaintiff has brought his suit on the theory that he was entitled to specific performance, now take the position that, since the court has power to grant relief at law, or in equity, compensation can be granted in such a suit as long as the right of the defendant to a trial by jury is not violated.<sup>7</sup>

**§ 3360. Restitution in equity.** If specific performance can not be granted, the party who has furnished a part, or all, of the consideration in reliance upon such contract, may have restitution in equity.<sup>1</sup> Relief of this sort may be justified historically, in part, since the remedy at law would be in quasi-contract;<sup>2</sup> and relief of this sort was originally equitable rather than legal.<sup>3</sup> It may also be justified for the reason that equity can give relief by granting a lien upon the property, which is the subject-matter of the contract. If a contract to convey realty can not be enforced specifically, the purchaser may have compensation for the value of improvements made by him upon the realty contracted for, and may have a lien therefor declared upon such realty.<sup>4</sup> If the vendor repudiates the

<sup>6</sup> *Horn v. Ludington*, 32 Wis. 73; *Park v. Minneapolis, St. Paul & Sault St. Marie Ry.*, 114 Wis. 347, 89 N. W. 532.

In other Wisconsin cases, compensation has been granted, see note 3, this section.

<sup>7</sup> *McLennan v. Church*, 163 Wis. 411, 158 N. W. 73.

<sup>1</sup> *United States. Pratt v. Law*, 13 U. S. (9 Cranch) 456, 3 L. ed. 791.

*Illinois. Ranson v. Ranson*, 233 Ill. 369, 84 N. E. 210.

*Ohio. Williams v. Champion*, 6 Ohio 169.

*Oklahoma. Superior Oil & Gas Co. v. Mehlin*, 25 Okla. 809, 108 Pac. 545.

*Oregon. Hodgson v. Martin*, 90 Or. 105, 166 Pac. 929, 175 Pac. 671.

<sup>2</sup> See §§ 1493 et seq.

<sup>3</sup> See §§ 29 et seq.

<sup>4</sup> *England. Rose v. Watson*, 10 H. L. Cas. 672.

*United States. King v. Thompson*, 38 U. S. (13 Pet.) 127, 10 L. ed. 91.

*Alabama. Aday v. Echols*, 18 Ala. 353, 52 Am Dec. 225; *Allen v. Young*, 88 Ala. 338, 6 So. 747; *Powell v. Higley*, 90 Ala. 103, 7 So. 440.

*Kentucky. Bobbitt v. James*, 148 Ky. 244, 146 S. W. 431.

*Ohio. Williams v. Champion*, 6 Ohio 169.

contract, the purchaser may have compensation and a lien for the part of the purchase money paid in and the value of the improvements made.<sup>5</sup> This relief can be given even where there is no personal liability on the part of the party against whose property such lien is awarded.<sup>6</sup> In the cases in which equity refuses to make restitution, the reason for such refusal is usually that the party who seeks restitution has no right thereto either in law or in equity,<sup>7</sup> as where the party who seeks restitution is himself in default,<sup>8</sup> or where restitution is sought for expenditures which were not required by the terms of the contract, but which were made voluntarily to subserve the interests of the party who now seeks restitution therefor.<sup>9</sup>

**§ 3361. Partial default by plaintiff—Specific performance with compensation granted.** As has already been said, equity, by reason of its power to grant compensation to the defendant in the same decree in which it grants specific performance to the plaintiff, recognized the doctrine of substantial performance before the courts of common law did; and they held that a plaintiff, who had performed substantially but not literally, and who has attempted to perform in good faith, could have specific performance against an unwilling defendant, although such defendant could have compensation for such deficiency.<sup>1</sup>

**Oklahoma.** Superior Oil & Gas Co. v. Mehlin, 25 Okla. 809, 108 Pac. 545.

**Pennsylvania.** Masson's Appeal, 70 Pa. St. 26.

**Tennessee.** Hilton v. Duncan 41 Tenn. (1 Coldw.) 313.

<sup>5</sup> Tyler v. Cate, 29 Or. 515, 45 Pac. 800.

<sup>6</sup> King v. Thompson, 38 U. S. (13 Pet.) 128, 10 L. ed. 91.

<sup>7</sup> Gardner Valve Manufacturing Co. v. Halyburton, 87 N. J. Eq. 689, 102 Atl. 893.

<sup>8</sup> Findley v. Koch, 126 Ia. 131, 101 N. W. 766; Scott v. Barber, 14 Ohio 547.

<sup>9</sup> Lauderdale Power Co. v. Perry, 202 Ala. 394, 80 So. 476.

<sup>1</sup> England. Calcraft v. Roebuck, 1 Ves. Jr. 221; Guest v. Homfray, 5 Ves. Jr. 818 (obiter); Dyer v. Hargrave, 10

Ves. Jr. 505; McQueen v. Farquhar, 11

Ves. Jr. 467; Stapylton v. Scott, 13

Ves. Jr. 425; Cleaton v. Gower, Cases Temp. Finch 164; Howland v. Norris, 1 Cox Ch. 59.

**United States.** Hepburn v. Auld, 9 U. S. (5 Cranch) 262, 3 L. ed. 96.

**Illinois.** D'Wolf v. Pratt, 42 Ill. 198; Buchhauser v. Yudelsohn, 287 Ill. 138, 122 N. E. 100.

**Kansas.** Keepers v. Yocum, 84 Kan. 554, Ann. Cas. 1912A, 748, 114 Pac. 1063.

**Kentucky.** Coleman v. Meade, 76 Ky. (13 Bush) 358.

**Maryland.** Foley v. Crow, 37 Md. 51; Hammer v. Westphal, 120 Md. 15, 87 Atl. 488.

**New Jersey.** Van Blarcom v. Hopkins, 63 N. J. Eq. 466, 52 Atl. 147.

A vendor may have specific performance of a contract for the sale of land, in case the deficiency in area, whether due to failure of title or not, is relatively slight in proportion to the amount of realty, and if the tract which is thus deficient is not material to the enjoyment of the rest of the property.<sup>2</sup> Specific performance has been granted to the vendor, if he has attempted to perform in good faith, where the deficiency is one foot frontage out of about two hundred and forty,<sup>3</sup> or of about one-tenth of an acre to a half an acre out of twelve acres which were not bought for a specific purpose,<sup>4</sup> or two and one-half acres out of one hundred and fourteen acres,<sup>5</sup> or seven acres out of two hundred and eighty acres,<sup>6</sup> or ten acres out of two hundred and twenty-four,<sup>7</sup> or twenty

**New York.** Heckmann v. Pinkney, 81 N. Y. 211.

**North Carolina.** Shaw v. Vincent, 64 N. Car. 690.

**Oregon.** McCourt v. Johns, 33 Or. 561, 53 Pac. 601; Heltzel v. Baird, 90 Or. 156, 175 Pac. 851.

**South Carolina.** Alderman v. McKnight, 95 S. Car. 245, 78 S. E. 982.

**Tennessee.** Charles B. James Land & Investment Co. v. Vernon, 129 Tenn. 637, 52 L. R. A. (N.S.) 959, 168 S. W. 156.

**Virginia.** Farris v. Hughes, 89 Va. 930, 17 S. E. 518.

**West Virginia.** Creigh v. Boggs, 19 W. Va. 240; Morgan v. Brast, 34 W. Va. 332, 12 S. E. 710.

For a discussion of substantial performance of contracts for the sale of realty, see § 2785.

"It is much too late to contend that every variance from the description will enable a man to resist performance. The principle is, that, if he gets substantially that for which he bargains, he must take a compensation for a deficiency in the value." Dyer v. Hargrave, 10 Ves. Jr. 505.

If A has agreed to execute a conveyance of a certain tract of land to B, A performs substantially and possibly literally, by tendering such deed,

although A is only a mortgagee holding under a conveyance, which is absolute on its face, if B has assumed and agreed to pay such mortgage deed and the payment which B has agreed to make to A is for the amount of the deed. Fouts v. Foudray, 31 Okla. 221, 38 L. R. A. (N.S.) 251, Ann. Cas. 1913E, 301, 120 Pac. 960.

<sup>2</sup>**England.** Calcraft v. Roebuck, 1 Ves. Jr. 221.

**United States.** Hepburn v. Auld, 9 U. S. (5 Cranch) 262, 3 L. ed. 96.

**Maryland.** Hammer v. Westphal, 120 Md. 15, 87 Atl. 488.

**Oregon.** Heltzel v. Baird, 90 Or. 156, 175 Pac. 851.

**South Carolina.** Alderman v. McKnight, 95 S. Car. 245, 78 S. E. 982.

**Tennessee.** Charles B. James Land & Investment Co. v. Vernon, 129 Tenn. 637, 52 L. R. A. (N.S.) 959, 168 S. W. 156.

<sup>3</sup>**Hammer v. Westphal**, 120 Md. 15, 87 Atl. 488.

<sup>4</sup>**Heltzel v. Baird**, 90 Or. 156, 175 Pac. 851.

<sup>5</sup>**Keepers v. Yocum**, 84 Kan. 554, Ann. Cas. 1912A, 748, 114 Pac. 1063.

<sup>6</sup>**Farris v. Hughes**, 89 Va. 930, 17 S. E. 518.

<sup>7</sup>**McCourt v. Johns**, 33 Or. 561, 53 Pac. 601.

acres out of three hundred acres,<sup>8</sup> or seven-foot frontage out of one-hundred-foot frontage, the area not being material to the purpose for which the land was bought,<sup>9</sup> or of twelve acres out of about one hundred and twenty-seven acres,<sup>10</sup> at least if such deficiency is in a tract which is not continuous with the main tract and which is not material to the enjoyment thereof.<sup>11</sup>

A vendor who has performed in good faith may have specific performance in spite of the fact that the premises are encumbered in violation of the terms of the contract, if such encumbrances are comparatively slight, or if they can be removed by the application of the purchase money thereto.<sup>12</sup> If the encumbrance is relatively trivial, specific performance has been granted, although such encumbrance could not be discharged by the payment of money,<sup>13</sup> as where the land was subject to an easement of an adjoining property owner to take water from a spring thereon, through a pipe.<sup>14</sup>

On the same principle specific performance with compensation has been granted where there are slight defects in the quality or condition of the premises,<sup>15</sup> as where the premises are slightly out of repair,<sup>16</sup> or where some of the fixtures are lacking,<sup>17</sup> or where the premises are out of repair and some of the fixtures are lacking.<sup>18</sup>

As in the case of contracts generally,<sup>19</sup> little objection can be made to the doctrine of substantial performance, as stated in its abstract form. In a world in which perfection is as rare as in ours, a refusal to enforce a contract except where there was per-

<sup>8</sup> *Morgan v. Brast*, 34 W. Va. 332, 12 S. E. 710.

<sup>9</sup> *Van Blarcom v. Hopkins*, 63 N. J. Eq. 466, 52 Atl. 147.

<sup>10</sup> *Charles B. James Land & Investment Co. v. Vernon*, 129 Tenn. 637, 52 L. R. A. (N.S.) 959, 168 S. W. 156.

<sup>11</sup> *Charles B. James Land & Investment Co. v. Vernon*, 129 Tenn. 637, 52 L. R. A. (N.S.) 959, 168 S. W. 156.

<sup>12</sup> *England. Horniblow v. Shirley*, 13 Ves. Jr. 81.

*Illinois. Buchhauser v. Yudelson*, 287 Ill. 138, 122 N. E. 100.

*Kansas. Guild v. Atchison, Topeka & Santa Fe Ry.*, 57 Kan. 70, 57 Am. St. Rep. 312, 33 L. R. A. 77, 45 Pac. 82.

*Massachusetts. Mansfield v. Wiles*, 221 Mass. 75, 108 N. E. 901.

*Ohio. Rife v. Lybarger*, 49 O. S. 422, 17 L. R. A. 403, 31 N. E. 768.

<sup>13</sup> *Melick v. Cross*, 62 N. J. Eq. 545, 51 Atl. 16.

<sup>14</sup> *Melick v. Cross*, 62 N. J. Eq. 545, 51 Atl. 16.

<sup>15</sup> *Dyer v. Hargrave*, 10 Ves. Jr. 505; *Towner v. Tickner*, 112 Ill. 217; *Smyth v. Sturges*, 108 N. Y. 495, 15 N. E. 544 (semble).

<sup>16</sup> *Dyer v. Hargrave*, 10 Ves. Jr. 505.

<sup>17</sup> *Smyth v. Sturges*, 108 N. Y. 495, 15 N. E. 544 (semble).

<sup>18</sup> *Towner v. Tickner*, 112 Ill. 217.

<sup>19</sup> See § 2783.

and literal performance on the part of the plaintiff would result in the practical invalidity of most transactions; and, in many cases, the forfeiture of the rights of one who did his best to perform and who performed in such a way as to give to the adversary party the practical benefit for which he contracted. Rightly, or wrongly, the courts decided long ago that it was more advisable to relax the standard of performance than to try to force human beings to perform literally. In its practical application, however, the doctrine of substantial performance is extended to cases in which there is a decided variance between the terms of the contract and the performance which is tendered, and in which the defendant is, as a matter of fact, unwilling to perform, although his refusal is not always due to the plaintiff's failure to perform and is not always actuated by the highest motives. Even in cases in which the defendant is apparently acting in perfect good faith in refusing to accept a defective performance the court substitutes its ideas for his, and compels him to accept a performance for which he did not contract and with which he is not satisfied, but which the court believes should be regarded by him as immaterial, in spite of his personal feelings.

**§ 3362. Partial default by plaintiff—Specific performance refused.** Even the courts of equity refuse, in theory at least, to make contracts for the parties, or to force, upon an unwilling purchaser, an obligation which he has not assumed; and, accordingly, if the vendor is not able to perform at least substantially, he can not have specific performance, although he is ready to make compensation.<sup>1</sup> A deficiency in area or title which is material, either because of its amount, or because it will affect the enjoyment of the rest of the premises in a material way, will prevent the vendor from having specific performance with compensation.<sup>2</sup> To have

<sup>1</sup> England. *Fildes v. Hooker*, 3 Madd. 193.

Ireland. *Prendergast v. Eyre*, 2 Hogan 78, 81; *Arnold v. Arnold*, L. R. 14 Ch. Div. 270; *Peers v. Lumbert*, 7 Beav. 546; *Perkins v. Ede*, 16 Beav. 193.

Iowa. *Olson v. Rogness*, 173 Ia. 331, 155 N. W. 301 (obiter).

Missouri. *Hill v. Rich Hill Coal Mining Co.*, 119 Mo. 9, 24 S. W. 223.

North Carolina. *Trimmer v. Gorman*, 129 N. Car. 161, 39 S. E. 804.

Tennessee. *Reed v. Noe*, 17 Tenn. (9 Yerg.) 283; *Wood v. Mason*, 42 Tenn. (2 Coldw.) 251.

If he is not ready to make compensation, specific performance will be denied. *McCann v. Ware*, — Fla. —, 87 So. 57.

<sup>2</sup> *Prendergast v. Eyre*, 2 Hogan 79; *Arnold v. Arnold*, L. R. 14 Ch. Div.

this affect the deficiency may be of a considerable portion of the land, as a deficiency of twenty-five acres out of seventy.<sup>3</sup> A failure of an undivided interest in the entire tract is sufficient to prevent specific performance.<sup>4</sup> Failure of title to a very small part of the land may prevent specific performance, if such part were material to the enjoyment of the entire tract,<sup>5</sup> as where failure of title to a small strip of land cut the rest of the property off from a public road,<sup>6</sup> or the title to only twelve acres out of seven hundred acres failed, but it was likely that in the hands of another owner such twelve acres would be used for a brickyard and for building a number of buildings.<sup>7</sup> If there is a considerable deficiency in area, and there is a substantial interference with the enjoyment of the rest of the property,<sup>8</sup> as where there is a deficiency of seven acres out of forty-one, cutting the rest of the tract off from a public road,<sup>9</sup> specific performance will be refused.

If there is a substantial encumbrance upon the realty which can not be removed by the application of the purchase money,<sup>10</sup> as where there is an outstanding right of dower,<sup>11</sup> or where the encumbrances exceed the purchase price,<sup>12</sup> specific performance can not be had.

A purchaser who is unable to perform his contract substantially can not have specific performance with compensation.<sup>13</sup> If he has agreed to pay in stock, and is unable to do so, he can not have specific performance with a decree for compensation in money.<sup>14</sup>

**§ 3363. Defendant in default—Partial specific performance, with compensation—Plaintiff ignorant of defendant's inability to perform—Minor variance.** If the party who is not in default,

270; *Peers v. Lumbert*, 7 Beav. 546; *Perkins v. Ede*, 16 Beav. 193; *Hill v. Rich Hill Coal Mining Co.*, 119 Mo. 9, 24 S. W. 223; *Reed v. Noe*, 17 Tenn. (9 Yerg.) 283; *Wood v. Mason*, 42 Tenn. (2 Coldw.) 251.

<sup>3</sup> *Reed v. Noe*, 17 Tenn. (9 Yerg.) 283.

<sup>4</sup> *Wood v. Mason*, 42 Tenn. (2 Coldw.) 251.

<sup>5</sup> *Perkins v. Ede*, 16 Beav. 193; *Knatchbull v. Grueber*, 1 Madd. Ch. 153.

<sup>6</sup> *Perkins v. Ede*, 16 Beav. 193.

<sup>7</sup> *Knatchbull v. Grueber*, 1 Madd. Ch. 153.

<sup>8</sup> *Arnold v. Arnold*, L. R. 14 Ch. Div. 270.

<sup>9</sup> *Arnold v. Arnold*, L. R. 14 Ch. Div. 270.

<sup>10</sup> *Fildes v. Hooker*, 3 Madd. 193; *Hinckley v. Smith*, 51 N. Y. 21; *Trimmer v. Gorman*, 129 N. Car. 161, 39 S. E. 804.

<sup>11</sup> *Trimmer v. Gorman*, 129 N. Car. 161, 39 S. E. 804.

<sup>12</sup> *Hinckley v. Smith*, 51 N. Y. 21.

<sup>13</sup> *Powell v. Adler*, —Okla. —, 172 Pac. 55.

<sup>14</sup> *Powell v. Adler*. — Okla. —, 172 Pac. 55.

seeks specific performance against the party who is in default, but who is not able to perform literally, and the party who is not in default does not seek compensation for the default of the defendant, he is entitled to specific performance, if the case is of a type in which specific performance would have been granted if the court could have compelled the defendant to perform literally.<sup>1</sup>

If the plaintiff seeks specific performance but demands compensation because of the inability of the defendant to perform literally, a question is presented which is different, not only from the case in which plaintiff seeks no compensation, but also from the case in which the party who is in default is seeking specific performance and wishes to make compensation.<sup>2</sup> Since the plaintiff demands compensation, the defendant will not receive all that he bargained for; and, on the other hand, it is impracticable to attempt to compel the defendant to do what he agreed to do. While the act of a court of equity, in granting a decree of this sort, bears some resemblance to making and enforcing a new contract for the parties, the courts have taken the position that this is not the case, since the defendant is not compelled to convey anything more than he agreed to convey, although he is compelled from the necessity of the case, to convey less; and the plaintiff pays at the contract rate for what he receives. At the same time the court does not regard the wording of the contract alone, nor does it enforce the contract mechanically. It regards the circumstances of the case, and it gives this relief only where the plaintiff did not know of the defect in question. In cases of this sort, however, in which the plaintiff believed when the contract was made, that the defendant would perform, the plaintiff may have specific performance with compensation,<sup>3</sup> subject to some restrictions which

<sup>1</sup> *Morris v. Basnight*, 179 N. Car. 298, 102 S. E. 389.

<sup>2</sup> See §§ 3361 et seq.

<sup>3</sup> *England*. *Cleaton v. Gower*, Cases Temp. Finch. 164; *Barnes v. Wood*, L. R. 8 Eq. 424.

*United States*. *Pratt v. Law*, 13 U. S. (9 Cranch) 456, 3 L. ed. 791; *Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383.

*Arkansas*. *Osborne v. Fairley*, 138 Ark. 433, 211 S. W. 917.

*Illinois*. *Eppstein v. Kuhn*, 225 Ill. 115, 10 L. R. A. (N.S.) 117, 80 N. E. 80; *Mitchell v. White*, 295 Ill. 135, 128 N. E. 803 (obiter); *Mitchell v. White*, 295 Ill. 135, 128 N. E. 803.

*Massachusetts*. *Cashman v. Bean*, 226 Mass. 198, 115 N. E. 574; *Melamed v. Donabedian*, — Mass. —, 130 N. E. 110; *Ratshesky v. Piscopo*, — Mass. —, 131 N. E. 449.

*Minnesota*. *Melin v. Woolley*, 103 Minn. 498, 22 L. R. A. (N.S.) 595, 115 N. W. 654, 946.

will be discussed later. It may be added in this connection that this is a problem of enforcing the contract as such; and it is not a problem as to the effect of fraud on the part of the defendant. In the latter case, whatever the plaintiff's right to enforce the contract, and to recover damages in an action in tort,<sup>4</sup> the plaintiff can not avoid the contract in part because of fraud or misrepresentation, and enforce the rest thereof.<sup>5</sup> The fact that the plaintiff has refused a deed because of a defect in the title, does not waive his right to have specific performance with a decree for compensation.<sup>6</sup>

This relief has been given where there is a very considerable deficiency, as where there has been a deficiency of one-sixth,<sup>7</sup> one-fourth,<sup>8</sup> seven-seventeenths,<sup>9</sup> one-half,<sup>10</sup> two-thirds,<sup>11</sup> or four-fifths.<sup>12</sup>

Such relief has been given where the contract called for the conveyance of a fee and the defendant is able to convey only a life estate.<sup>13</sup>

A defendant who assumes to sell a tract of property in which he owns, in fact, only an undivided interest, can be compelled to perform specifically with compensation, proportionate to the interest which the plaintiff fails to receive.<sup>14</sup> Relief has been given against a defendant who owns eleven-twelfths of the property,

Missouri. *Barthel v. Engle*, 261 Mo. 307, 168 S. W. 1154; *Tebeau v. Ridge*, 261 Mo. 547, L. R. A. 1915C, 367, 170 S. W. 871.

New Jersey. *Hostetter v. Merrick*, — N. J. Eq. —, 112 Atl. 487.

Washington. *Baldwin v. Brown*, 48 Wash. 303, 93 Pac. 413.

West Virginia. *Neill v. McClung*, 71 W. Va. 458, 76 S. E. 878.

Wisconsin. *Docter v. Hellberg*, 65 Wis. 415, 27 N. W. 176.

<sup>4</sup> See § 359. *Rutherford v. Acton-Adams* [1915], A. C. 866. (Innocent misrepresentation that there were two hundred thirty two miles of fencing when there were only one hundred sixty four.)

<sup>5</sup> See § 353.

<sup>6</sup> *Epstein v. Kuhn*, 225 Ill. 115, 80 N. E. 80.

<sup>7</sup> *Garrett v. Goff*, 61 W. Va. 221, 56 S. W. 351.

<sup>8</sup> *Hazzard v. Morrison*, 104 Tex. 589, 143 S. W. 142.

<sup>9</sup> *Milam v. Williams*, 73 W. Va. 467, 80 S. E. 770.

<sup>10</sup> *Burrow v. Scammell*, 19 Ch. D. 175.

<sup>11</sup> *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch. Div. 236.

<sup>12</sup> *Bogan v. Daugdrill*, 51 Ala. 312.

<sup>13</sup> *Barnes v. Wood*, L. R. 8 Eq. 424.

<sup>14</sup> *Cochran v. Blout*, 161 U. S. 350, 40 L. ed. 729; *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340; *Melin v. Woolley*, 103 Minn. 498, 22 L. R. A. (N.S.) 595, 115 N. W. 654, 946; *Keator v. Brown*, 57 N. J. Eq. 600, 42 Atl. 278; *Farrell v. Bork*, 76 N. J. Eq. 615, 79 Atl. 897.

which he has agreed to convey,<sup>16</sup> or three-fourths,<sup>16</sup> or one-half.<sup>17</sup> The right to this relief is especially clear where the plaintiff is willing to perform in full.<sup>18</sup>

If the contract provides for the conveyance of property, free from encumbrances and such property is encumbered, the purchaser may have specific performance, with compensation, for the encumbrance,<sup>19</sup> even if the encumbrance is one the value of which is not measured by the parties in money.<sup>20</sup> An exception to this is found in some jurisdictions, where the encumbrance consists of the inchoate right of dower of the wife of the vendor,<sup>21</sup> or where it is impracticable to compute the value of the encumbrance in money.<sup>22</sup>

**§ 3364. Inchoate dower as encumbrance.** If the encumbrance on the property consists of an inchoate right of dower, and the party who is entitled to such dower has not entered into a valid obligation to release such dower right, a decree for specific performance requiring such party to release such dower right, can not be entered,<sup>1</sup> since there is no contractual obligation on the part of such party to release such right, and in the absence of a contract, no rule of law requires such release. If such party is made a party to the suit, for specific performance, however, and admits the execution of the contract and fails to raise the question at the trial, a decree against such party for specific performance will not be reversed, although the contract shows on its face that such party did not execute it.<sup>2</sup>

If a married man has entered into a contract for the sale of land in which his wife has an interest, whether dower or some other interest, the original practice of the courts of equity was to render a decree of specific performance against the husband, on

<sup>16</sup> *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340.

<sup>16</sup> *Farrell v. Bork*, 76 N. J. Eq. 615, 79 Atl. 897.

<sup>17</sup> *Melin v. Woolley*, 103 Minn. 498, 22 L. R. A. (N.S.) 595, 115 N. W. 654, 946.

<sup>18</sup> *Morris v. Basnight*, 179 N. Car. 298, 102 S. E. 389 (defendant had half interest).

<sup>19</sup> *Osborne v. Fairley*, 138 Ark. 433, 211 S. W. 917; *Mitchell v. White*, 295 Ill. 135, 128 N. E. 803 (obiter).

<sup>20</sup> *Shepherd v. Croft* [1911], 1 Ch.

521; *Cashman v. Bean*, 226 Mass. 198, 115 N. E. 574.

<sup>21</sup> See § 3364.

<sup>22</sup> See § 3366.

<sup>1</sup> *Murphy v. Hohne*, 73 Fla. 803, L. R. A. 1917F, 594, 74 So. 973 (obiter); *Mix v. Baldwin*, 156 Ill. 313, 40 N. E. 959 (dower right); *Casstevens v. Casstevens*, 227 Ill. 547, 81 N. E. 709 (obiter); *Stromme v. Rieck*, 107 Minn. 177, 119 N. W. 948.

<sup>2</sup> *Schoonmaker v. Bonnie*, 119 N. Y. 565, 23 N. E. 1106.

the theory that his wife's consent in advance would be presumed,<sup>3</sup> and to require him to convey such realty and to induce his wife to execute such conveyance.<sup>4</sup> This decree was rendered where the husband did not claim that he was unable to induce his wife to join in the conveyance.<sup>5</sup> In case of his inability to induce his wife to join in the conveyance, he could be punished for contempt, by imprisonment, if necessary. In this way, in most cases, the wife was coerced indirectly to release a right which she had not agreed to release; and accordingly it is held, at modern equity, that the husband will not be ordered to secure his wife's execution of such conveyance.<sup>6</sup>

If the contract of sale is conditioned on the assent of the wife, it is clear that the purchaser can not have specific performance against the vendor or his wife;<sup>7</sup> and he can not have specific performance against the vendor with compensation for the value of such dower.<sup>8</sup>

If the contract is not conditioned on the assent of the party who is entitled to such inchoate dower right, it is held by the weight of modern authority that specific performance will be given with compensation to the purchaser for the value of such dower right.<sup>9</sup> In some jurisdictions this takes the form of permitting the pur-

<sup>3</sup> Hall v. Hardy, 3 P. Williams 187.

<sup>4</sup> Hall v. Hardy, 3 P. Williams 187; Barrington v. Horn, 5 Vin. Abr. 547, 2 Eq. Cases 17 pl. 7; Sedgwick v. Hargrave, 2 Ves. Sr. 57; Morris v. Stephenson, 7 Ves. Jr. 474.

<sup>5</sup> Morris v. Stephenson, 7 Ves. Jr. 474.

<sup>6</sup> England. Emery v. Wase, 5 Ves. Jr. 846, S. C. 8 Ves. Jr. 505.

Delaware. Long v. Chandler, 10 Del. Ch. 339, 92 Atl. 256.

Illinois. Clark v. Jankowski, 255 Ill. 129, 99 N. E. 338.

Michigan. Weed v. Terry, 2 Dougl. (Mich.) 344, 45 Am. Dec. 257.

New Jersey. Peeler v. Levy, 26 N. J. Eq. 330.

<sup>7</sup> Venator v. Swenson, 100 Ia. 295, 69 N. W. 522.

<sup>8</sup> Schwab v. Baremore, 95 Minn. 295, 104 N. W. 10.

<sup>9</sup> Alabama. Minge v. Green, 176 Ala.

343, 58 So. 381; Parsons v. Liuza, — Ala. —, 87 So. 801.

Arkansas. Hirschman v. Forehand, 114 Ark. 436, 170 S. W. 98; Osborne v. Fairley, 138 Ark. 433, 211 S. W. 917.

Iowa. Leach v. Forney, 21 Ia. 271; Presser v. Hildenbrand, 23 Ia. 483; Union Coal Mining Co. v. McAdam, 38 Ia. 663; Noecker v. Wallingford, 133 Ia. 605, 111 N. W. 37.

Massachusetts. Woodbury v. Luddy, 96 Mass. (14 All.) 1, 92 Am. Dec. 731; Melamed v. Donabedian, — Mass. —, 130 N. E. 110.

Missouri. Tebeau v. Ridge, 261 Mo. 547, L. R. A. 1915C, 367, 170 S. W. 871 [overruling, Aiple-Hemmelmann Real Estate Co. v. Spelbrink, 211 Mo. 671, 111 S. W. 480].

North Carolina. Bethell v. McKinney, 164 N. Car. 71, 80 S. E. 162.

Wisconsin. Wright v. Young, 6 Wis. 127, 70 Am. Dec. 453.

chaser to withhold a portion of the purchase price, proportionate to the entire amount which can be claimed as dower, to be paid over on the death of the party who is entitled to such dower right.<sup>10</sup> In some jurisdictions emphasis is laid on the fact that the purchaser did not know that the vendor was married and that he expected a title free from such dower right, without the necessity of obtaining the consent of any third person.<sup>11</sup> It is proper to decree specific performance with compensation, unless the wife will join in the conveyance and thus release her inchoate dower.<sup>12</sup>

In some jurisdictions, however, specific performance against the husband with compensation for the inchoate dower right of the wife is denied.<sup>13</sup> This refusal to grant specific performance is placed on the theory that such a decree will operate as an indirect coercion of a married woman to release her inchoate dower,<sup>14</sup> on the theory that it will change the contract if compensation is given,<sup>15</sup> and on the theory that the value of inchoate dower, depending as it does not only upon the expectancy of life, but also on the relative health of the parties, is so uncertain that the amount thereof can not be estimated with sufficient accuracy.<sup>16</sup> In

<sup>10</sup> *Minge v. Green*, 176 Ala. 343, 58 So. 381; *Parsons v. Liuza*, — Ala. —, 87 So. 801; *Leach v. Forney*, 21 Ia. 271, 89 Am. Dec. 574.

<sup>11</sup> *Tebeau v. Ridge*, 261 Mo. 547, L. R. A. 1915C, 367, 170 S. W. 871 [overruling, *Aiple-Hemmelmann Real Estate Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480].

See however, *McGinness v. Brodrick*, — Mo. —, 192 S. W. 420, in which the vendor was an experienced real estate dealer; and specific performance was decreed against him, even if it would result in the sale of the land under a mortgage, and the barring of the wife's dower.

<sup>12</sup> *Martin v. Merritt*, 57 Ind. 34, 26 Am. Rep. 45.

<sup>13</sup> *Delaware. Long v. Chandler*, 10 Del. Ch. 339, 92 Atl. 256.

*Florida. Murphy v. Hohne*, 73 Fla. 803, L. R. A. 1917F, 594, 74 So. 973.

*Illinois. Cowan v. Kane*, 211 Ill. 572, 71 N. E. 1097.

*New Jersey. Stone v. Stanley*, — N. J. —, 112 Atl. 496.

*Ohio. Barnes v. Christy*, — Ohio —, 131 N. E. 352.

*Oregon. Kuratli v. Jackson*, 60 Or. 203, 38 L. R. A. (N.S.) 1195, Ann. Cas. 1914A, 203, 118 Pac. 192, 1013.

*Virginia. Aetna Insurance Co. v. Aston*, 123 Va. 327, 96 S. E. 772.

*West Virginia. Milam v. Williams*, 73 W. Va. 467, 80 S. E. 770.

<sup>14</sup> *Barbour v. Hickey*, 2 D. C. App. 207, 24 L. R. A. 763; *Riesz's Appeal*, 73 Pa. St. 485; *Haden v. Falls*, 115 Va. 779, 80 S. E. 576.

<sup>15</sup> *Barbour v. Hickey*, 2 D. C. App. 207, 24 L. R. A. 763.

<sup>16</sup> *Delaware. Long v. Chandler*, 10 Del. Ch. 339, 92 Atl. 256.

*Illinois. Humphrey v. Clement*, 44 Ill. 299; *Cowan v. Kane*, 211 Ill. 572, 71 N. E. 1097.

*New York. Sternberger v. McGovern*, 56 N. Y. 12.

some jurisdictions emphasis is laid on the fact that the purchaser knew that the vendor's wife was alive, and that she had not signed the contract.<sup>17</sup> This refusal to grant specific performance has been placed on the ground that in such cases the purchaser takes the chance of the wife's refusal to execute the deed.<sup>18</sup>

If specific performance with compensation is ever to be granted, it would seem that this is a most appropriate occasion therefor. The vendor is the one who has taken a chance on inducing his wife to release her dower; contingent dower can be estimated, on the average, as accurately as vested dower, though not, of course, in the concrete case, since it depends on two lives in the alternative, instead of one; and the only coercion which is put upon the wife is the permission to the purchaser to withhold from the purchase price an amount proportionate to the interest for which he bargained and which he did not get.

**§ 3365. Excessive variance of performance from contract.** In some cases, however, specific performance is denied under the circumstances to the party who is not in default, on the ground that there is so great a variance between the performance which is promised in the contract and the performance which can be compelled by a court of equity, that a decree will be impracticable,<sup>1</sup> or that compensation will be the main item, if such relief is given and specific performance merely an incidental item.<sup>2</sup> Specific performance has been refused where there has been a deficiency of half

**Oregon.** *Kuratli v. Jackson*, 60 Or. 203, 38 L. R. A. (N.S.) 1195, Ann. Cas. 1914A, 203, 118 Pac. 192.

**Pennsylvania.** *Riesz's Appeal*, 73 Pa. St. 485.

This refusal is based on the theory that such decree "changes the contract between the parties and \* \* \* compels the vendee to accept an imperfect title which he had not in mind when he agreed to purchase." This reasoning would be convincing if A were seeking to enforce the contract against B; but it seems inapplicable if B is attempting to enforce such contract against A. *Solomon v. Shewitz*, 185 Mich. 620, 3 A. L. R. 557, 152 N. W. 196.

<sup>17</sup> *People's Savings Bank v. Parisette*, 68 O. S. 450, 96 Am. St. Rep. 672, 67 N. E. 896; *Kuratli v. Jackson*, 60 Or. 203, 38 L. R. A. (N.S.) 1195, Ann. Cas. 1914A, 203, 118 Pac. 192; *Leo v. Deitz*, 63 Or. 261, 127 Pac. 550; *Free v. Little*, 31 Utah 449, 88 Pac. 407.

<sup>18</sup> *People's Savings Bank v. Parisette*, 68 O. S. 450, 96 Am. St. Rep. 672, 67 N. E. 896.

<sup>1</sup> *Wheatley v. Slade*, 4 Sim. 126; *Durham v. Legard*, 34 Beav. 611; *Price v. Griffith*, 1 De Gex M. & G. 80; *Corby v. Drew*, 55 N. J. Eq. 387, 36 Atl. 827.

<sup>2</sup> *Chicago, Milwaukee & St. Paul Ry. v. Durant*, 44 Minn. 361, 46 N. W. 676.

the subject-matter,<sup>3</sup> or where there is a failure of title as to more than half of the subject-matter.<sup>4</sup> Specific performance has been denied where the defendants had agreed to acquire realty from third persons, across which they were to grant a right of way to the plaintiff.<sup>5</sup>

**§ 3366. Uncertainty as to amount of compensation, etc.** Compensation has been denied, although specific performance has been given, where there was a lack of evidence as to the diminution in value due to an outstanding encumbrance,<sup>1</sup> such as a lease,<sup>2</sup> or a building restriction.<sup>3</sup> Specific performance has been denied as unfair to the defendant,<sup>4</sup> as where the exact interest of the defendant was uncertain and he might be compelled to convey a large interest for the price of a much smaller one,<sup>5</sup> or where specific performance of a contract to exchange realty will leave the co-tenant of one tract who has agreed to exchange the entire tract, as tenant in common with the adversary party and not with the other co-tenant, in the tract which he is to receive in exchange.<sup>6</sup> In a case of the latter type, it would seem that that objection was one which could be made by the party who was not in default, and not by the party whose default had caused the situation of which he is now complaining.

**§ 3367. Plaintiff's knowledge in advance of defendant's inability to perform.** Specific performance with compensation is not decreed mechanically, in accordance with the terms of the contract alone, but in accordance with the general equities of the whole transaction; and accordingly the party who is not in default can not have relief of this sort, if he knew when he entered into the contract that the defendant was not able to perform.<sup>1</sup> If the pur-

<sup>3</sup> *Durham v. Legard*, 34 Beav. 611; *Price v. Griffith*, 1 De Gex M. & G. 80. (Lease of colliery: contract also ambiguous.)

<sup>4</sup> *Corby v. Drew*, 55 N. J. Eq. 387, 36 Atl. 827.

<sup>5</sup> *Chicago, Milwaukee & St. Paul Ry. v. Durant*, 44 Minn. 361, 46 N. W. 676.

<sup>1</sup> *Rudd v. Lascelles* [1900], 1 Ch. 815; *Kuhn v. Eppstein*, 239 Ill. 555, 88 N. E. 174.

See however, § 3363.

<sup>2</sup> *Kuhn v. Eppstein*, 239 Ill. 555, 88 N. E. 174.

<sup>3</sup> *Rudd v. Lascelles* [1900], 1 Ch. 815.

<sup>4</sup> *Olson v. Lovell*, 91 Cal. 506, 27 Pac. 765; *Brisbane v. Sullivan*, 86 N. J. Eq. 411, 99 Atl. 197.

<sup>5</sup> *Brisbane v. Sullivan*, 86 N. J. Eq. 411, 99 Atl. 197.

<sup>6</sup> *Olson v. Lovell*, 91 Cal. 506, 27 Pac. 765.

<sup>1</sup> *England. Castle v. Wilkinson*, L. R. 5 Ch. 534.

*Arizona. Pauley v. Hadlock*, — Ariz. —, 188 Pac. 263.

*California. Jackson v. Torrence*, 83 Cal. 521, 23 Pac. 695.

chaser knows that the vendor has only an undivided interest, the purchaser can not have specific performance with compensation.<sup>2</sup> If a contract for the sale of a tract of land is expressly conditioned upon conveyance by all of the co-tenants,<sup>3</sup> as where some of the co-tenants are minors, and they agreed to convey on condition of the approval of such contract by the orphans' court,<sup>4</sup> specific performance can not be enforced against any of the vendors. However, knowledge of the existence of a first mortgage has been held not to prevent specific performance by a second mortgagee, of a contract to buy in such property on foreclosure proceedings under such second mortgage and convey to the mortgagor, although after such purchase by such second mortgagee, such property was sold under such first mortgage.<sup>5</sup>

**§ 3368. Conditional specific performance.** One of the great advantages which equity has over common law is that while the judgment at common law must necessarily be rigid and unyielding, and must be a judgment either in favor of the plaintiffs against the defendants, or in favor of the defendants against the plaintiffs, a decree in equity may be molded in such a way as to give full protection as to the rights of the parties as set forth in the pleadings and in the evidence. A judgment of specific performance in favor of the plaintiff may be conditioned on his performance of the covenants, of which performance on his part is due, or will be due on performance by the defendant.<sup>1</sup>

Since specific performance is discretionary and may be refused in case great hardship will result to the party against whom the relief is sought, the court may give such relief upon such terms and conditions as will prevent such hardship from resulting.<sup>2</sup> An option

**Michigan.** Wayne Woods Land Co. v. Beeman, — Mich. —, 178 N. W. 696.

**Nebraska.** Moore v. Lutjeharms, 91 Neb. 548, 136 N. W. 343.

**North Carolina.** Joyner v. Crisp, 158 N. Car. 199, 73 S. E. 1004.

**Oregon.** Wetherby v. Griswald, 75 Or. 468, 147 Pac. 388.

<sup>2</sup> Pauley v. Hadlock, — Ariz. —, 188 Pac. 263; Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695; Moore v. Lutjeharms, 91 Neb. 548, 136 N. W. 343.

<sup>3</sup> Brown v. Power, 263 Pa. St. 287, 106 Atl. 539; Affirme v. Mandel, — Pa. St. —, 111 Atl. 255.

<sup>4</sup> Brown v. Power, 263 Pa. St. 287, 106 Atl. 539; Affirme v. Mandel, — Pa. St. —, 111 Atl. 255.

<sup>5</sup> Lindholm v. Patrick, 107 Wash. 243, 181 Pac. 876.

<sup>1</sup> Holman v. Lowrance, 102 Ark. 252, 144 S. W. 190; Gilpin v. Watts, 1 Colo. 479; Bruegger v. Cartier, 29 N. D. 575, 151 N. W. 34; Watts v. Kinney, 30 Va. (3 Leigh) 272, 23 Am. Dec. 266.

<sup>2</sup> Giddings v. Seventy-Six Land & Water Co., 109 Cal. 116, 41 Pac. 788; Brewer v. Peed, 30 Ky. (7 J. J. Mar.) 230.

to sell at a certain price, given when the only money recognized by law as legal tender was gold and silver coin, will be enforced specifically after paper currency has been made a legal tender and has depreciated to one-half the value of coin, but only on condition that the purchase money is paid in the stipulated amount of coin.<sup>3</sup> If there is delay in enforcing specific performance of a contract to assign a patent-right, specific performance may be given on condition that the right of accounting be waived.<sup>4</sup> A agreed to sell realty to B. B agreed to resell to C, and A agreed to accept C. Subsequently A, understanding that the deed was to be made to C, executed and delivered such a deed, and C mortgaged to X, a bona fide mortgagee, to raise money to pay to A the unpaid purchase money. B sued for specific performance against A and to have the deed to C set aside. It was held that he could have such relief, but on condition that the mortgage to X was treated as valid.<sup>5</sup>

## VIII

### PARTIES TO SPECIFIC PERFORMANCE

**§ 3369.** By whom specific performance may be had. Specific performance may be given in a proper case, on the application of the party to the contract who is entitled to such relief.<sup>1</sup> The question of the party who is entitled to specific performance on the death of the original party to the contract depends upon the nature of the subject-matter and the relation of the decedent to the contract. If the purchaser of realty has died and specific performance is sought against the vendor, the heirs of the decedent are the parties who are entitled to bring such suit, since the performance of the contract will enure to their benefit.<sup>2</sup> They should,

<sup>3</sup> Willard v. Tayloe, 75 U. S. (8 Wall.) 557, 19 L. ed. 501.

<sup>4</sup> Harrigan v. Smith, 57 N. J. Eq. 635, 42 Atl. 579 [reversing, 40 Atl. 13].

<sup>5</sup> Fountain v. Leveque, 108 Mich. 614, 66 N. W. 575.

<sup>1</sup> Saginaw v. Consumers' Power Co., — Mich. —, 182 N. W. 146; Slattery v. Gross, 96 Or. 554, 187 Pac. 300, 190 Pac. 577; Waldron v. Waller, 65 W. Va. 605, 32 L. R. A. (N.S.) 284, 64 S. E. 964.

As to other parties, see Specific Per-

formance for and against Strangers to the Contract, by James Barr Ames, 17 Harvard Law Review 174; and Specific Performance in Connection with Receiverships, by Ralph E. Clark, 33 Harvard Law Review 64.

<sup>2</sup> Hadden v. Thompson, 118 Ga. 207, 44 S. E. 1001; Weidenbaum v. Raphael, 83 N. J. Eq. 17, 90 Atl. 683; Zeuske v. Zeuske, 62 Or. 46, 124 Pac. 203.

See also as to enforcement of antenuptial contract. Eaton v. Eaton, 233 Mass. 351, 124 N. E. 37.

however, join the personal representative of the decedent's estate, unless they are ready and willing to pay the purchase price themselves, or unless the purchaser has paid the purchase price in his lifetime, since otherwise payment must be made out of the personal estate of the decedent.<sup>3</sup> If the purchaser has devised his interest in the property, the devisee is the proper party to sue for specific performance.<sup>4</sup> If the contract is one for the sale or transfer of personal property, and specific performance thereof can be had, the personal representative of the deceased purchaser is the proper party by whom such suit should be brought.<sup>5</sup> The heirs can not maintain such suit.<sup>6</sup> If the vendor of realty has died, and it is sought to enforce specific performance against the purchaser, the personal representative of the vendor is the proper party to institute such suit, since the proceeds thereof will be paid to him.<sup>7</sup> Unless the heirs of the vendor are ready and willing to convey, they should be joined as parties in order that they may be bound by the decree ordering them to convey such realty to the purchaser.<sup>8</sup> If the vendor had brought suit for specific performance in his lifetime, and had tendered a deed and deposited it in court, it is not necessary to make his heirs parties to a suit for specific performance, since, if such decree is entered, the delivery of the deed to the purchaser will relate back to the death of the vendor, as though it were an ordinary delivery in escrow.<sup>9</sup>

If the purchaser has assigned a contract for the purchase of realty, his assignee may have specific performance in his own name.<sup>10</sup> The vendor can not attack the sufficiency of the considera-

<sup>3</sup> *Miller v. Henderson*, 10 N. J. Eq. 320.

<sup>4</sup> *Thommen v. Smith*, 88 N. J. Eq. 476, 103 Atl. 25.

<sup>5</sup> *Pair v. Pair*, 147 Ga. 754, 95 S. E. 295.

<sup>6</sup> *Pair v. Pair*, 147 Ga. 754, 95 S. E. 295.

<sup>7</sup> *Stewart v. Griffith*, 217 U. S. 323, 54 L. ed. 782; *Coles v. Feeney*, 52 N. J. Eq. 493, 29 Atl. 172.

<sup>8</sup> *Hays v. Hall*, 4 Port. (Ala.) 374, 30 Am. Dec. 530.

<sup>9</sup> *Armstrong v. Maryland Coal Co.*, 67 W. Va. 589, 69 S. E. 195.

<sup>10</sup> *United States. Lenman v. Jones*, 222 U. S. 51, 56 L. ed. 89.

*Illinois. Miedema v. Wormhoudt*, 288 Ill. 537, 123 N. E. 596.

*Maryland. Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 23 L. R. A. (N.S.) 1135, 71 Atl. 442.

*Massachusetts. Cashman v. Bean*, 226 Mass. 198, 115 N. E. 574.

*Michigan. Craig v. Crossman*, — Mich. —, 177 N. W. 400; *Cutler v. Lovinger*, — Mich. —, 180 N. W. 462.

If the contract contains a covenant against assignment, the assignee can not have specific performance. *Boyd v. Bondy*, — Wash. —, 194 Pac. 393.

tion as between the purchaser and his assignee.<sup>11</sup> If the assignee has not assumed the obligations of the contract, it is said that he can not maintain an action against the promisor, since such assignee is not bound to perform.<sup>12</sup> If one of the parties has made an assignment for the benefit of his creditors, such assignee may have specific performance.<sup>13</sup>

An execution creditor of a party to a contract who seeks to reach his debtor's interest and enforce the contract specifically can not enforce the contract unless his debtor could, and hence can not enforce it where the debtor has failed to perform conditions precedent.<sup>14</sup>

The grantee of realty can not have specific performance of a covenant with reference thereto, but which does not run with the land.<sup>15</sup>

A beneficiary may have specific performance of a contract to which he is not a party but which has been made for his benefit,<sup>16</sup> if such contract is one of which the promisee could have had specific performance if it had been made for his benefit.

**§ 3370. Against whom specific performance may be had.** In a proper case for specific performance such remedy will be given against the promisor,<sup>1</sup> or against those who claim under him, other than bona fide purchasers for value and without notice,<sup>2</sup> such as

<sup>11</sup> *Craig v. Crossman*, — Mich. —, 177 N. W. 400.

<sup>12</sup> *Lunt v. Lorscheider*, 285 Ill. 589, 121 N. E. 237.

<sup>13</sup> *Blanton v. Kentucky Distilleries & Warehouse Co.*, 120 Fed. 318.

<sup>14</sup> *Costello v. Friedman*, 8 Ariz. 215, 71 Pac. 935.

<sup>15</sup> *Luray Caverns Co. v. Kauffman*, 112 Va. 725, 38 L. R. A. (N.S.) 1207, 72 S. E. 709. (Sale of photographs.)

<sup>16</sup> *Crawford v. Wilson*, 139 Ga. 654, 44 L. R. A. (N.S.) 773, 78 S. E. 30 (injunction); *Morgan v. Sanborn*, 225 N. Y. 454, 122 N. E. 696; *In re Edmundson*, 259 Pa. St. 429, 2 A. L. R. 1150, 103 Atl. 277.

A consumer may enforce a contract between a city and an electric company which is, in part, for the benefit

of the consumer. *Saginaw v. Consumers' Power Co.*, — Mich. —, 182 N. W. 146.

<sup>1</sup> *Brown v. Western Maryland Ry.*, — W. Va. —, 4 A. L. R. 522, 99 S. E. 457.

<sup>2</sup> *England. Potter v. Sanders*, 6 Hare 1.

*District of Columbia. Kresge v. Crowley*, 47 D. C. App. 13.

*Illinois. Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265.

*Massachusetts. Melamed v. Donabedian*, — Mass. —, 130 N. E. 110.

*Michigan. White Marble Lime Co. v. Consolidated Lumber Co.*, 205 Mich. 634, 172 N. W. 603.

*Missouri. McCune v. Graves*, 273 Mo. 584, 201 S. W. 894.

*North Dakota. Horgan v. Russell*, 24 N. D. 490, 43 L. R. A. (N.S.) 1150, 140 N. W. 99.

the heirs,<sup>3</sup> or the widow of the promisor;<sup>4</sup> or purchasers with notice,<sup>5</sup> such as transferees in fraud of the rights of the party who seeks specific performance.<sup>6</sup> Specific performance can be given against one who has bought land with knowledge that there is an outstanding irrevocable option thereon, even if such option has not been accepted.<sup>7</sup> Possession under an executory contract of sale is sufficient notice to subsequent purchasers.<sup>8</sup> If the statute provides for the protection of the contract which was first recorded, and neither contract is recorded, specific performance can be given to one who has accepted an option for a nominal consideration as against one who has entered into a contract for the purchase of such property with knowledge of such prior option.<sup>9</sup> A gratuitous transfer of property by the vendor to his wife does not render specific performance impossible.<sup>10</sup>

**Vermont.** Wilkins v. Somerville, 80 Vt. 48, 130 Am. St. Rep. 906, 11 L. R. A. (N.S.) 1183, 66 Atl. 893.

**Virginia.** Wolford v. Jackson, 123 Va. 280, 96 S. E. 237.

**Wisconsin.** Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538.

<sup>3</sup> McCune v. Graves, 273 Mo. 584, 201 S. W. 894; Mueller v. Nortmann, 116 Wis. 468, 93 N. W. 538.

<sup>4</sup> Burdine v. Burdine, 98 Va. 515, 81 Am. St. Rep. 741, 36 S. E. 992.

<sup>5</sup> **Arkansas.** Vance v. Newman, 72 Ark. 359, 105 Am. St. Rep. 42, 80 S. W. 574.

**Massachusetts.** Melamed v. Donabedian, — Mass. —, 130 N. E. 110.

**Michigan.** White Marble Lime Co. v. Consolidated Lumber Co., 205 Mich. 634, 172 N. W. 603.

**New Mexico.** Jasper v. Wilson, 14 N. M. 482, 23 L. R. A. (N.S.) 982, 94 Pac. 951.

**North Dakota.** Horgan v. Russell, 24 N. D. 490, 43 L. R. A. (N.S.) 1150, 140 N. W. 99.

**Oklahoma.** Kolachny v. Galbreath, 26 Okla. 772, 38 L. R. A. (N.S.) 451, 110 Pac. 902.

**Pennsylvania.** Northern Central Ry. v. Walworth, 193 Pa. St. 207, 74 Am. St. Rep. 683, 44 Atl. 253 (corporate

stock); Henry v. Black, 210 Pa. St. 245, 105 Am. St. Rep. 802, 59 Atl. 1070.

**Vermont.** Wilkins v. Somerville, 80 Vt. 48, 11 L. R. A. (N.S.) 1183, 66 Atl. 893.

**Virginia.** Wolford v. Jackson, 123 Va. 280, 96 S. E. 237.

**Washington.** Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co., 102 Wash. 608, 173 Pac. 508.

**West Virginia.** Welch Publishing Co. v. Johnson Realty Co., 78 W. Va. 350, L. R. A. 1917A, 200, 89 S. E. 707.

<sup>6</sup> Ames v. Witbeck, 179 Ill. 458, 53 N. E. 969 (corporate stock); Henry v. Black, 210 Pa. St. 245, 105 Am. St. Rep. 802, 59 Atl. 1070; Hoberg v. McNevins, 169 Wis. 486, 173 N. W. 221.

<sup>7</sup> Horgan v. Russell, 24 N. D. 490, 43 L. R. A. (N.S.) 1150, 140 N. W. 99.

<sup>8</sup> Smith v. Bangham, 156 Cal. 359, 28 L. R. A. (N.S.) 522, 104 Pac. 689 (nominal consideration for option); Kerr v. Day, 14 Pa. St. 112, 53 Am. Dec. 526; Welch Publishing Co. v. Johnson Realty Co., 78 W. Va. 350, L. R. A. 1917A, 200, 89 S. E. 707; Sizer v. Clark, 116 Wis. 534, 93 N. W. 539.

<sup>9</sup> Smith v. Bangham, 156 Cal. 359, 28 L. R. A. (N.S.) 522, 104 Pac. 689.

<sup>10</sup> Zipperer v. Helmly, 148 Ga. 480, 97 S. E. 74; Hoberg v. McNevins, 169 Wis. 486, 173 N. W. 221.

Specific performance can not be given against bona fide purchasers of the property without notice of the contract,<sup>11</sup> whether they acquire their interests by a contract prior to,<sup>12</sup> or subsequent to,<sup>13</sup> the contract sought to be enforced specifically. If A has entered into a contract to devise his property to X, and A subsequently marries B, who does not know of such contract, B is given the same protection as a bona fide purchaser for value, and specific performance of such contract will not be given as against her interests.<sup>14</sup> A subsequent purchaser who has assumed a debt in consideration of his purchase, and has given his note for part of the purchase price and has made valuable improvements, before he has notice of the prior contract, will be protected as a bona fide purchaser.<sup>15</sup> If the owner of property which is encumbered by a mortgage has agreed to exchange it on the assumption that the mortgage could be extended, and he can not obtain such extension, one to whom he has conveyed an interest in order to avoid foreclosure is treated as a bona fide purchaser.<sup>16</sup> If the vendor has bound himself to convey land by two inconsistent contracts, equity will not order him to break the second contract for the benefit of the first purchaser.<sup>17</sup>

One of two or more joint purchasers may have specific performance against the other joint purchasers if the default will prevent the plaintiff from obtaining his interest under the contract.<sup>18</sup> If two or more tenants in common have agreed to sell their entire interests for an entire price, it is held that the purchaser can not have specific performance against one if his suit has been dismissed as to the other.<sup>19</sup> An adverse claimant who has agreed with the vendor to convey his interest may be made a defendant.<sup>20</sup>

<sup>11</sup> *Charlton v. Columbia Real Estate Co.*, 64 N. J. Eq. 631, 54 Atl. 444.

<sup>12</sup> *Flackhamer v. Himes*, 24 R. I. 306, 53 Atl. 46.

<sup>13</sup> *Shields v. Trammell*, 19 Ark. 51; *Ferrier v. Buzick*, 2 Ia. 136.

<sup>14</sup> *Mayfield v. Cook*, 201 Ala. 187, 77 So. 713; *Owens v. McNally*, 113 Cal. 444, 33 L. R. A. 369, 45 Pac. 710.

<sup>15</sup> *Bernard v. Benson*, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439.

<sup>16</sup> *Thackaberry v. Kibbe*, 284 Ill. 199, 119 N. E. 897.

<sup>17</sup> *Saperstein v. Mechanics' & Farmers' Savings Bank*, 228 N. Y. 257, 126 N. E. 708.

<sup>18</sup> *Slattery v. Gross*, 96 Or. 554, 187 Pac. 300, 190 Pac. 577.

<sup>19</sup> *Hudson v. Cozart*, 179 N. Car. 247, 102 S. E. 278 (purchaser had agreed to construct a building on such tract).

<sup>20</sup> *Hoefling v. Borsen*, — Ia. —, 180 N. W. 750.

## CHAPTER XC

### INJUNCTION AND CANCELATION

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## I

## INJUNCTION

**§ 3371. History of Injunction.** The equitable remedy of injunction had its analogies in Roman law and in early common law. The Roman praetor issued his interdicta in which he interposed his authority at the beginning of an action and forbade something to be done;<sup>1</sup> and the injunction of the chancellor was possibly copied directly from the interdictum of the praetor.<sup>2</sup> In early English law, the royal writ was occasionally issued to order a private party not to do a specified thing.<sup>3</sup> In the reign of Henry II the writ of prohibition was a means by which the king's courts prevented the local courts from proceeding with actions involving freehold interests where the tenant had placed himself upon the assise of the king.<sup>4</sup> It was also the means by which the king's courts prevented the ecclesiastical courts from hearing cases of which they had no jurisdiction.<sup>5</sup> These writs of prohibition were analogous to the later injunction in equity, except that the writ of prohibition was addressed to the court in its official capacity, a power which the chancellor never ventured to assume, the jurisdiction being limited to the orders to the individuals indirectly concerned.<sup>6</sup> The writ of estrepement afforded a rough and limited means by which the common law could prevent the commission of waste.<sup>7</sup> With these analogies before him, it was difficult for the chancellor to resort to

<sup>1</sup> If he interposed his authority to order that something should be done, such order was known as a decretum.

<sup>2</sup> Spence, *Equitable Jurisdiction of the Court of Chancery*, Vol. I 669 et seq. (original paging).

<sup>3</sup> Spence, *Equitable Jurisdiction of the Court of Chancery*, Vol. I 108 (original paging), note.

<sup>4</sup> Glanville (Beames' Translation), Book II, ch. VIII.

<sup>5</sup> Glanville, Book IV, ch. XIII.

<sup>6</sup> For the analogy between the writ of prohibition and the injunction, see II Pollock & Maitland, *History of English Law* 593 (original paging).

<sup>7</sup> Bracton, Book IV, f. 315; Spence, *Equitable Jurisdiction of the Court of Chancery*, Vol. I 668 (original paging); Spelling on Injunction, etc., § 4.

injunction as a means of exercising and enforcing his growing jurisdiction.<sup>8</sup> By the year 1400 we find that injunction was sought and granted;<sup>9</sup> the applications read as if a well recognized remedy were sought. The chancellor seems to be traveling a well-trodden road, and not cutting a path through the wilderness. In these early cases, the orator sets up a wrong which is in the nature of a tort, although sometimes, as in the case of an injunction against witchcraft,<sup>10</sup> a wrong which is of a character different from those which modern equity recognize and enforce. The allegation that the promise is without adequate remedy at law, generally coupled with an allegation of facts which make the legal remedy inadequate, is a stock form of the bill, although in many it is the wealth and power of the defendant, and the poverty of the plaintiff that is given as a ground for the inability of the common law to render justice. Only in one of the early cases we find anything which resembles a contract or quasi-contract remotely, and that is an application to enjoin the treasurer of Calais from permitting a wife to pay over a sum which is the profits of the ransom of certain prisoners at the Battle of Agincourt and until it can be determined whether such prisoners were not taken wrongfully from the plaintiffs by one of the defendants; that such defendant be compelled to declare the names of the prisoners and that the king may have such portion of his prisoners.<sup>11</sup> By the reign of James I, the power of the chancellor to issue injunction is thoroughly established,<sup>12</sup> and it has been held that it has been decided that the common-law courts have no power, by contempt proceedings, to prevent the chancellor from enjoining parties from prosecuting actions at law. While the chancellor was asserting his power to issue injunction against torts, and while he was asserting his power to enjoin an action in which the defendant in such action could not set up an equitable defense, there appears to be practically no attempt to make out of injunction a means of enforcing negative covenants in a contract. It may be that, in the form in which contracts were usually drawn, the legal remedy was adequate as long as penalties for the breach of negative covenants could be enforced at law. Whatever the reason may have been, and while an occasional injunction for enforcing a negative cove-

<sup>8</sup> Kerly, *History of Equity* 89.

<sup>9</sup> 10 Selden Society (*Select Cases in Chancery*) 70, 86, 112.

<sup>10</sup> *Hoigges v. Harry*, 1 Cal., ch. XXIV.

<sup>11</sup> 10 Selden Society (*Select Cases in Chancery*) 112.

<sup>12</sup> Spence, *Equitable Jurisdiction of the Court of Chancery* 371 (original paging).

nant is granted in the eighteenth century, there seems to be little attempt to enforce negative covenants by injunction until the early part of the nineteenth century.<sup>13</sup> In the half century that followed, the general outlines of the doctrine were drawn, although they have been more or less effaced in the mass of litigation in which this remedy has been sought for negative covenants during the last sixty years.

**§ 3372. Injunction as negative specific performance.** To enjoin a party to a contract from breaking some provision thereof is to grant a "negative specific performance."<sup>1</sup> Such a suit is said to be "a case, so far as the covenant is concerned, for a negative specific performance by means of an injunction."<sup>2</sup> A bill in equity seeking such relief is, "though not strictly a bill for the specific performance of a contract, is in substance a bill of that kind."<sup>3</sup> The relief given by this remedy is specific and not compensatory.<sup>4</sup> Such remedy is, of course, especially suitable to nega-

<sup>13</sup> *Morris v. Coleman*, 18 Ves. Jr. 437 (decided in 1812); *Martin v. Nutkin*, 2 Peere Wms. 266 (decided in 1724); *Barret v. Blagrove*, 5 Ves. Jr. 555 (decided in 1800), 6 Ves. Jr. 104 (decided in 1801).

<sup>1</sup> *Dills v. Doeblor*, 62 Conn. 366 (368), 36 Am. St. Rep. 345, 20 L. R. A. 432, 26 Atl. 389.

See Specific Performance by Injunction, by Clarence D. Ashley, 6 *Columbia Law Review* 82. For other questions, see *The Rationale of the Injunction*, by William Trickett, 42 *American Law Review* 687; *Trade Unions and Trade Disputes in English Law*, by J. C. Pease, 12 *Columbia Law Review* 589; *The Respective Rights of Capital and Labor in Strikes*, by Francis E. Baker, 5 *Illinois Law Review* 453; and *Injunction Without Damage as Illustrated by a Point in the Law of Waters*, by Samuel C. Wiel, 5 *California Law Review* 199.

<sup>2</sup> *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 110, 60 L. R. A. 822, 66 N. E. 436.

<sup>3</sup> *Chicago Municipal Gas, Light &*

*Fuel Co. v. Lake*, 130 Ill. 42, 22 N. E. 616 [quoted in *Welty v. Jacobs*, 171 Ill. 624, 631, 40 L. R. A. 98, 49 N. E. 723].

To the same effect, see *Manchester Ship Canal Co. v. Manchester Racecourse Co.* [1901], 2 Ch. 37.

*United States. Sharum v. Whitehead Coal Mining Co.*, 223 Fed. 282, 138 C. C. A. 524.

*Alabama. Edmundson-Randle Drug Co. v. Partin Mfg. Co.*, 200 Ala. 208, 75 So. 966.

*Illinois. South Chicago City Ry. v. Calumet Electric Street Ry.*, 171 Ill. 391, 49 N. E. 576; *Ulrey v. Keith*, 237 Ill. 284, 86 N. E. 696.

*Maryland. Maryland Telephone & Telegraph Co. v. Charles Simon Sons Co.*, 103 Md. 136, 115 Am. St. Rep. 346, 63 Atl. 314.

*Michigan. Windemere-Grand Improvement & Protective Association v. American State Bank*, 205 Mich. 539, 172 N. W. 29.

*Virginia. Grubb v. Moore*, 108 Va. 72, 60 S. E. 757.

<sup>4</sup> *American Laundry Co. v. E. & W. Dry-cleaning Co.*, 199 Ala. 154, 74 So.

tive covenants, where the injunction can restrain a party to the contract from doing an act which is forbidden by such contract.<sup>5</sup>

**§ 3373. Validity of contract.** The general theory upon which injunction is given is, in most respects, the same as the theory which underlies the doctrine of specific performance; and the same general principles apply as to the validity of the contract and the reasons for granting or denying this relief.<sup>1</sup> A contract may be enforced by injunction although there has been no formal offer

58; *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57.

"A court of equity, where there is a basis for the assertion of its jurisdiction, will not suffer men to depart from their agreements at pleasure, leaving the party with whom they have contracted to the mere chance of damages which a jury may give." *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 110, 30 L. R. A. 822, 66 N. E. 436.

<sup>5</sup> *United States*. *Hapgood v. Rosenstock*, 23 Fed. 86; *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620.

**Alabama.** *American Laundry Co. v. E. & W. Dry-cleaning Co.*, 199 Ala. 154, 74 So. 58.

**Georgia.** *Wells v. First National Exhibitors' Circuit*, 149 Ga. 200, 99 S. E. 615.

**Illinois.** *Lanyon v. Garden City Sand Co.*, 223 Ill. 616, 9 L. R. A. (N.S.) 446, 7 Ann. Cas. 50, 79 N. E. 313.

**New Jersey.** *Vulcan Detinning Co. v. American Can Co.*, 67 N. J. Eq. 243, 58 Atl. 290.

<sup>1</sup> *Alabama*. *American Laundry Co. v. E. & W. Dry-cleaning Co.*, 199 Ala. 154, 74 So. 58.

**Florida.** *Simms v. Burnette*, 55 Fla. 702, 16 L. R. A. (N.S.) 389, 15 Ann. Cas. 690, 46 So. 90.

**Indiana.** *Fowler Utilities Co. v.*

*Gray*, 168 Ind. 1, 120 Am. St. Rep. 344, 7 L. R. A. (N.S.) 726, 79 N. E. 897.

**Kentucky.** *Friedberg v. McClary*, 173 Ky. 579, L. R. A. 1917C, 777, 191 S. W. 300; *American Snuff Co. v. Walker*, 175 Ky. 149, 193 S. W. 1021.

**Maryland.** *Smith v. Meyers*, 130 Md. 64, 99 Atl. 938.

**Massachusetts.** *Old Corner Book Store v. Upham*, 194 Mass. 101, 120 Am. St. Rep. 532, 80 N. E. 228.

**Michigan.** *Davison v. Taylor*, 196 Mich. 605, 162 N. W. 1033; *Baxter v. Ogooshevitz*, 205 Mich. 249, 171 N. W. 385; *Windemere-Grand Improvement & Protective Association v. American State Bank of Highland Park*, 205 Mich. 539, 172 N. W. 29.

**New Mexico.** *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

**North Carolina.** *Bradshaw v. Millikin*, 173 N. Car. 432, 92 S. E. 161.

**Ohio.** *Steinau v. Gas Company*, 48 O. S. 324, 27 N. E. 545.

**Wisconsin.** *Eureka Laundry Co. v. Long*, 146 Wis. 205, 35 L. R. A. (N.S.) 119, 131 N. W. 412; *Schuster v. Kuryer Publishing Co.*, 165 Wis. 327, 162 N. W. 173.

"The jurisdiction of equity to grant such an injunction is substantially coincident with its jurisdiction to compel specific performance by an affirmative decree." *Dills v. Doebler*, 62 Conn. 366 (368), 36 Am. St. Rep. 345, 20 L. R. A. 432, 26 Atl. 398.

and acceptance.<sup>2</sup> Building restrictions may be enforced by parties who buy in reliance thereon, although there is no formal contract between the parties thereto.<sup>3</sup> Building restrictions to which the defendant assented, may be enforced by injunction although similar restrictions were not imposed upon the purchasers of other adjoining tracts.<sup>4</sup>

A genuine agreement must, however, be shown if injunction is to be granted.<sup>5</sup> A lot owner who buys without notice of a general plan for the improvement of land, and without notice that the covenants in his deed are intended for the benefit of adjoining property owners, can not be enjoined from violating such covenants in a suit brought by an adjoining lot owner.<sup>6</sup> If a contract or provision thereof has been terminated by the voluntary agreement of the parties,<sup>7</sup> even if such agreement is expressed by informal conduct,<sup>8</sup> as by a general disregard of building restrictions,<sup>9</sup> injunction will not lie.

The contract upon which injunction is sought must be so definite that the court can determine what the parties have agreed not to do in such a way that it can draw a clear and definite decree without adding to the terms of the contract; and unless the contract possesses this degree of definiteness and certainty, injunction will not be granted.<sup>10</sup> Since equity prefers to leave the parties to make such bargains as they choose, subject to the ordinary rules which govern the validity of contracts, equity will not refuse to issue an injunction in what is otherwise a proper case therefor,

<sup>2</sup> *Brandenburg v. Lager*, 272 Ill. 622, 112 N. E. 321.

<sup>3</sup> *Brandenburg v. Lager*, 272 Ill. 622, 112 N. E. 321.

<sup>4</sup> *Smith v. Graham*, 217 N. Y. 655, 112 N. E. 1076.

<sup>5</sup> *Kiley v. Hall*, — O. S. —, L. R. A. 1918B, 961, 117 N. E. 359.

<sup>6</sup> *Kiley v. Hall*, — O. S. —, L. R. A. 1918B, 961, 117 N. E. 359.

<sup>7</sup> *Loomis v. Collins*, 272 Ill. 221, 111 N. E. 999; *Gnau v. Fitzpatrick*, 203 Mich. 65, 168 N. W. 1007.

<sup>8</sup> *Loomis v. Collins*, 272 Ill. 221, 111 N. E. 999; *Gnau v. Fitzpatrick*, 203 Mich. 65, 168 N. W. 1007.

<sup>9</sup> *Loomis v. Collins*, 272 Ill. 221, 111 N. E. 999; *Gnau v. Fitzpatrick*, 203 Mich. 65, 168 N. W. 1007.

<sup>10</sup> *England. Capes v. Hutton*, 2 Russ. 357.

*Florida. Hover v. Thompson*, 64 Fla. 301, 60 So. 222.

*Illinois. Cleveland v. Martin*, 218 Ill. 73, 3 L. R. A. (N.S.) 629, 75 N. E. 772.

*Indiana. Gas Light & Coke Co. v. New Albany*, 139 Ind. 660, 39 N. E. 462.

*New Jersey. Fenton v. Crook*, 88 N. J. Eq. 432, 102 Atl. 834; *Marsh v. Marsh*, 90 N. J. Eq. 244, 106 Atl. 810.

*Pennsylvania. New Idea Pattern Co. v. Whitner*, 215 Pa. St. 193, 64 Atl. 518.

*Wisconsin. Hazelton v. Putnam*, 3 Chand. (Wis.) 117, 3 Pinn. (Wis.) 107, 54 Am. Dec. 158.

See on this question, *Lyle v. Munson*, — Mich. —, 181 N. W. 1002.

for the reason that the court may not regard the consideration as fully adequate to the covenant on which the suit is brought.<sup>11</sup> If the inadequacy of consideration is so extreme as to shock the conscience of the chancellor, or to render the contract unconscionable,<sup>12</sup> injunction will be refused.<sup>13</sup>

In accordance with the principles which control, in some jurisdictions, in specific performance, it has been held that reformation can not be granted in a suit in equity to enforce a negative covenant which has been omitted by mistake.<sup>14</sup> After performance by the lessee, the lessor may be enjoined from breach of an oral covenant to give a lease on certain terms.<sup>15</sup>

**§ 3374. Breach.** A breach must either be threatened or exist, to justify this remedy. What constitutes a breach of such contracts is discussed in detail elsewhere.<sup>1</sup> The facts which are alleged as breach must be a clear violation of the covenant upon which the suit is brought.<sup>2</sup> The exercise of an option to end the contract prevents the enforcement of its covenants by injunction, assuming that such a transaction is a contract.<sup>3</sup> Injunction will not issue unless the breach, which it is sought to prevent, will work a serious injury to the plaintiff.<sup>4</sup> An injunction will not issue to enforce building restrictions, if, by reason of a change in the character of the neighborhood, the threatened breach will not work any material injury.<sup>5</sup> The fact that the amount of the injury can not be expressed in money damages, does not prevent the use of injunction.<sup>6</sup> One who is in default in the performance of pre-

<sup>11</sup> *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806; *Up River Ice Co. v. Denler*, 114 Mich. 296, 68 Am. St. Rep. 480, 72 N. W. 157.

See §§ 637 et seq.

<sup>12</sup> *Thayer v. Younge*, 86 Ind. 259.

See §§ 641 et seq.

<sup>13</sup> *Kimberly v. Jennings*, 6 Sim. 340; *Miller v. Laneda*, 75 Or. 349, 146 Pac. 1090.

<sup>14</sup> *Sargent v. Leonardi*, 223 Mass. 556, 112 N. E. 633.

See § 3285.

<sup>15</sup> *Halligan v. Frey*, 161 Ia. 185, 49 L. R. A. (N.S.) 112, 141 N. W. 944.

<sup>1</sup> See §§ 2878 et seq.

<sup>2</sup> *Wolverton v. Mountain States Tele-*

*phone & Telegraph Co.*, 58 Colo. 58, 142 Pac. 165; *Marsh v. Marsh*, 90 N. J. Eq. 244, 106 Atl. 810 (violation of building restrictions).

<sup>3</sup> *Wolverton v. Mountain States Telephone & Telegraph Co.*, 58 Colo. 58, 142 Pac. 165.

<sup>4</sup> *Bryant v. Whitney*, 178 Cal. 640, 174 Pac. 32; *Moore v. Curry*, 176 Mich. 456, 142 N. W. 839 (obiter).

<sup>5</sup> *Bryant v. Whitney*, 178 Cal. 640, 174 Pac. 32; *Moore v. Curry*, 176 Mich. 456, 142 N. W. 839 (obiter).

<sup>6</sup> *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459 (injunction to prevent violation of seniority provision, in assigning runs to conductors).

cedent or concurrent covenants can not enjoin the adversary party for breach of corresponding subsequent or concurrent covenants.<sup>7</sup> A vendor who has refused to appoint arbitrators to fix the price of the property, can not enjoin the purchaser from ignoring the remaining provisions of the contract.<sup>8</sup> If the husband has broken an ante-nuptial contract during his lifetime, by transferring property to his children, his executor can not enforce the remaining provisions of such contract by enjoining the widow from resisting the probate of the husband's will.<sup>9</sup>

If a contract has been discharged by performance or breach, the adversary party may be prevented by injunction from attempting to enforce the remaining covenants.<sup>10</sup> If the title to realty has failed entirely, the purchaser may enjoin the vendor from bringing an action to collect the unpaid purchase money.<sup>11</sup> If a contract has been discharged by breach, injunction will lie to prevent the defendant from interfering with the plaintiff in removing property which he had furnished in attempted performance of the contract.<sup>12</sup> If a street contractor has not constructed the street in accordance with the terms of the contract, and he is denied recovery in contract or quasi-contract, he may enjoin the municipal corporation from interfering with him in removing the pavement and curbing.<sup>13</sup>

**§ 3375. Discretionary power of chancellor.** As in the case of specific performance,<sup>1</sup> it is frequently said that an injunction is not a matter of right, but that it depends upon the discretion of the chancellor.<sup>2</sup> As in the case of specific performance, this does

<sup>7</sup> *Glenwood Springs v. Glenwood Light & Water Co.*, 202 Fed. 678, 121 C. C. A. 88, L. R. A. 1915C, 438; *Eaton v. Eaton*, 233 Mass. 351, 5 A. L. R. 1426, 124 N. E. 37.

<sup>8</sup> *Glenwood Springs v. Glenwood Light & Water Co.*, 202 Fed. 678, 121 C. C. A. 88, L. R. A. 1915C, 438.

<sup>9</sup> *Eaton v. Eaton*, 233 Mass. 351, 5 A. L. R. 1426, 124 N. E. 37.

<sup>10</sup> *Harvey v. Ryan*, 59 W. Va. 134, 115 Am. St. Rep. 897, 53 S. E. 7.

<sup>11</sup> *Harvey v. Ryan*, 59 W. Va. 134, 115 Am. St. Rep. 897, 53 S. E. 7.

<sup>12</sup> *Snouffer v. Tipton*, 161 Ia. 223, L. R. A. 1915B, 173, 142 N. W. 97.

<sup>13</sup> *Snouffer v. Tipton*, 161 Ia. 223, L. R. A. 1915B, 173, 142 N. W. 97.

For former litigation, see *Wingert v. Tipton*, 134 Ia. 97, 108 N. W. 1035, 111 N. W. 432; *Snouffer v. Grove*, 139 Ia. 466, 116 N. W. 1056, and *Snouffer v. Tipton*, 150 Ia. 73, 129 N. W. 345.

<sup>1</sup> See §§ 3346 et seq.

<sup>2</sup> *England. Robinson v. Heuer* [1898], 2 Ch. 451.

*United States. Weeghman v. Killefer*, 215 Fed. 289, L. R. A. 1915A, 820.

*California. Bryant v. Whitney*, 178 Cal. 640, 174 Pac. 32.

*Florida. Simms v. Burnette*, 55 Fla. 702, 16 L. R. A. (N.S.) 389, 15 Ann. Cas. 690, 46 So. 90.

*Maryland. Maryland Telephone & Telegraph Co. v. Charles Simon Sons*

not, however, mean the personal discretion of the individual judge, but a judicial discretion to be exercised in accordance with the general principles of equity. Injunction may be refused, if it could not be granted without working a great hardship on the defendant,<sup>3</sup> as where the enforcement of such decree would result in the insolvency of a public service corporation,<sup>4</sup> or where the effect of the injunction, if granted, will be to compel a railroad to operate two main lines over different tracks.<sup>5</sup> Injunction will be refused, if it would work a hardship to the public to grant it.<sup>6</sup>

In the exercise of its discretion, the court may refuse injunction to a plaintiff who has himself been guilty of inequitable conduct with reference to the transaction in which he is seeking injunction.<sup>7</sup> If A has induced X to break his contract with B, and to enter into a new contract with A, A can not enjoin X from breach of his contract with A and from re-entering the employment of B.<sup>8</sup> If one has bought standing timber, and has paid therefor, the vendor can not enjoin the buyer from cutting and removing it.<sup>9</sup> On the other hand, the fact that a physician has registered his certificate of authority to practice, with the wrong official, does not prevent him from enjoining a competitor from engaging in practice in violation of a valid covenant not to do so.<sup>10</sup>

Co., 103 Md. 136, 115 Am. St. Rep. 346, 63 Atl. 314; *Whalen v. Baltimore & Ohio Ry.*, 108 Md. 11, 17 L. R. A. (N.S.) 130, 69 Atl. 390.

**Michigan.** *Osius v. Hinchman*, 150 Mich. 603, 16 L. R. A. (N.S.) 393, 114 N. W. 402; *Davison v. Taylor*, 196 Mich. 605, 162 N. W. 1033; *Baxter v. Ogooshevitz*, 205 Mich. 249, 171 N. W. 385; *Windemere-Grand Improvement & Protective Association v. American State Bank*, 205 Mich. 539, 172 N. W. 29.

**Minnesota.** *Davis v. Forrestal*, 124 Minn. 10, L. R. A. 1915F, 1012, Ann. Cas. 1915B, 448, 144 N. W. 423; *Bennett v. Fox Film Corporation*, — Minn. —, 182 N. W. 905.

**Utah.** *Swanson v. Sims*, 51 Utah 485, 170 Pac. 774.

<sup>3</sup>*Maryland Telephone & Telegraph Co. v. Charles Simon Sons Co.*, 103 Md. 136, 115 Am. St. Rep. 346, 63 Atl. 314; *Whalen v. Baltimore & Ohio Ry.*, 108

Md. 11, 17 L. R. A. (N.S.) 130, 69 Atl. 390.

<sup>4</sup>*Maryland Telephone & Telegraph Co. v. Charles Simon Sons Co.*, 103 Md. 136, 115 Am. St. Rep. 346, 63 Atl. 314.

<sup>5</sup>*Whalen v. Baltimore & Ohio Ry.*, 108 Md. 11, 17 L. R. A. (N.S.) 130, 69 Atl. 390.

<sup>6</sup>*Maryland Telephone & Telegraph Co. v. Charles Simon Sons Co.*, 103 Md. 136, 115 Am. St. Rep. 346, 63 Atl. 314; *Whalen v. Baltimore & Ohio Ry.*, 108 Md. 11, 17 L. R. A. (N.S.) 130, 69 Atl. 390.

<sup>7</sup>*Weeghman v. Killifer*, 215 Fed. 289, 131 C. C. A. 520, L. R. A. 1915A, 820; *Bell v. Gress Mfg. Co.*, 127 Ga. 15, 55 S. E. 1043.

<sup>8</sup>*Weeghman v. Killifer*, 215 Fed. 289, 131 C. C. A. 520, L. R. A. 1915A, 820.

<sup>9</sup>*Bell v. Gress Manufacturing Co.*, 127 Ga. 15, 55 S. E. 1043.

<sup>10</sup>*Rowe v. Toon*, 185 Ia. 848, 169 N. W. 38.

**§ 3376. Adequacy of remedy at law.** As is the case in specific performance,<sup>1</sup> injunction will not issue unless the remedy at law for damages is not clear, adequate and complete,<sup>2</sup> or unless a multiplicity of actions can be prevented.<sup>3</sup> Injunction can not be given to restrain the breach of a contract by a board of education to adopt a certain arithmetic in the schools of a city for the period of five years,<sup>4</sup> or a contract for the sale of bark, which the vendor is threatening to sell to other persons.<sup>5</sup> Injunction will not lie to restrain the prosecution of an action at law because of an agreement between the parties, entered into after such action was brought, by which it was agreed that such action should not be prosecuted, if such subsequent agreement can be used as a defense to such action.<sup>6</sup> The fact that the parties have entered into an accord and satisfaction, after the action has been begun, does not justify an injunction to restrain the prosecution of such action, if such accord and satisfaction can be pleaded as a defense in the original action.<sup>7</sup>

On the other hand, the fact that it is impracticable to ascertain the amount of damage caused by the breach, is a reason, and often a controlling one, for granting an injunction.<sup>8</sup> Express negative covenants have been enforced by injunction, although only nom-

<sup>1</sup> See §§ 3322 et seq.

<sup>2</sup> *Alabama.* *Irwin v. Shoemaker*, — Ala. —, 88 So. 129.

*Florida.* *Simms v. Burnette*, 55 Fla. 702, 16 L. R. A. (N.S.) 389, 15 Ann. Cas. 690, 46 So. 90.

*Indiana.* *Fowler Utilities Co. v. Gray*, 168 Ind. 1, 120 Am. St. Rep. 344, 7 L. R. A. (N.S.) 726, 79 N. E. 897.

*Kentucky.* *Campbell v. Irvine Toll Bridge Co.*, 173 Ky. 313, 190 S. W. 1098; *American Snuff Co. v. Walker*, 175 Ky. 149, 193 S. W. 1021.

*Maryland.* *Smith v. Meyers*, 130 Md. 64, 99 Atl. 938.

*Michigan.* *Osius v. Hinchman*, 150 Mich. 603, 16 L. R. A. (N.S.) 393, 114 N. W. 402.

*New Jersey.* *Savage v. Edgar*, 86 N. J. Eq. 205, 3 A. L. R. 1021, 98 Atl. 407.

*New Mexico.* *Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

*New York.* *Posner v. Jackson*, 223 N. Y. 325, 119 N. E. 573 (obiter).

*Ohio.* *Steinau v. Gas Company*, 48 O. S. 324, 27 N. E. 545.

See also, *Coe v. Columbus, Piqua & Indiana Ry.*, 10 O. S. 372, 75 Am. Dec. 518.

<sup>3</sup> *American Snuff Co. v. Walker*, 175 Ky. 149, 193 S. W. 1021.

<sup>4</sup> *Attorney General v. Detroit*, 133 Mich. 681, 95 N. W. 746.

<sup>5</sup> *Mundy v. Brooks*, 204 Pa. St. 232, 53 Atl. 1000.

<sup>6</sup> *Savage v. Edgar*, 86 N. J. Eq. 205, 3 A. L. R. 1021, 98 Atl. 407.

See also, *Williams v. Wilson*, 124 Mass. 257; *Deepwater Ry. v. Motter*, 60 W. Va. 55, 116 Am. St. Rep. 873, 53 S. E. 705.

<sup>7</sup> *Savage v. Edgar*, 86 N. J. Eq. 205, 3 A. L. R. 1021, 98 Atl. 407.

<sup>8</sup> *Bradshaw v. Millikin*, 173 N. Car. 432, 92 S. E. 161; *Schuster v. Kuryer Pub. Co.*, 165 Wis. 327, 162 N. W. 173.

inal damages could be shown.<sup>9</sup> Indeed, the impracticability of showing actual damages which may result in awarding only nominal damages may be a reason for enforcing a negative covenant by injunction.<sup>10</sup> The fact that the damages arising from breach are uncertain, is not, of itself, however, sufficient to induce a court of equity to grant an injunction.<sup>11</sup>

Restrictive covenants with reference to land,<sup>12</sup> such as restrictive covenants in a lease,<sup>13</sup> may be enforced by injunction, although it is not shown that irreparable injury will follow. If a judgment for money damages is not an adequate remedy for a negative covenant, injunction may be granted.<sup>14</sup> Since a judgment for money would be an inadequate remedy for a breach, by a husband, of a covenant not to sue for restitution of conjugal rights, he will be enjoined from bringing such action in violation of such covenant.<sup>15</sup>

### § 3377. Effect of covenant for payment of money on default.

As in the case of specific performance,<sup>1</sup> the effect of a covenant for the payment of money in case of the failure of the promisor to perform another covenant of the contract, upon the right of the promisee to an injunction to restrain the breach of such other covenant, if negative, depends upon the intent with which the covenant for the payment of money was inserted.

Such covenant may be inserted as an alternative covenant and the promisor may reserve to himself the right to elect which covenant he will perform. In cases of this sort, injunction will not issue to restrain the breach of a negative covenant, since this will deprive the promisor of his election to perform, by the payment of a stipulated sum.<sup>2</sup>

<sup>9</sup> *Roper v. Pryor*, 102 Neb. 709, 169 N. W. 257.

<sup>10</sup> *Roper v. Pryor*, 102 Neb. 709, 169 N. W. 257.

<sup>11</sup> *Barber Asphalt Paving Co. v. Hamilton*, 80 Wash. 51, 141 Pac. 199.

<sup>12</sup> *Asa G. Candler, Inc. v. Georgia Theatre Co.*, 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226.

<sup>13</sup> *Asa G. Candler, Inc. v. Georgia Theatre Co.*, 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226.

<sup>14</sup> *Hunt v. Hunt*, 4 De Gex F. & J. 221; *Rutland Marble Co. v. Ripley*, 77

U. S. (10 Wall.) 339, 19 L. ed. 955; *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 37 L. R. A. 682, 39 S. W. 486, 40 S. W. 353.

<sup>15</sup> *Hunt v. Hunt*, 4 De Gex F. & J. 221.

<sup>1</sup> See § 3323.

<sup>2</sup> *Woodward v. Gyles*, 2 Vern. 119; *Ponsonby v. Adams*, 2 Brown P. C. 431; *Rolfe v. Peterson*, 2 Brown P. C. 436; *Dills v. Doeblor*, 62 Conn. 366, 36 Am. St. Rep. 345, 20 L. R. A. 432, 26 Atl. 398.

The provision for the payment of money in case of non-performance may be intended by the parties as a covenant for the payment of liquidated damages. A covenant for the payment of liquidated damages can be enforced at law;<sup>3</sup> and, in contracts of this sort, the question is then presented whether such remedy at law is adequate, so as to prevent the use of injunction in cases in which injunction would have been granted but for such provision for liquidated damages. According to the weight of authority, a covenant for liquidated damages does not prevent a court of equity from issuing an injunction in a case which would otherwise be a proper one,<sup>4</sup> on the theory that the parties are contemplating performance, and that the provision for liquidated damages is to operate only in case of breach, and in case an action at law is brought for the recovery of damages. According to this theory it is not intended to give the right of election to the party in default; and, while it makes the amount of damages certain, it does not make the remedy at law adequate. This principle has been applied to cases in which the provision for the payment of money has been called a penalty, as long as the court construed it as a covenant for liquidated damages.<sup>5</sup> In some jurisdictions, however, a covenant for liquidated damages is regarded as a ground for refusing an injunction to restrain the breach of negative covenants,<sup>6</sup> on the theory that the remedy at law is adequate. This theory has been applied even where the amount to be paid is spoken of in the contract as "forfeited," if such provision is construed as one for liquidated damages.<sup>7</sup> If the promisee has recovered liquidated damages in an action at law; his election to resort to such remedy

<sup>3</sup> See § 2119.

<sup>4</sup> **England.** Howard v. Woodward, 5 New Reports 8, 34 L. J. Ch. (N.S.) 47; Coles v. Sims, 5 De G. M. & G. 1, 2 Eq. Rep. 951; Bird v. Lake, 1 Hem. & M. 111.

**Alabama.** Harris v. Theus, 149 Ala. 133, 10 L. R. A. (N.S.) 204, 43 So. 131.

**Georgia.** Busk v. Wolf, 143 Ga. 18, 84 S. E. 63; Wells v. First National Exhibitors' Circuit, 149 Ga. 200, 99 S. E. 615.

**Maine.** Augusta Steam Laundry v. Debow, 98 Me. 496, 57 Atl. 845.

**Massachusetts.** Ropes v. Upton, 125 Mass. 258.

**New Jersey.** American Ice Co. v. Lynch, 74 N. J. Eq. 298, 70 Atl. 138.

**New York.** Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

**North Carolina.** Bradshaw v. Millikin, 173 N. Car. 432, L. R. A. 1917E, 880, 92 S. E. 161.

<sup>5</sup> Ropes v. Upton, 125 Mass. 258.

<sup>6</sup> Martin v. Murphy, 129 Ind. 464, 28 N. E. 1118; Stafford v. Shortreed, 62 Ia. 524, 17 N. W. 756.

<sup>7</sup> Martin v. Murphy, 129 Ind. 464, 28 N. E. 1118.

prevents him from obtaining an injunction thereafter, even if it turns out that the legal remedy was inadequate.<sup>8</sup>

The provision for the payment of money may be intended by the parties as a penalty to coerce performance. No action can be brought at law to recover a penalty;<sup>9</sup> and accordingly a provision for a penalty does not prevent a court of equity from granting an injunction, if an injunction could be granted but for such provision.<sup>10</sup>

**§ 3378. Mutuality of remedy.** The analogy between the principles which govern affirmative relief in equity by specific performance, and those which govern negative relief by injunction is so close that there would be little to add to what has already been said about specific performance,<sup>1</sup> if it were not for the fact that, in many jurisdictions, the negative remedy of injunction is broader than the affirmative remedy of specific performance, and that in many cases the former relief is given when the latter relief would be denied. The difference between these two forms of equitable relief grows out of a difference as to the so-called mutuality of obligation. In a contract between A and B, affirmative covenants on the part of A may be the consideration of negative covenants on the part of B. If no action at law can be maintained by B against A upon A's affirmative covenant, A should not have injunction against B; but while this is occasionally referred to as a want of mutuality in remedy, it really indicates that the contract between A and B is not a binding obligation at law; and, accordingly, in most cases, it is not a binding obligation in equity.<sup>2</sup> B may have a right of action against A at law, but A's covenants may be of such a sort that equity could not enforce them either by specific performance or by injunction. If B's right of action for damages against A would have given adequate relief to B, the question of the necessity of mutuality of obligation is presented. In some of the earlier cases, it seems to be assumed that the rules which govern specific performance and those which govern injunction are identical; and that injunction can not be granted against defendant, unless he could have had, either specific performance or

<sup>8</sup> *Sainter v. Ferguson*, 1 Mac N. & G. 286.

<sup>9</sup> See § 2118.

<sup>10</sup> *Mellon v. Oliver*, 256 Pa. St. 209,

100 Atl. 796; *Srolowitz v. Roseman*, 263 Pa. St. 588, 107 Atl. 322.

<sup>1</sup> See ch. LXXXIX.

<sup>2</sup> See §§ 524, 537 et seq., 3238 and 3310 et seq.

injunction against the plaintiff if the defendant had offered to perform and the plaintiff had refused performance.<sup>3</sup> In many jurisdictions, modern equity regards injunction as radically different in one respect at least, from specific performance. In specific performance it is sought to compel the defendant to perform all the covenants of the contract on his part to be performed; and there is, accordingly, some justification for the theory that he should not be compelled to perform unless he can have specific performance against the plaintiff,<sup>4</sup> although, even in specific performance, it is held in many jurisdictions, that sufficient protection can be given by a conditional decree and the like.<sup>5</sup> In a suit for an injunction, the plaintiff does not necessarily seek to compel the defendant to perform all of the covenants which he is bound to perform; but he merely seeks, in many cases, to restrain the defendant from doing certain things which he has bound himself, by his negative covenants, not to do. In many jurisdictions, accordingly, equity is ready to grant injunction against the defendant who could not have had either specific performance or injunction against the plaintiff.<sup>6</sup> By statute, in some jurisdictions, injunction can not be granted as a means of enforcing the negative covenants unless specific performance could have been granted as a means of enforcing the affirmative covenants.<sup>7</sup>

In suits for injunction, as well as in suits for specific performance, the question of the extent to which the plaintiff has performed the contract may be material. If the plaintiff has performed the contract on his part in full, the question of the defendant's ability to have obtained an adequate remedy against the plaintiff, if the plaintiff had refused to perform, has become immaterial.<sup>8</sup> With reference to the extent to which the plaintiff has performed the contract, the cases may accordingly be grouped under three general headings: (1) cases in which all the covenants have been performed except the negative covenants for which injunction is sought; (2) cases in which the executory affirmative covenants are such that specific performance thereof could have been given and injunction is sought to enforce the negative covenants; and (3) cases in which the executory covenants are such

<sup>3</sup> *Pickering v. Bishop of Ely*, 2 Y. & Coll. (Vice-Chancellor) 249.

<sup>4</sup> See § 3318.

<sup>5</sup> See § 3368.

<sup>6</sup> See §§ 3382 et seq.

<sup>7</sup> *Davies v. Johnson*, — Ariz. —, 193

Pac. 1019; *Peterson v. McDonald*, 13 Cal. App. 644, 110 Pac. 465; *Anderson v. Neal Institute*, 37 Cal. App. 174, 173 Pac. 779.

<sup>8</sup> See § 3321.

that specific performance thereof could not have been given and injunction is sought to enforce the negative covenants.

**§ 3379. Effect of insolvency.** If the negative covenant is one the breach of which equity would not restrain by injunction, if the defendant were solvent, it is held that the insolvency of the defendant does not prevent the remedy at law from being adequate and does not justify the use of the injunction.<sup>1</sup> If the contract is an alternative contract for the payment of money, or the performance of a negative covenant, the insolvency of the defendant is held not to be a ground for granting injunction, and thus ignoring the defendant's right to elect between the two covenants.<sup>2</sup> The fact that it is not alleged that the defendant is insolvent, seems to be regarded as an additional reason for refusing an injunction.<sup>3</sup> In other cases, the insolvency of defendant seems to be regarded as the decisive reason for using an injunction which would not have issued if he had been solvent.<sup>4</sup> Injunction has been granted to enjoin the seller of personal property, who is insolvent, from selling such property to a third party, if such breach of contract will inflict irreparable injury on the buyer.<sup>5</sup> In cases of this sort, it seems to be assumed that the legal remedy would have been adequate if the buyer had been solvent.

**§ 3380. Express and implied negative covenants.** If the negative covenant upon which injunction is sought is stated in express and unequivocal language, no question can arise as to the intent of the parties and the only question is as to the propriety of giving specific performance by injunction, under the remaining circumstances of the case.<sup>1</sup> If the contract does not contain an express negative covenant, but the language, taken as a whole, construed with reference to the subject-matter and the surrounding circum-

<sup>1</sup> *Dills v. Doeblor*, 62 Conn. 366, 36 Am. St. Rep. 345, 20 L. R. A. 432, 26 Atl. 398; *Simms v. Burnette*, 55 Fla. 702, 16 L. R. A. (N.S.) 389, 15 Ann. Cas. 690, 46 So. 90.

<sup>2</sup> *Dills v. Doeblor*, 62 Conn. 366, 36 Am. St. Rep. 345, 20 L. R. A. 432, 26 Atl. 398.

<sup>3</sup> *Campbell v. Irvine Toll Bridge Co.*, 173 Ky. 313, 190 S. W. 1098.

<sup>4</sup> *Lanyon v. Garden City Sand Co.*,

223 Ill. 616, 9 L. R. A. (N.S.) 446, 7 Ann. Cas. 50, 79 N. E. 313; *Friedberg v. McClary*, 173 Ky. 579, L. R. A. 1917C, 777, 191 S. W. 300.

<sup>5</sup> *Lanyon v. Garden City Sand Co.*, 223 Ill. 616, 9 L. R. A. (N.S.) 446, 7 Ann. Cas. 50, 79 N. E. 313 (fire clay); *Friedberg v. McClary*, 173 Ky. 579, L. R. A. 1917C, 777, 191 S. W. 300 (tobacco).

<sup>1</sup> See § 332.

stances, shows that one of the parties thereto had agreed not to do a certain thing, it is held, in most jurisdictions, that such implied negative covenant will be enforced by injunction, if a similar express negative covenant would have been enforced by this remedy.<sup>2</sup> An employe will be enjoined from making use, against his former employer, of information obtained while he was engaged in his employer's business.<sup>3</sup> One who has sold a business, together with the good will, under circumstances which show a clear though not an express covenant on his part, not to compete with the purchaser, will be enjoined from competing with him.<sup>4</sup> A widow may be enjoined from resisting to probate her husband's will if she has entered into an ante-nuptial contract by which her interest in his estate is fixed, although such ante-nuptial contract does not contain an express covenant on her part not to interfere with the probating of such will.<sup>5</sup> One who has agreed to render personal services, which, in their nature, are exclusive, may be enjoined from rendering such services for a competitor of the employer, although the contract of employment does not contain an express negative covenant.<sup>6</sup> In some jurisdictions, however, it is held that, in contracts of this sort, the negative covenant must be expressed, or that at least the intention to enter into such negative covenant must appear so clearly that it is practically impossible to deduce it by implication.<sup>7</sup>

<sup>2</sup> England. *Doherty v. Allman*, 3 App. Cas. 709; *Metropolitan Electric Supply Co. v. Ginder* [1901], 2 Ch. 499.

United States. *General Electric Co. v. Westinghouse Electric Co.*, 151 Fed. 664.

Indiana. *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590.

Massachusetts. *Dwight v. Hamilton*, 113 Mass. 175; *Essex Trust Co. v. Enwright*, 214 Mass. 507, 47 L. R. A. (N.S.) 567, 102 N. E. 441; *Eaton v. Eaton*, 233 Mass. 351, 5 A. L. R. 1426, 124 N. E. 37 (obiter).

See The Word "not" as a Test Of Equity Jurisdiction to enjoin a Breach of Contract, by Henry Schofield, 2 Illinois Law Review 217.

<sup>3</sup> *Essex Trust Co. v. Enwright*, 214 Mass. 507, 47 L. R. A. (N.S.) 567, 102

N. E. 441; *Aronson v. Orlov*, 228 Mass. 1, 116 N. E. 951.

<sup>4</sup> *Old Corner Book Store v. Upham*, 194 Mass. 101, 120 Am. St. Rep. 532, 80 N. E. 228; *Foss v. Roby*, 195 Mass. 292, 10 L. R. A. (N.S.) 1200, 11 Ann. Cas. 571, 81 N. E. 199.

<sup>5</sup> *Eaton v. Eaton*, 233 Mass. 351, 5 A. L. R. 1426, 124 N. E. 37 (obiter).

<sup>6</sup> *Montague v. Flockton*, L. R. 16 Eq. 189 (actor); *Kennerly v. Simonds*, 247 Fed. 822; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622 (actress).

<sup>7</sup> See obiter to same effect in *Cort v. Lassard*, 18 Or. 221, 17 Am. St. Rep. 726, 6 L. R. A. 653, 22 Pac. 1054.

<sup>8</sup> *Whitwood Chemical Co. v. Hardman* [1891], 2 Ch. 416; *Burton v. Marshall*, 4 Gill (Md.) 478, 45 Am. Dec. 171 (actor).

**§ 3381. Mutuality of obligation.** As in specific performance,<sup>1</sup> the rule that an injunction to restrain breach of negative covenants can be had, only if the contract itself is a binding obligation, is frequently expressed in terms of mutuality, and it is said that injunction will issue only if the contract is an obligation which binds both parties mutually.<sup>2</sup> If one party has the option under the contract to terminate it at will, he can not have injunction against the adversary party who has no such option.<sup>3</sup> Even on this point, however, the authorities are not unanimous. The right to end a contract for operating a telegraph wire at the end of any year,<sup>4</sup> or the right to terminate a contract of employment of a baseball player on ten days' notice,<sup>5</sup> have each been held not to prevent injunction against breach by the party to whom the option to terminate is not reserved. The right to terminate a contract of employment on thirty days' notice has been held not to prevent the use of injunction to restrain the employe from entering the service of a competitor, if such employe has learned trade secrets of his employer.<sup>6</sup> The fact that the contract is, by its terms, to terminate upon the happening of a specified event, which is not dependant on the sole will of either of the parties, does not prevent the existence of mutuality of obligation, and does not prevent the enforcement of the negative covenants of such contracts by injunction.<sup>7</sup>

**§ 3382. Negative covenants only remaining executory—General principles.** If all the covenants of a contract have been performed except the negative covenants, injunction may be given if the proper circumstances for the exercise of equitable relief are present.<sup>1</sup> In cases of this sort, all questions of so-called mutuality

<sup>1</sup> See §§ 3308 et seq.

<sup>2</sup> *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27.

<sup>3</sup> *Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339, 19 L. ed. 955; *Fowler Utilities Co. v. Gray*, 168 Ind. 1, 120 Am. St. Rep. 344, 7 L. R. A. (N.S.) 726, 79 N. E. 897; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265.

<sup>4</sup> *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 36 L. ed. 776.

<sup>5</sup> *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 90 Am. St. Rep. 627, 58 L. R. A. 227, 51 Atl. 973.

<sup>6</sup> *McCall Co. v. Wright*, 198 N. Y. 143, 31 L. R. A. (N.S.) 249, 91 N. E. 516.

<sup>7</sup> *Jones v. Williams*, 139 Mo. 1, 61 Am. St. Rep. 436, 37 L. R. A. 682, 39 S. W. 486, 40 S. W. 353 (contract for managing newspaper, conditioned on gross receipts equaling or exceeding a certain sum).

<sup>1</sup> *United States. Halla v. Rogers*, 176 Fed. 709, 100 C. C. A. 263, 34 L. R. A. (N.S.) 120.

*Alabama. White v. Harrison*, 202 Ala. 623, 81 So. 565.

*Georgia. Asa G. Candler, Inc. v. Georgia Theater Co.*, 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226 (obiter); *Manesis v. Sulunias*, — Ga. —, 103 S. E. 459.

have been eliminated by performance, and injunction by which breaches of the negative covenants may be restrained, will result in complete performance on both sides. Cases of this type present the least difficulty, as far as questions of mutuality are involved.

**§ 3383. Negative covenants only remaining executory—Conveyances of realty.** If a contract for the conveyance of realty has been performed by the vendor, and such realty has been conveyed to the purchaser, and the only executory covenants are the negative covenants which are contained in the conveyance, such executory covenants will be enforced by injunction, if otherwise valid, and if the proper circumstances for granting equitable relief exist.<sup>1</sup> In granting this relief, the courts of equity, like the courts of law,

**Maryland.** *Slingluff v. Franklin Davis Nurseries*, — Md. —, 110 Atl. 523.

**Massachusetts.** *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 34 L. R. A. (N.S.) 730, Ann. Cas. 1912B, 450, 95 N. E. 216.

**Michigan.** *Rosenzweig v. Rose*, 201 Mich. 681, 167 N. W. 1008; *Hill v. Rabinowitch*, — Mich. —, 177 N. W. 719.

**New Hampshire.** *Winnepesaukee Association v. Grodon*, 63 N. H. 505, 3 Atl. 426.

**New York.** *Smith v. Graham*, 217 N. Y. 655, 112 N. E. 1076.

**Ohio.** *Brown v. Huber*, 80 O. S. 183, 28 L. R. A. (N.S.) 705, 88 N. E. 322; *Adams v. Donovan*, 97 O. S. 83, 119 N. E. 252.

**Pennsylvania.** *Murphy v. Ahlberg*, 252 Pa. St. 267, 97 Atl. 406; *Kelly v. Phillips Gas & Oil Co.*, 262 Pa. St. 412, 105 Atl. 631.

**Rhode Island.** *Ball v. Milliken*, 31 R. I. 36, 37 L. R. A. (N.S.) 623, Ann. Cas. 1912B, 30, 76 Atl. 789.

**Virginia.** *Virginian Ry. Co. v. Avis*, 124 Va. 711, 98 S. E. 638.

**West Virginia.** *Withers v. Ward*, — W. Va. —, 104 S. E. 96.

<sup>1</sup> **Alabama.** *White v. Harrison*, 202 Ala. 623, 81 So. 565.

**Georgia.** *Asa G. Candler, Inc. v. Georgia Theater Co.*, 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226.

**Massachusetts.** *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 34 L. R. A. (N.S.) 730, Ann. Cas. 1912B, 450, 95 N. E. 216.

**Michigan.** *Rosenzweig v. Rose*, 201 Mich. 681, 167 N. W. 1008; *Baxter v. Ogooshevitz*, 205 Mich. 249, 171 N. W. 385; *Hill v. Rabinowitch*, — Mich. —, 177 N. W. 719.

**Minnesota.** *Sharkey v. Batcher*, 139 Minn. 337, 166 N. W. 350.

**New York.** *Lattimore v. Livermore*, 72 N. Y. 174; *Smith v. Graham*, 217 N. Y. 655, 112 N. E. 1076.

**Ohio.** *Brown v. Huber*, 80 O. S. 183, 28 L. R. A. (N.S.) 705, 88 N. E. 322; *Adams v. Donovan*, 97 O. S. 83, 119 N. E. 252.

**Pennsylvania.** *Murphy v. Ahlberg*, 252 Pa. St. 267, 97 Atl. 406; *Kelly v. T. W. Phillips Gas & Oil Co.*, 262 Pa. St. 412, 105 Atl. 631.

**Rhode Island.** *Ball v. Milliken*, 31 R. I. 36, 37 L. R. A. (N.S.) 623, Ann. Cas. 1912B, 30, 76 Atl. 789.

**Virginia.** *Virginian Ry. Co. v. Avis*, 124 Va. 711, 98 S. E. 638.

**West Virginia.** *Withers v. Ward*, — W. Va. —, 104 S. E. 96.

have generally assumed that a covenant which restricts the use of realty, does not violate the rule against perpetuities; and, accordingly, covenants have been enforced in equity by injunction without much regard to the propriety of imposing permanent restrictions upon realty. The use of the injunction in cases of this sort has been explained on the theory that a trust, or some other equitable interest, has been created by the contract, which equity will recognize and protect.<sup>2</sup> Even in covenants of this sort, it is said that equity will not grant injunction, as a matter of absolute right, but that the granting of an injunction will be governed by the general principles which govern specific performance.<sup>3</sup>

Building restrictions,<sup>4</sup> such as covenants that buildings erected on the realty shall be set back a certain distance from the street,<sup>5</sup>

<sup>2</sup> *Slingluff v. Franklin Davis Nurseries*, — Md. —, 110 Atl. 523; *Virginian Ry. Co. v. Avis*, 124 Va. 711, 98 S. E. 638.

<sup>3</sup> *Davison v. Taylor*, 196 Mich. 605, 162 N. W. 1033; *Baxter v. Ogooshevitz*, 205 Mich. 249, 171 N. W. 385.

<sup>4</sup> *England. Collins v. Castle*, 36 Ch. Div. 243.

*Alabama. White v. Harrison*, 202 Ala. 623, 81 So. 565.

*Connecticut. Hall v. Solomon*, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876.

*Illinois. Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145.

*Kentucky. Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410.

*Massachusetts. Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691 (obiter); *Hills v. Metzneroth*, 173 Mass. 423, 53 N. E. 890; *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 34 L. R. A. (N.S.) 730, Ann. Cas. 1912B, 450, 95 N. E. 216.

*Michigan. Watrous v. Allen*, 57 Mich. 362, 58 Am. St. Rep. 363, 24 N. W. 104; *Frink v. Hughes*, 133 Mich. 63, 94 N. W. 601; *Maine v. Mulliken*, 176 Mich. 443, 142 N. W. 782; *Rosenzweig v. Rose*, 201 Mich. 681, 167 N. W. 1008; *Swan v. Mithskun*, 207 Mich. 70, 173 N. W. 529; *Hill v. Rabinowitch*, — Mich. —, 177 N. W. 719.

*Minnesota. Velie v. Richardson*, 126 Minn. 334, 148 N. W. 286.

*New Jersey. Haskell v. Wright*, 23 N. J. Eq. 389; *Gawtry v. Leland*, 31 N. J. Eq. 385; *Gawtry v. Leland*, 40 N. J. Eq. 323; *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11 (obiter); *Catoggio v. Rehm*, 83 N. J. Eq. 327, 90 Atl. 1047.

*New York. Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Lewis v. Gollner*, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81.

*Ohio. Stines v. Dorman*, 25 O. S. 580; *McGuire v. Caskey*, 62 O. S. 419, 57 N. E. 53; *Brown v. Huber*, 80 O. S. 183, 28 L. R. A. (N.S.) 705, 88 N. E. 322.

*Pennsylvania. St. Andrews Church's Appeal*, 67 Pa. St. 512; *Murphy v. Ahlberg*, 252 Pa. St. 267, 97 Atl. 406.

*Rhode Island. Ball v. Milliken*, 31 R. I. 36, 37 L. R. A. (N.S.) 623, Ann. Cas. 1912B, 30, 76 Atl. 789.

*West Virginia. Withers v. Ward*, — W. Va. —, 104 S. E. 86.

<sup>5</sup> *Massachusetts. Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691; *Hills v. Metzneroth*, 173 Mass. 423, 53 N. E. 890.

*Michigan. Frink v. Hughes*, 133 Mich. 63, 94 N. W. 601; *Hill v. Rabinowitch*,

or that an easement of light, air, and prospect in other realty shall exist for the benefit of a grantee,<sup>8</sup> or that only buildings of a certain kind and cost shall be erected upon the realty,<sup>7</sup> or that the realty which is conveyed shall be used for residence purposes only,<sup>8</sup> or that a tenement shall not be constructed on such realty,<sup>9</sup> or that certain realty shall not be used for the sale of intoxicating liquor,<sup>10</sup> or for hotel purposes,<sup>11</sup> or for a church,<sup>12</sup> or for breaking stone,<sup>13</sup> or that the realty can be used only for a church,<sup>14</sup> or for a blacksmith shop,<sup>15</sup> may be enforced by injunction. If a grantor has reserved the right to remove nursery trees and the grantee refuses to permit the grantor to remove such trees, and threatens to lease the realty, the grantee may be restrained by injunction from interfering with the removal of the trees by the grantor.<sup>16</sup>

Contracts as to the use of realty need not be in the deed to be thus enforced, as contracts collateral to a conveyance or entirely disconnected from any conveyance, such as agreements between

— Mich. —, 177 N. W. 719 (different building lines for residence property and business property).

**New Jersey.** *Gawtry v. Leland*, 31 N. J. Eq. 385; *Gawtry v. Leland*, 40 N. J. Eq. 323; *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961.

**Ohio.** *McGuire v. Caskey*, 62 O. S. 419, 57 N. E. 53.

**West Virginia.** *Withers v. Ward*, — W. Va. —, 104 S. E. 96.

<sup>8</sup> *Murphy v. Ahlberg*, 252 Pa. St. 267, 97 Atl. 406.

<sup>7</sup> *Collins v. Castle*, 36 Ch. Div. 243; *Frink v. Hughes*, 133 Mich. 63, 94 N. W. 601; *Rosenzweig v. Rose*, 201 Mich. 681, 167 N. W. 1008; *Maine v. Mulliken*, 176 Mich. 443, 142 N. W. 782; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11; *Brown v. Huber*, 80 O. S. 183, 28 L. R. A. (N.S.) 705, 88 N. E. 322.

<sup>8</sup> **Massachusetts.** *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 34 L. R. A. (N.S.) 730, Ann. Cas. 1912B, 450, 95 N. E. 216 (held to prevent use of private garage, although building need not be removed).

**Michigan.** *Swan v. Mitschkun*, 207 Mich. 70, 173 N. W. 529.

**Minnesota.** *Velie v. Richardson*, 126 Minn. 334, 148 N. W. 286.

**New Jersey.** *Catoggio v. Rehm*, 83 N. J. Eq. 327, 90 Atl. 1047.

**New York.** *Columbia College v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615.

<sup>9</sup> *Rosenzweig v. Rose*, 201 Mich. 681, 167 N. W. 1008; *Lewis v. Gallner*, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81.

<sup>10</sup> *Hall v. Solomon*, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876; *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145; *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; *Watrous v. Allen*, 57 Mich. 362, 58 Am. St. Rep. 363, 24 N. W. 104.

<sup>11</sup> *Stines v. Dorman*, 25 O. S. 580.

<sup>12</sup> *St. Andrew's Church's Appeal*, 67 Pa. St. 512.

<sup>13</sup> *Haskell v. Wright*, 23 N. J. Eq. 389.

<sup>14</sup> *White v. Harrison*, 202 Ala. 623, 81 So. 565.

<sup>15</sup> *Ball v. Milliken*, 31 R. I. 36, 37 L. R. A. (N.S.) 623, Ann. Cas. 1912B, 30, 76 Atl. 780.

<sup>16</sup> *Slingluff v. Franklin Davis Nurseries*, — Md. —, 110 Atl. 523 (oral reservation).

adjoining land owners as to the use to be made of their respective lands.<sup>17</sup> Covenants which create easements may be protected by injunction, such as a contract to divert only so much water as can be pumped through a pipe not exceeding two inches in diameter.<sup>18</sup>

**§ 3384. Negative covenants in leases of realty—Covenants of lessee.** A negative covenant in a lease of realty resembles a negative covenant in a conveyance of realty in that, in each case, the negative covenant conveys or reserves an interest in land, or something analogous thereto; and the enforcement of such negative covenant by injunction may be regarded as a means of protecting a right in realty.<sup>1</sup> A negative covenant in a lease differs from a negative covenant in a conveyance, since, as a rule, in the case of a conveyance, all the other covenants of the original contract have been performed, and the only covenant which remains executory is the negative covenant; while in a lease, as a rule, the covenant on the part of the lessee to pay rent is executory, and can not be enforced by specific performance. Mutuality of remedy in the more limited sense of the term is lacking.<sup>2</sup>

In most jurisdictions, it is held that a negative covenant in a lease with reference to the use of the premises may be enforced by injunction.<sup>3</sup> The fact that the lease contains a provision for forfeiture in case of breach of such negative covenant does not prevent the use of injunction as a means of enforcing such negative covenant,<sup>4</sup> unless the lease shows an intention to give to the lessee

<sup>17</sup> *Parker v. Nightingale*, 88 Mass. (6 All.) 341, 83 Am. Dec. 632; *Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615.

<sup>18</sup> *Salem Flouring Mills Co. v. Lord*, 42 Or. 82, 103, 60 Pac. 1033, 70 Pac. 832 (where the grantee had constructed an underground conduit, which plaintiff could not inspect, and was pumping water through two ten-inch pipes).

<sup>1</sup> See § 3325.

<sup>2</sup> See § 3378.

<sup>3</sup> *England. Barret v. Blagrove*, 5 Ves. Jr. 555.

*Georgia. Asa G. Candler, Inc. v. Georgia Theatre Co.*, 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226; *Manesis v. Sulunias*, — Ga. —, 103 S. E. 459.

*Iowa. Kraft v. Welch*, 112 Ia. 695, 84 N. W. 908; *Chamberlain v. Brown*, 141 Ia. 540, 120 N. W. 334 (obiter, as no violation of covenant existed).

*Kansas. Godfrey v. Black*, 39 Kan. 193, 7 Am. St. Rep. 544, 17 Pac. 849.

*Maryland. Gale v. McCullough*, 118 Md. 287, 84 Atl. 469.

*Michigan. Wertheimer v. Circuit Judge*, 83 Mich. 56, 47 N. W. 47.

*Wisconsin. Cawker v. Trimmel*, 155 Wis. 108, 143 N. W. 1046 (obiter, as it was held that tenant had not broken his covenant).

<sup>4</sup> *Barret v. Blagrove*, 5 Ves. Jr. 555; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241.

the option between performing such negative covenant and surrendering the premises.<sup>5</sup>

Injunction has been used as a means of enforcing a covenant restricting the kind of building to be constructed upon the premises,<sup>6</sup> or restricting the use to be made of such premises,<sup>7</sup> as a covenant not to carry on a house of public entertainment,<sup>8</sup> or not to use the premises as a restaurant,<sup>9</sup> or to use the premises only as a theater,<sup>10</sup> or a covenant to use only for the sale of tea, coffee, and the like,<sup>11</sup> or a covenant against selling liquor upon the premises,<sup>12</sup> or a covenant to use a building for hotel purposes only.<sup>13</sup> Injunction will issue to enforce a covenant for the use of premises for residence purposes only.<sup>14</sup>

If the lease contains a covenant to return the premises in good order, the lessee may be enjoined from opening a public highway through such premises.<sup>15</sup> Under an oil and gas lease which provides that the lessee shall not drill within a certain distance of the lessor's buildings, the lessee may be enjoined from using a well which he has drilled within such distance, against the objection of the lessor.<sup>16</sup> If the lease contains a covenant that the lessee will not assign without the consent of the lessor, the lessee will be enjoined from assigning in violation of such covenant.<sup>17</sup>

<sup>5</sup> *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241.

<sup>6</sup> *Kraft v. Welch*, 112 Ia. 695, 84 N. W. 908 (where lessee was authorized to erect a store building to be used in connection with the other buildings which were leased for creamery purposes).

<sup>7</sup> *England. Barret v. Blgrave*, 5 Ves. Jr. 555.

*Georgia.* *Asa G. Candler, Inc. v. Georgia Theater Co.*, 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226; *Manesis v. Sulunias*, — Ga. —, 103 S. E. 459.

*Kansas.* *Godfrey v. Black*, 39 Kan. 193, 7 Am. St. Rep. 544, 17 Pac. 849.

*Michigan.* *Wertheimer v. Circuit Judge*, 83 Mich. 56, 47 N. W. 47.

*Minnesota.* *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241.

<sup>8</sup> *Barret v. Blgrave*, 5 Ves. Jr. 555.

<sup>9</sup> *Manesis v. Sulunias*, — Ga. —, 103 S. E. 459.

<sup>10</sup> *Asa G. Candler, Inc. v. Georgia Theater Co.*, 148 Ga. 188, L. R. A. 1918F, 389, 96 S. E. 226 (injunction against use as motion picture house).

<sup>11</sup> *Wertheimer v. Circuit Judge*, 83 Mich. 56, 47 N. W. 47 (injunction against use as music-store).

<sup>12</sup> *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241.

<sup>13</sup> *Godfrey v. Black*, 39 Kan. 193, 7 Am. St. Rep. 544, 17 Pac. 849 (injunction against use for realty and brokerage business).

<sup>14</sup> *Linwood Park Co. v. Van Dusen*, 63 O. S. 183, 58 N. E. 576 (lessee on grounds of camp meeting enjoined from sub-letting rooms).

<sup>15</sup> *Gale v. McCullough*, 118 Md. 287, 84 Atl. 469.

<sup>16</sup> *Kelly v. T. W. Phillips Gas & Oil Co.*, 262 Pa. St. 412, 105 Atl. 631.

<sup>17</sup> *McEacharn v. Colton* [1902], A. C. 104.

In some jurisdictions, a covenant by the lessee to buy a certain article from the lessor exclusively has been enforced by injunction;<sup>18</sup> but in other jurisdictions it is held that injunction is not a proper remedy, since the sole purpose of such a covenant is to protect the profits of the lessor.<sup>19</sup>

Since the covenants on the part of the lessee can not be enforced specifically, it has been held that a statute which provides that injunction shall not issue unless the contract can be enforced specifically, prevents the enforcement of negative covenants in a lease by injunction,<sup>20</sup> such as a covenant as to the method of cultivating a farm.<sup>21</sup> A lessor of a mine, who has wrongfully interfered with the lessee's use of the mine, will be enjoined from interfering with the lessee's possession for a reasonable time after the expiration of the lease, if such reasonable time is necessary to enable the lessee to secure the benefits for which he contracted.<sup>22</sup>

**§ 3385. Covenants of lessor.** In proper cases the lessee may enforce negative covenants on the part of the lessor by injunction,<sup>1</sup> such as a covenant not to permit adjoining property, belonging to the lessor, to be used as a hotel,<sup>2</sup> or a covenant on the part of the lessor to use adjoining property for private dwellings only.<sup>3</sup> The lessor will be enjoined from evicting a tenant wrongfully.<sup>4</sup> An injunction against forcible entry and detainer proceedings does not prevent the landlord from cutting off heat from the premises.<sup>5</sup>

The lessee can not have injunction against the lessor if the covenant is one which requires performance in detail over a considerable space of time, since the court can not enforce such decree

<sup>18</sup> *Ferris v. American Brewing Co.*, 155 Ind. 539, 52 L. R. A. 305, 58 N. E. 701 (sale of beer); *Schlitz Brewing Co. v. Nielsen*, 77 Neb. 868, 8 L. R. A. (N.S.) 494, 110 N. W. 746 (sale of beer).

<sup>19</sup> *Voigt Brewery Co. v. Holtz*, 168 Mich. 352, 134 N. W. 19.

<sup>20</sup> *Davies v. Johnson*, — Ariz. —, 193 Pac. 1019.

<sup>21</sup> *Davies v. Johnson*, — Ariz. —, 193 Pac. 1019.

<sup>22</sup> *Halla v. Rogers*, 176 Fed. 709, 100 C. C. A. 263, 34 L. R. A. (N.S.) 120.

<sup>1</sup> *Spicer v. Martin*, 14 App. Cas. 12; *Jay v. Richardson*, 30 Beav. 563; *Halla v. Rogers*, 176 Fed. 709, 100 C. C. A.

263, 34 L. R. A. (N.S.) 120; *Halligan v. Frey*, 161 Ia. 185, 49 L. R. A. (N.S.) 112, 141 N. W. 944; *Minnis v. Newbro-Gallogly Co.*, 174 Mich. 635, 44 L. R. A. (N.S.) 1110, 140 N. W. 980.

<sup>2</sup> *Jay v. Richardson*, 30 Beav. 563.

<sup>3</sup> *Spicer v. Martin*, 14 App. Cas. 12.

<sup>4</sup> *Halligan v. Frey*, 161 Ia. 185, 49 L. R. A. (N.S.) 112, 141 N. W. 944; *Minnis v. Newbro-Gallogly Co.*, 174 Mich. 635, 44 L. R. A. (N.S.) 1110, 140 N. W. 980.

<sup>5</sup> *Howe v. Frith*, 43 Colo. 75, 17 L. R. A. (N.S.) 672, 15 Ann. Cas. 1069, 95 Pac. 603.

without devoting an undue amount of attention thereto.<sup>6</sup> If a lessor has agreed to erect a building to contain a certain amount of floor space, and to lease a certain amount thereof, the lessee can not compel the lessor to erect such building in accordance with such contract;<sup>7</sup> and if it is erected, with less floor space than is agreed upon, equity will not enjoin the breach of such covenant.<sup>8</sup>

**§ 3386. Covenants not concerning realty—Covenants not to compete in business—Incident to sale of good will or dissolution of partnership.** The use of the injunction in enforcing negative covenants, with reference to the use of real property, may be explained on the theory that such negative covenant passes an interest of some sort in realty, which is to be protected by injunction, as other property rights are protected.<sup>1</sup> The use of injunction as a means of enforcing negative covenants is not, however, limited to covenants with reference to the use of realty. A covenant not to compete in a certain business, trade, or profession, which is entered into as a part of a contract, for the sale of good will, and which is not void, as being in unreasonable restraint of trade,<sup>2</sup> may be enforced by injunction.<sup>3</sup> The use of injunction in cases of this

<sup>6</sup> *Bromberg v. Eugenotto Construction Co.*, 158 Ala. 323, 19 L. R. A. (N.S.) 1175, 48 So. 60.

<sup>7</sup> *Bromberg v. Eugenotto Construction Co.*, 158 Ala. 323, 19 L. R. A. (N.S.) 1175, 48 So. 60.

See § 3354.

<sup>8</sup> *Bromberg v. Eugenotto Construction Co.*, 158 Ala. 323, 19 L. R. A. (N.S.) 1175, 48 So. 60.

<sup>1</sup> See §§ 3383 et seq.

<sup>2</sup> See §§ 775 et seq.

<sup>3</sup> *United States. Booth v. Davis*, 127 Fed. 875; *Hall Manufacturing Co. v. Western Steel & Iron Works*, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620.

*California. Brown v. Kling*, 101 Cal. 295, 35 Pac. 995; *Ragsdale v. Nagle*, 106 Cal. 332, 39 Pac. 628.

*Indiana. O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946.

*Iowa. Rowe v. Toon*, 185 Ia. 848, 169 N. W. 38.

*Louisiana. Mouton v. Marshall*, 147 La. 458, 85 So. 204.

*Massachusetts. Angier v. Webber*, 96 Mass. (14 All.) 211, 92 Am. Dec. 748; *Old Corner Book Store v. Upham*, 194 Mass. 101, 120 Am. St. Rep. 532, 80 N. E. 228.

*Michigan. Grow v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737, 11 N. W. 404.

*Nebraska. Ammon v. Keill*, 95 Neb. 695, 52 L. R. A. (N.S.) 503, 146 N. W. 1009.

*New Jersey. Fleckenstein Bros. Co. v. Fleckenstein*, — N. J. Eq. —, 53 Atl. 1043.

*New Mexico. Locke v. Murdoch*, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

*New York. Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419.

*North Carolina. Cowan v. Fairbrother*, 118 N. Car. 406, 54 Am. St. Rep. 733, 32 L. R. A. 829, 24 S. E. 212;

sort, is justified by the inadequacy of the remedy at law.<sup>4</sup> It is perfectly possible that the good will of a business may be ruined by competition of the former owner of the business, in violation of his agreement not to compete, and the unfortunate purchaser of such good will may be unable to prove the existence of any actual damage as a result of such breach of contract. The fact that only nominal damages can be shown does not prevent the court from granting an injunction in cases of this sort;<sup>5</sup> and, indeed, the fact that only nominal damages can be recovered is one of the reasons for granting injunction.<sup>6</sup>

Injunction has been given to prevent breach of a covenant by a physician,<sup>7</sup> or a dentist,<sup>8</sup> or an insurance broker,<sup>9</sup> or a manufacturer,<sup>10</sup> or a plumber,<sup>11</sup> or a dressmaker,<sup>12</sup> or a barber,<sup>13</sup> or one who operates a gin,<sup>14</sup> not to engage in the practice of his profession, business or trade. If A sells his business to B, and agrees not to go into or to conduct such business directly or indirectly within the county for a period of ten years, A's conduct in working by

**Bradshaw v. Millikin**, 173 N. Car. 432, L. R. A. 1917E, 880, 92 S. E. 161.

**Ohio. Morgan v. Perhamus**, 36 O. S. 517, 38 Am. Rep. 607.

**Oregon. Feenaughty v. Beall**, 91 Or. 654, 178 Pac. 600.

**Pennsylvania. Wilkinson v. Colley**, 164 Pa. St. 35, 26 L. R. A. 114, 30 Atl. 286; **Pittsburg Stove & Range Co. v. Pennsylvania Stove Co.**, 208 Pa. St. 37, 57 Atl. 77.

**Tennessee. Jackson v. Byrnes**, 103 Tenn. 698, 54 S. W. 984.

**Texas. Malakoff Gin Co. v. Riddlesperger**, 108 Tex. 273, 192 S. W. 530.

<sup>4</sup> **Locke v. Murdoch**, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298; **Bradshaw v. Millikin**, 173 N. Car. 432, L. R. A. 1917E, 880, 92 S. E. 161.

See § 3376.

<sup>5</sup> **Malakoff Gin Co. v. Riddlesperger**, 108 Tex. 273, 192 S. W. 530.

<sup>6</sup> **Locke v. Murdoch**, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

<sup>7</sup> **Alabama. McCurry v. Gibson**, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806.

**Iowa. Rowe v. Toon**, 185 Ia. 848, 169 N. W. 38.

**Michigan. Timmerman v. Dever**, 52 Mich. 34, 50 Am. Rep. 240, 17 N. W. 230.

**New Jersey. Marvel v. Jonah**, 83 N. J. Eq. 295, L. R. A. 1915B, 206, 90 Atl. 1004.

**Rhode Island. French v. Parker**, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870.

<sup>8</sup> **Cook v. Johnson**, 47 Conn. 175, 35 Am. Rep. 64; **Locke v. Murdoch**, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298.

<sup>9</sup> **Mouton v. Marshall**, 147 La. 458, 85 So. 204.

<sup>10</sup> **Hall Manufacturing Co. v. Western Steel & Iron Works**, 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C, 620; **Feenaughty v. Beall**, 91 Or. 654, 178 Pac. 600.

<sup>11</sup> **Ammon v. Keill**, 95 Neb. 695, 52 L. R. A. (N.S.) 503, 146 N. W. 1009.

<sup>12</sup> **Morgan v. Perhamus**, 36 O. S. 517, 38 Am. Rep. 607.

<sup>13</sup> **Bradshaw v. Millikin**, 173 N. Car. 432, L. R. A. 1917E, 880, 92 S. E. 161.

<sup>14</sup> **Malakoff Gin Co. v. Riddlesperger**, 108 Tex. 273, 192 S. W. 530.

the day for the owner of a building at such business is a breach of such contract, and B is entitled to an injunction.<sup>15</sup>

A covenant not to compete, which is a part of a contract of partnership, may be enforced by injunction.<sup>16</sup> The fact that the partner who seeks relief has so large a business that he can not attend to it all in person, does not prevent him from having such good will protected by injunction.<sup>17</sup>

**§ 3387. Incident to contracts of employment.** An employe has an opportunity, in many cases, to learn the trade secrets of his employer, or to acquire such a knowledge of his business and of his customers that he is able to divert them from such employer to some competitor; and covenants are frequently found, in contracts of employment, by which the employe agrees not to compete with his employer, or to enter the services of a competitor, during the period of his employment, or for a prescribed time thereafter. Such covenants are valid if they are reasonably adapted to protect the business of the employer.<sup>1</sup> Whether such covenants will be enforced by injunction depends on the extent to which a breach of such covenant will injure the employer. If the employe is in such a position that he can injure his employer by diverting business, if he breaks such covenant not to compete, such covenant may be enforced by injunction.<sup>2</sup> A covenant not to engage in similar

<sup>15</sup> *Ammon v. Keill*, 95 Neb. 695, 52 L. R. A. (N.S.) 503, 146 N. W. 1009.

<sup>16</sup> *Marvel v. Jonah*, 83 N. J. Eq. 295, L. R. A. 1915B, 206, 90 Atl. 1004.

<sup>17</sup> *Marvel v. Jonah*, 83 N. J. Eq. 295, L. R. A. 1915B, 206, 90 Atl. 1004.

<sup>1</sup> See § 780.

<sup>2</sup> *England. Benwell v. Inns*, 24 Beav. 307; *Evans v. Ware* [1892], 3 Ch. 502; *Dubowski v. Goldstein* [1896], 1 Q. B. 478.

*Colorado. Freudenthal v. Epsey*, 45 Colo. 488, 26 L. R. A. (N.S.) 961, 102 Pac. 280.

*Georgia. Kinney v. Scarbrough*, 138 Ga. 77, 40 L. R. A. (N.S.) 473, 74 S. E. 772; *Shirk v. Loftis*, 148 Ga. 500, 97 S. E. 66.

*Indiana. Westervelt v. National Paper & Supply Co.*, 154 Ind. 673, 57 N. E. 552.

*Michigan. Thum Co. v. Tloczynski*, 114 Mich. 149, 68 Am. St. Rep. 469, 38 L. R. A. 200, 72 N. W. 140.

*Nebraska. Roper v. Pryor*, 102 Neb. 709, 169 N. W. 257.

*New Jersey. Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379.

*New York. McCall Co. v. Wright*, 198 N. Y. 143, 31 L. R. A. (N.S.) 249, 91 N. E. 516.

*Pennsylvania. Srolowitz v. Roseman*, 263 Pa. St. 588, 107 Atl. 322.

*Wisconsin. Eureka Laundry Co. v. Long*, 146 Wis. 205, 35 L. R. A. (N.S.) 119, 131 N. W. 412.

See *The Doctrine of Lumley v. Wagner*, by E. C. C. Firth, 13 *Law Quarterly Review* 306; and *Enforcement of Negative Covenants (Some Old Problems in a Modern Guise)*, by Barry Gilbert, 4 *California Law Review* 114; and *Impli-*

employment for a period of four years, and in the city in which the employe had worked,<sup>3</sup> or a covenant by one who has accepted and entered into an employment in which he has learned many of his employer's trade secrets not to engage in the same business with any other employer during the term of his employment, within a radius of twelve hundred miles of a certain town,<sup>4</sup> may be enforced by injunction. A salesman and local manager,<sup>5</sup> or a driver who has charge of a laundry route,<sup>6</sup> or a physician who is employed by another physician,<sup>7</sup> have each such opportunities for diverting custom, that negative covenants not to compete will be enforced by injunction.

There is, however, no arbitrary rule which requires the court to enjoin a former employe from breaking a covenant by which he has agreed not to compete with his former employer. Injunction is granted in such cases on the theory that the remedy at law is inadequate, and that the employer will suffer a serious injury, for which his action at law can give no adequate remedy. Accordingly, injunction will not issue if the nature of the employment or the relation of the employe to the business of the employer, is such that the breach of the negative covenant by the employe will not cause serious or irreparable injury to his former employer.<sup>8</sup> Unless it is shown that a breach of such negative covenant will result in serious or irreparable injury, a bookkeeper in the liquor business will not be enjoined from competing with his employer, though in violation of such negative covenant;<sup>9</sup> nor will the manager of a clothing store be enjoined from competing with his former employer;<sup>10</sup> nor will a dentist who has been employed by another dentist be enjoined from competing with his former employer.<sup>11</sup>

cations of *Lumley v. Wagner*, by George L. Clark, 17 *Columbia Law Review* 687.

<sup>3</sup> *Shirk v. Loftis*, 148 Ga. 500, 97 S. E. 66.

<sup>4</sup> *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915.

<sup>5</sup> *Kinney v. Scarbrough*, 138 Ga. 77, 40 L. R. A. (N.S.) 473, 74 S. E. 772.

<sup>6</sup> *Eureka Laundry Co. v. Long*, 146 Wis. 205, 35 L. R. A. (N.S.) 119, 131 N. W. 412.

<sup>7</sup> *Freudenthal v. Epsey*, 45 Colo. 488, 26 L. R. A. (N.S.) 961, 102 Pac. 280.

<sup>8</sup> *Simms v. Burnette*, 55 Fla. 702, 127 Am. St. Rep. 201, 16 L. R. A. (N.S.) 389, 15 Ann. Cas. 690, 46 So. 90; *Osius v. Hinchman*, 150 Mich. 603, 16 L. R. A. (N.S.) 393, 114 N. W. 402; *Menter Co. v. Brock*, — Minn. —, 180 N. W. 553.

<sup>9</sup> *Simms v. Burnette*, 55 Fla. 702, 127 Am. St. Rep. 201, 16 L. R. A. (N.S.) 389, 15 Ann. Cas. 690, 46 So. 90.

<sup>10</sup> *Menter Co. v. Brock*, — Minn. —, 180 N. W. 553.

<sup>11</sup> *Osius v. Hinchman*, 150 Mich. 603, 16 L. R. A. (N.S.) 393, 114 N. W. 402.

**§ 3388. Protection of trade secrets.** One to whom trade secrets have been disclosed under an agreement not to divulge them, will be enjoined from divulging them in violation of such contract,<sup>1</sup> or from entering into business with a competitor.<sup>2</sup> While this remedy exists in favor of an employer as against an employe,<sup>3</sup> it is not limited to this relation; but it applies to all cases in which injunction is necessary to protect trade secrets.<sup>4</sup> A manufacturer to whom designs for the manufacture of torpedoes have been furnished by the United States, may be enjoined from disclosing such designs.<sup>5</sup> An employe who has obtained a list of the names of customers of his employer, will be enjoined from making use of such names himself,<sup>6</sup> or from disclosing it to his new employer, who is a competitor of his former employer.<sup>7</sup>

Cases of this sort present one point of difference from those in which it is sought to restrain an employe from entering into the employment of a competitor of his employer, before his term of employment has ended. In the latter case, there are executory covenants on the part of the employe and on the part of the employer; and specific performance will not be granted to enforce either of these covenants.<sup>8</sup> In the former case, where the breach takes place after the term of employment has ended, all of the covenants of the contract, except the negative covenants, have been performed; and if an injunction is granted, performance of all of the covenants will thus be secure.

<sup>1</sup> *United States. E. W. Bliss Co. v. United States*, 248 U. S. 37, 63 L. ed. 61.

*Illinois. Witkowsky v. Affeld*, 283 Ill. 557, 119 N. E. 630.

*Massachusetts. American Stay Co. v. Delaney*, 211 Mass. 229, 97 N. E. 911.

*New Jersey. Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794, 63 L. R. A. 344, 55 Atl. 736; *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 12 L. R. A. (N.S.) 102, 67 Atl. 339; *Pomeroy Ink Co. v. Pomeroy*, 77 N. J. Eq. 293, 78 Atl. 698.

*Pennsylvania. Macbeth-Evans Glass Co. v. Schnellbach*, 239 Pa. St. 76, 86 Atl. 688.

<sup>2</sup> *McCall Co. v. Wright*, 198 N. Y. 143, 31 L. R. A. (N.S.) 249, 91 N. E. 516.

<sup>3</sup> *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 103 Am. St. Rep. 794,

63 L. R. A. 344, 55 Atl. 736; *McCall Co. v. Wright*, 198 N. Y. 143, 31 L. R. A. (N.S.) 249, 91 N. E. 516.

<sup>4</sup> *E. W. Bliss Co. v. United States*, 248 U. S. 37, 63 L. ed. 61; *Witkowsky v. Affeld*, 283 Ill. 557, 119 N. E. 630; *Vulcan Detinning Co. v. American Can Co.*, 72 N. J. Eq. 387, 12 L. R. A. (N.S.) 102, 67 Atl. 339; *Pen Carbon Manifold Co. v. Tomney*, 90 N. J. Eq. 233, 110 Atl. 445.

<sup>5</sup> *E. W. Bliss Co. v. United States*, 248 U. S. 37, 63 L. ed. 61.

<sup>6</sup> *Stevens v. Stiles*, 29 R. I. 399, 20 L. R. A. (N.S.) 933, 17 Ann. Cas. 140, 71 Atl. 802.

<sup>7</sup> *Empire Steam Laundry v. Lozier*, 165 Cal. 95, 44 L. R. A. (N.S.) 1159, 130 Pac. 1180.

<sup>8</sup> See § 3354.

**§ 3389. Contracts of public utilities.** The attempt to employ injunction as a means of preventing a public utility from breaking its contract to supply consumers, presents a number of difficulties, which might seem insuperable if it were not for the extent of the public interest and for the irreparable character of the injury which would follow from refusal to grant such relief. There is, as a rule, no binding contract for any specific period of time, and accordingly in some jurisdictions it is held that injunction will not be granted.<sup>1</sup> An attempt to enforce the affirmative covenants on the part of the public service company by specific performance would require the court to supervise the performance of continuous duties extending over a long period of time; a thing which courts of equity have been unwilling to do.<sup>2</sup> Here, again, the public interest, and the serious consequences which would follow the denial of specific performance has induced some courts to grant specific performance in spite of these difficulties.<sup>3</sup>

Even where the courts refuse to grant specific performance of affirmative covenants of this sort, negative performance by injunction has been granted.<sup>4</sup> Under a statute which provides in express terms that injunction can not be granted unless specific performance can be granted, injunction has been denied as a means of enforcing a reservation in a deed between private persons, by which the grantor was to receive water from the land which he had conveyed.<sup>5</sup> In some jurisdictions, injunction will not be granted against a consumer who has entered into a binding contract for the exclusive use of some public service,<sup>6</sup> although a contract to take electric energy from one company alone for five years may be enforced by injunction to prevent the party to whom it was furnished from taking such energy from any other person.<sup>7</sup>

If a payment in advance has been made for the public service, this difficulty as to relief in equity against the consumer disappears; and the public service company may be enjoined from

<sup>1</sup> *Fowler Utilities Co. v. Gray*, 168 Ind. 1, 120 Am. St. Rep. 344, 7 L. R. A. (N.S.) 726, 79 N. E. 897.

See § 3373.

<sup>2</sup> See § 3354.

<sup>3</sup> See § 3354.

<sup>4</sup> *Warmack v. Major Stave Co.*, 132 Ark. 173, 200 S. W. 799 (electricity).

<sup>5</sup> *Peterson v. McDonald*, 13 Cal. App. 644, 110 Pac. 465.

<sup>6</sup> A contract for exclusive use of gas. *Steinau v. Gas Co.*, 48 O. S. 324, 27 N. E. 545.

A contract for the exclusive supply of electricity. *Dewey Hotel Co. v. United States Electric Lighting Co.*, 17 D. C. App. 356.

<sup>7</sup> *Metropolitan Electric Supply Co. v. Ginder* [1901], 2 Ch. 799 (even if there is no express negative covenant).

refusing to furnish service, at least as long as it continues in business.<sup>8</sup> If a valid monopoly has been given to a public service company, an injunction will issue to prevent a municipal corporation from constructing water works which would violate the terms of such franchise.<sup>9</sup>

In spite of these difficulties, there is so great a public interest in the performance of contracts of public utility companies, and the consequences of breach are so serious that, in most jurisdictions, injunction will be granted to restrain a public service company from refusing to render such service, at least as long as it continues in business.<sup>10</sup> This remedy has been given against public utility companies which were engaged in furnishing water,<sup>11</sup>

<sup>8</sup> *Warmack v. Major Stave Co.*, 132 Ark. 173, 200 S. W. 799 (electricity).

<sup>9</sup> *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. ed. 1102.

<sup>10</sup> *England. Keith v. National Telephone Co.* [1894], 2 Ch. 147.

*Alabama. Mobile Electric Co. v. Mobile*, 201 Ala. 607, L. R. A. 1918F, 667, 79 So. 39.

*California. Gallagher v. Equitable Gaslight Co.*, 141 Cal. 699, 75 Pac. 329.

*Georgia. Edwards v. Milledgeville Water Co.*, 116 Ga. 201, 42 S. E. 417.

*Indiana. Xenia Real-Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 60 L. R. A. 822, 66 N. E. 436; *Simpson v. Pittsburgh Plate Glass Co.*, 28 Ind. App. 343, 62 N. E. 753.

*Iowa. Spaulding Manufacturing Co. v. Grinnell*, 155 Ia. 500, 136 N. W. 649.

*Maine. Wood v. Auburn*, 87 Me. 287, 29 L. R. A. 376, 32 Atl. 906; *Belfast v. Belfast Water Co.*, 115 Me. 234, L. R. A. 1917B, 908, 98 Atl. 738.

*Maryland. Carter v. Suburban Water Co.*, 131 Md. 91, L. R. A. 1918A, 764, 101 Atl. 771.

*Massachusetts. Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432, 40 L. R. A. 657, 50 N. E. 634.

*Montana. Horsky v. Helena Consolidated Water Co.*, 13 Mont. 229, 33 Pac. 689.

*New Jersey. Washington v. Washington Water Co.*, 70 N. J. Eq. 254, 62 Atl. 390.

*New York. McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785.

*North Dakota. Great Northern Ry. v. Sheyenne Telephone Co.*, 27 N. D. 256, 145 N. W. 1062.

*Pennsylvania. People's Natural Gas Co. v. American Natural Gas Co.*, 233 Pa. St. 569, 82 Atl. 935; *American Conduit Manufacturing Co. v. Kensington Water Co.*, 234 Pa. St. 208, 83 Atl. 70.

*South Carolina. Poole v. Paris Mountain Water Co.*, 81 S. Car. 438, 128 Am. St. Rep. 923, 62 S. E. 874.

*Wisconsin. Oconto Electric Co. v. Oconto Service Co.*, 168 Wis. 165, 169 N. W. 293.

<sup>11</sup> *Georgia. Edwards v. Milledgeville Water Co.*, 116 Ga. 201, 42 S. E. 417.

*Iowa. Spaulding Manufacturing Co. v. Grinnell*, 155 Ia. 500, 136 N. W. 649.

*Maine. Wood v. Auburn*, 87 Me. 287, 29 L. R. A. 376, 32 Atl. 906; *Belfast v. Belfast Water Co.*, 115 Me. 234, L. R. A. 1917B, 908, 98 Atl. 738.

*Maryland. Carter v. Suburban Water Co.*, 131 Md. 91, L. R. A. 1918A, 764, 101 Atl. 771.

*Massachusetts. Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432, 40 L. R. A. 657, 50 N. E. 634.

electricity,<sup>12</sup> and telephone service.<sup>13</sup> Injunction has been allowed where the party under contract to furnish gas breaks or threatens to break his contract.<sup>14</sup> Thus a contract between a natural gas company and a city whereby the gas company agrees not to charge more than a certain price for gas may be enforced by injunction if the gas company attempts to charge a higher rate than that agreed upon.<sup>15</sup> An injunction may be given against cutting off the supply of natural gas furnished under contract.<sup>16</sup>

**§ 3390. Executory covenants enforceable specifically.** If the affirmative executory covenants are such as can be enforced by a decree of specific performance, injunction will generally be granted to restrain breach of the negative covenants.<sup>1</sup> Where performance of a contract concerning the use of railway tracks and a right of way can be enforced specifically, breach thereof may be prevented by injunction.<sup>2</sup> A contract to give to vendee the first refusal of vendor's realty may be enforced by injunction if the vendor threatens to sell the realty to another.<sup>3</sup> While one who has agreed to buy specific corporate stock may enjoin the vendor from disabling himself from performance by selling so much stock that he will not have enough to deliver under the contract, yet if the corporation will, after issuing the stock contemplated, have enough

**Montana.** *Horsky v. Helena Consolidated Water Co.*, 13 Mont. 229, 33 Pac. 689.

**New Jersey.** *Washington v. Washington Water Co.*, 70 N. J. Eq. 254, 62 Atl. 390.

**New York.** *McEntee v. Kingston Water Co.*, 165 N. Y. 27, 58 N. E. 785.

**Pennsylvania.** *American Conduit Manufacturing Co. v. Kensington Water Co.*, 234 Pa. St. 208, 83 Atl. 70.

**South Carolina.** *Poole v. Paris Mountain Water Co.*, 81 S. Car. 438, 128 Am. St. Rep. 923, 62 S. E. 874.

<sup>12</sup> *Mobile Electric Co. v. Mobile*, 201 Ala. 607, L. R. A. 1918F, 667, 79 So. 39; *Oconto Electric Co. v. Oconto Service Co.*, 168 Wis. 165, 169 N. W. 293.

<sup>13</sup> *Keith v. National Telephone Co.* [1894], 2 Ch. 147; *Great Northern Ry.*

*v. Sheyenne Telephone Co.*, 27 N. D. 256, 145 N. W. 1062.

<sup>14</sup> *Gallagher v. Equitable Gaslight Co.*, 141 Cal. 699, 75 Pac. 329; *Xenia Real-Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *People's Natural Gas Co. v. American Natural Gas Co.*, 233 Pa. St. 569, 82 Atl. 935.

<sup>15</sup> *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 60 L. R. A. 822, 66 N. E. 436.

<sup>16</sup> *Simpson v. Pittsburgh Plate Glass Co.*, 28 Ind. App. 343, 62 N. E. 753.

<sup>1</sup> *Davis v. Davis*, 89 Fed. 532.

<sup>2</sup> *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843.

<sup>3</sup> *Manchester Ship Canal Co. v. Race Course Co.* [1900], 2 Ch. 352.

See also, *Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co.*, 102 Wash. 608, 173 Pac. 508.

stock left to perform its contract with the vendee, the latter can not have an injunction against the contemplated issue.<sup>4</sup>

If the executory covenants which have remained unperformed on the part of the plaintiff can be enforced specifically by injunction, the fact that they remain executory does not prevent the court from granting injunction as against the defendant.<sup>5</sup> A contract between a number of men engaged in business, by which they agree to close the places of business at a certain hour, may be enforced by injunction.<sup>6</sup> If A has agreed to sell personal property to B, B may enjoin A from selling such property to third persons where A could have had specific performance against B.<sup>7</sup>

**§ 3391. Affirmative executory covenants not enforceable specifically—Injunction denied.** If the covenants which remain executory are, in part, affirmative covenants which can not be enforced by specific performance, and in part negative covenants, and it is sought to enforce the negative covenants by injunction, a number of questions are presented on some of which there has been a sharp conflict of authority. The executory covenants which can not be enforced specifically may be covenants by which the defendant has undertaken to do something. In a case of this sort, the doctrine of mutuality, so-called, does not affect the result, if the plaintiff has performed in full, or if his performance can be compelled by specific performance; but otherwise injunction against the defendant will secure performance of only part of the defendant's covenants, and the plaintiff may be able, if such remedy is given, to compel the defendant to perform such negative covenants, while, at the same time, the plaintiff is able to resist performance on his part, if any covenants which he is to perform remain executory, by showing that the defendant has broken the affirmative covenants which form a vital part of the contract. If the executory covenants which can not be enforced by injunction or specific performance are to be performed by the plaintiff, the

<sup>4</sup> *Quin v. Havenor*, 118 Wis. 53, 94 N. W. 642.

<sup>5</sup> *Stovall v. McCutchen*, 107 Ky. 577, 54 S. W. 969; *White Marble Lime Co. v. Consolidated Lumber Co.*, 205 Mich. 634, 172 N. W. 603.

<sup>6</sup> *Stovall v. McCutchen*, 107 Ky. 577, 54 S. W. 969.

<sup>7</sup> *White Marble Lime Co. v. Consolidated Lumber Co.*, 205 Mich. 634, 172 N. W. 603.

Injunction has been granted in cases of this sort without reference to the seller's right to have specific performance against the buyer.

See § 3378.

doctrine of mutuality is frequently invoked.<sup>1</sup> In many of the cases there are executory covenants on both sides, none of which can be enforced specifically, except the negative covenants on which injunction is sought. In cases of this sort, there is, on the one hand, a want of so-called mutuality, and, on the other hand, the granting of the injunction will not compel full performance on the part of the defendant; and accordingly the plaintiff will be able to compel performance of the negative covenants if injunction is granted, and at the same time to resist performance of the executory covenants to be performed on his part, because of the defendant's failure to perform his affirmative covenants. Many of the cases in which this question is presented, involve covenants for personal services. The original rule seems to have been that equity would not grant injunction to restrain the breach of covenants in contracts of this sort,<sup>2</sup> even if there was an express negative covenant.<sup>3</sup> Injunction has accordingly been denied against one who has agreed to render services of a unique or extraordinary character,<sup>4</sup> such as an actor.<sup>5</sup>

In some jurisdictions injunction is still refused as a means of enforcing negative covenants, if there are executory covenants for which specific performance can not be granted.<sup>6</sup> If a tenant has bought live stock from his lessor on credit, and has agreed not to remove such live stock from such premises until he has paid therefor, he can not be prevented by injunction from removing them.<sup>7</sup> A contract was made by the owner of a theater to lease it to the owner and manager of a theatrical troupe. Subsequently, the owner of the theater repudiated the contract and leased to a rival troupe. On suit for injunction it was held that since specific performance could not have been had against the troupe, injunc-

<sup>1</sup> See § 3378.

<sup>2</sup> *Kemble v. Kean*, 6 Sim. 333; *De Rivaflinoli v. Corsetti*, 4 Paige (N. Y.) 264, 25 Am. Dec. 532; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529.

<sup>3</sup> *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315.

<sup>4</sup> *Kemble v. Kean*, 6 Sim. 333; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529.

<sup>5</sup> *Kemble v. Kean*, 6 Sim. 333; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.)

315; *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529.

<sup>6</sup> *Rutland Marble Co. v. Ripley*, 77 U. S. (10 Wall.) 339, 19 L. ed. 955; *Davis v. Kemp*, 201 Ala. 219, 77 So. 745; *Welty v. Jacobs*, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723; *Richmond v. Dubuque & Sioux City Ry. Co.*, 33 Ia. 422, 486; *H. W. Gossard Co. v. Crosby*, 132 Ia. 155, 6 L. R. A. (N.S.) 1115, 109 N. W. 483.

<sup>7</sup> *Davis v. Kemp*, 201 Ala. 219, 77 So. 745.

tion could not be given against the owner of the theater.<sup>8</sup> Under a statute which provides that injunction can not be granted unless specific performance could be granted, the negative covenants of a contract by a medical institute to furnish medicines, advertising matter, and the exclusive right to make use of their remedies, and their name, will not be enforced by injunction.<sup>9</sup>

**§ 3392. Injunction granted—Contracts of employment—Unique services.** Modern courts have, however, receded somewhat from this extreme and uncompromising position.<sup>1</sup> In some cases, the irreparable nature of the injury which will follow from the breach, and the ability of the court to lessen such injury by granting an injunction, seems to be regarded as sufficient to justify the use of an injunction without regard to the ability of the court to grant specific performance of the remaining covenants.<sup>2</sup> In some cases it has been held that if the services contracted for are unique in character, and if by reason of the special knowledge, skill, ability or reputation of the party rendering them it is difficult for the adversary party to provide a substitute therefor, equity will give an injunction against the breach of a negative covenant by the employe not to render services to any other person during his term of employment.<sup>3</sup> An injunction has been given against breach of

<sup>8</sup> *Welty v. Jacobs*, 171 Ill. 624, 40 L. R. A. 98, 49 N. E. 723.

<sup>9</sup> *Anderson v. Neal Institutes Co.*, 37 Cal. App. 174, 173 Pac. 779.

<sup>1</sup> *Kemble v. Kean*, 6 Sim. 333, was expressly overruled in *Lumley v. Wagner*, 1 De G. M. & G. 604.

See also, *Cain v. Garner*, 169 Ky. 633, L. R. A. 1916E, 682, 185 S. W. 122; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622.

<sup>2</sup> *Illinois. Inter-Ocean Publishing Co. v. Associated Press*, 184 Ill. 438, 56 N. E. 822.

*Iowa. Tusant v. Grand Lodge Ancient Order of United Workmen*, 183 Ia. 489, L. R. A. 1918F, 452, 163 N. W. 690.

*Michigan. Rolfe v. Burnham* 110 Mich. 660, 68 N. W. 980.

*New York. Langan v. Supreme Council American Legion of Honor*, 174 N. Y. 266, 66 N. E. 932.

*Wisconsin. Schuster v. Kuryer Publishing Co.*, 165 Wis. 327, 162 N. W. 173.

<sup>3</sup> *Cain v. Garner*, 169 Ky. 633, L. R. A. 1916E, 682, 185 S. W. 122; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622; *Posner v. Jackson*, 223 N. Y. 325, 119 N. E. 573 (obiter).

"Where a contract stipulates for special unique or extraordinary personal services or acts, or where the services to be rendered are purely intellectual or are peculiar and individual in their character, the court will grant an injunction in aid of specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages." *The William Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 364, 18 Am. St. Rep. 278, 7 L. R. A. 779, 20 Atl. 467.

a contract by an actor or actress,<sup>4</sup> or a baseball player,<sup>5</sup> or an expert designer of women's garments,<sup>6</sup> or a jockey,<sup>7</sup> each of peculiar ability and great reputation.

If a railroad has agreed to assign work to conductors in order of seniority, a conductor may enjoin the railroad from assigning his passenger run to another conductor.<sup>8</sup>

**§ 3393. Services not unique.** If the services contracted for are not of a unique or extraordinary character, equity will not enjoin the employe from accepting other employment during his term.<sup>1</sup> Under this principle it has been held that a traveling salesman and secretary,<sup>2</sup> a saleswoman and demonstrator,<sup>3</sup> a salesman,<sup>4</sup> even if he has the "particular run of a class of trade,"<sup>5</sup> a special insurance agent,<sup>6</sup> a collector,<sup>7</sup> railroad employes,<sup>8</sup> or acrobats and tumblers,<sup>9</sup> will not be enjoined from accepting other employment during their term of employment, if it is not shown that their services are of extraordinary and unique value. It has, however, been held that a court goes too far in holding that injunction should be given only when it is impossible to replace the employe.<sup>10</sup>

<sup>4</sup> *Lumley v. Wagner*, 1 De G. M. & G. 604; *Montague v. Flockton*, L. R. 16 Eq. 189; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622.

<sup>5</sup> "He may not be the sun in the base ball firmament, but he is certainly a bright particular star." *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 217, 90 Am. St. Rep. 627, 58 L. R. A. 227, 51 Atl. 973.

<sup>6</sup> *Posner v. Jackson*, 223 N. Y. 325, 119 N. E. 573 (obiter).

<sup>7</sup> *Cain v. Garner*, 169 Ky. 633, L. R. A. 1016E, 682, 185 S. W. 122.

<sup>8</sup> *Gregg v. Starks*, 188 Ky. 834, 224 S. W. 459.

<sup>9</sup> *Simms v. Burnette*, 55 Fla. 702, 16 L. R. A. (N.S.) 389, 15 Ann. Cas. 690, 46 So. 90; *Rosenstein v. Zentz*, 118 Md. 564, 44 L. R. A. (N.S.) 63, 85 Atl. 675; *Chain Belt Co. v. Von Sprekelsen*, 117 Wis. 106, 94 N. W. 78.

See however, *Robinson v. Heuer* [1898], 2 Ch. 451.

<sup>2</sup> *The William Rogers Mfg. Co. v.*

*Rogers*, 58 Conn. 356, 18 Am. St. Rep. 278, 7 L. R. A. 779, 20 Atl. 467.

<sup>3</sup> *H. W. Gossard Co. v. Crosby*, 132 Ia. 155, 6 L. R. A. (N.S.) 1115, 109 N. W. 483.

<sup>4</sup> *Rosenstein v. Zentz*, 118 Md. 564, 44 L. R. A. (N.S.) 63, 85 Atl. 675.

<sup>5</sup> *Rosenstein v. Zentz*, 118 Md. 564, 44 L. R. A. (N.S.) 63, 85 Atl. 675.

<sup>6</sup> *Burney v. Ryle*, 91 Ga. 701, 17 S. E. 986.

<sup>7</sup> *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348.

<sup>8</sup> *Toledo, Ann Arbor & North Michigan Ry. v. Pennsylvania Co.*, 54 Fed. 730, 19 L. R. A. 387.

*Contra, Farmers', Loan & Trust Co. v. Northern Pacific Ry.*, 60 Fed. 803, 25 L. R. A. 414 (in foot-note); *Arthur v. Oakes*, 63 Fed. 310, 25 L. R. A. 414.

<sup>9</sup> *Cort v. Lassard*, 18 Or. 221, 17 Am. St. Rep. 726, 6 L. R. A. 653, 22 Pac. 1054.

<sup>10</sup> *Philadelphia Ball Club v. Lajoie*, 202 Pa. St. 210, 90 Am. St. Rep. 627, 58 L. R. A. 227, 51 Atl. 973.

**§ 3394. Other contracts involving irreparable injury.** The use of injunction as a means of enforcing negative covenants where the affirmative covenants can not be enforced by specific performance, is not limited to contracts for personal services; but, in some jurisdictions, it is used wherever the damage resulting from breach would be serious or irreparable.<sup>1</sup> An insurance company will be enjoined from renouncing its contracts or from increasing the assessments so as to render the contracts of no value.<sup>2</sup> A contract by a department store, by which it agrees that it will not permit any goods other than those made by plaintiff to be sold at its store, may be enforced by injunction, even if it is not practicable to grant specific performance of the remaining covenants.<sup>3</sup> A railroad will be enjoined from interfering with a contract by which it agrees that a lumber company may store lumber on its premises, although it may not be practicable to enforce, by specific performance, the covenants on the part of the lumber company to give a certain portion of its business to the railroad company, and to pay a certain amount per car for hauling freight.<sup>4</sup> If a purchaser of personalty will suffer serious or irreparable injury on account of breach by the seller, the seller may be enjoined from selling goods to third persons who are not innocent purchasers for value, even though the affirmative covenants of such contract could not be enforced specifically.<sup>5</sup>

<sup>1</sup> England. *James Jones & Sons v. Tankerville* [1909], 2 Ch. 440; *Frogley v. Lovelace, Johnson* 333.

Illinois. *Lanyon v. Garden City Sand Co.*, 223 Ill. 616, 9 L. R. A. (N.S.) 446, 7 Ann. Cas. 50, 79 N. W. 313.

Iowa. *Tusant v. Grand Lodge Ancient Order of United Workmen*, 183 Ia. 489, L. R. A. 1918F, 452, 163 N. W. 690.

Kentucky. *Friedberg v. McClary*, 173 Ky. 579, L. R. A. 1917C, 777, 191 S. W. 300.

West Virginia. *Brown v. Western Maryland Ry. Co.*, — W. Va. —, 4 A. L. R. 522, 99 S. E. 457.

<sup>2</sup> *Tusant v. Grand Lodge Ancient Order of United Workmen*, 183 Ia. 489, L. R. A. 1918F, 452, 163 N. W. 690.

<sup>3</sup> *Standard Fashion Co. v. Siegel-*

*Cooper Co.*, 157 N. Y. 60, 68 Am. St. Rep. 749, 43 L. R. A. 854, 51 N. E. 408.

<sup>4</sup> *Brown v. Western Maryland Ry. Co.*, — W. Va. —, 4 A. L. R. 522, 99 S. E. 457.

<sup>5</sup> *James Jones & Sons v. Tankerville* [1909], 2 Ch. 440 (license to cut timber); *Frogley v. Lovelace, Johnson* 333 (license to kill rabbits on land of another); *Lanyon v. Garden City Sand Co.*, 223 Ill. 616, 9 L. R. A. (N.S.) 446, 79 N. E. 313 (fire clay); *Grant County v. Allphin*, 152 Ky. 280, 153 S. W. 417 (contract for pooling tobacco); *Friedberg v. McClary*, 173 Ky. 579, L. R. A. 1917C, 777, 191 S. W. 300 (tobacco); *Schuster v. Kuryer Publishing Co.*, 165 Wis. 327, 162 N. W. 173 (contract to furnish advertising).

**§ 3395. Injunction to restrain breach of affirmative covenants.**

If an injunction is sought as a means of restraining the entire breach of the contract, including affirmative and negative covenants, a mandatory injunction is, in effect, a decree of specific performance; and such injunction will not issue unless the affirmative covenants can be enforced specifically.<sup>1</sup> The court will not enjoin breach of a contract to maintain railroad shops and offices at a given point;<sup>2</sup> nor of a contract between a number of banks to conduct a clearing house,<sup>3</sup> since an injunction of this sort can not be enforced without compelling specific performance of the affirmative covenants.

**§ 3396. By whom and against whom injunction may be had.**

In order to prevent a multiplicity of actions, a municipal corporation may bring a suit to enjoin a public service corporation from breaking its contract to charge certain rates to the various consumers.<sup>1</sup> Breach of a covenant not to compete in business, may be enforced, in a suit for injunction, by one who has purchased such business from the original promisee.<sup>2</sup> Building restrictions may be enforced by the parties for whose benefit they were intended, although not parties to the original agreement.<sup>3</sup> They can not be enforced against subsequent grantees without notice of the fact that such restrictions were inserted in the deeds for the benefit of adjoining property owners.<sup>4</sup> A third person may be enjoined from entering into a contract which will cause a breach of the contract between the plaintiff and the defendant.<sup>5</sup> A party who is himself in default as to a material covenant can not enjoin the adversary party.<sup>6</sup>

<sup>1</sup> *Texas & Pacific Ry. v. Marshall*, 136 U. S. 393, 34 L. ed. 385; *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; *People's Savings Bank v. First National Bank*, 102 Wash. 436, 173 Pac. 52.

<sup>2</sup> *Texas & Pacific Ry. v. Marshall*, 136 U. S. 393, 34 L. ed. 385.

<sup>3</sup> *People's Savings Bank v. First National Bank*, 102 Wash. 436, 173 Pac. 52.

<sup>1</sup> *Mobile Electric Co. v. Mobile*, 201 Ala. 607, L. R. A. 1918F, 667, 79 So. 39.

<sup>2</sup> *Morgan v. Perhamus*, 36 O. S. 517, 38 Am. Rep. 607.

<sup>3</sup> *Brandenburg v. Lager*, 272 Ill. 622, 112 N. E. 321.

<sup>4</sup> *Kiley v. Hall*, 96 O. S. 374, L. R. A. 1918B, 961, 117 N. E. 359.

<sup>5</sup> *Friedberg v. McClary*, 173 Ky. 579, L. R. A. 1917C, 777, 191 S. W. 300.

<sup>6</sup> *Stronge Warner Co. v. H. Choate & Co.*, — Minn. —, 182 N. W. 712.

## II

## CANCELATION

**§ 3397. Nature and history of cancelation in equity.** Cancelation is a remedy given by a court of equity, by which a contract, conveyance, and the like, is declared to be of no effect.<sup>1</sup> In a suit for cancelation, the party who would be the defendant in an action at law, is the plaintiff; the cause of action which he sets up would amount to a defense at law in some cases, and in other cases it is prevented from being a defense at law, only by the operation of arbitrary rules which equity is seeking to break down, and the defendant is the party who would be the plaintiff in the action at law.

If equity took jurisdiction and granted relief of this sort, such decree was originally given effect by ordering the adversary party to bring the written contract (usually under seal) into court for physical cancelation or mutilation, and also by enjoining him from maintaining an action thereon. Relief of this sort, although not perhaps in this exact form, is given in equity at a rather early period.<sup>2</sup> Neither of these remedies could operate directly upon the right of action at law which the adversary party had. The courts of law paid no attention to a decree of this sort, which was rendered by a court of equity. Ordinarily the power of equity to punish disobedience of such decrees as contempt of court made it possible to give effect to decrees of this sort indirectly, since in most cases the defendant in equity would forego his action at law, rather than incur the risk of punishment for contempt. If, however, he succeeded in escaping the physical power of a court of equity, or if he was brave enough or reckless enough to endure its punishment, he had the power to prosecute his action at law in spite of a decree of cancelation in equity.

Under modern codes of civil procedure, or other reform procedure, the unedifying spectacle of two different courts of coordinate jurisdiction, neither of which paid any attention to the orders of the other, and each of which might give active resistance

<sup>1</sup> See, *The Jurisdiction of Equity for the Rescission of Contracts*, by F. M. Hudson, 33 *American Law Review*, 702.

<sup>2</sup> *Parker v. Ive*, 1 Cal. Ch. XX (relief against a forged charter; possibly coupled with discovery); *Milner v.*

*Leche*, 10 *Selden Society* (Select Cases in Chancery), 8 (duress); *Bodenham v. Halle*, 10 *Selden Society* (Select Cases in Chancery), 141 (non-delivery of obligation of Statute Merchant, which defendant, nevertheless, enforced).

to enforcing the orders of the other, has been ended. Equitable defenses can now be made in actions at law; and, under procedure of this sort, a decree of cancelation is self-executing.

### § 3398. General principles determining grant of cancelation.

While the differences of procedure between law and equity have been abolished, the essential nature of these different systems and of the remedies given by each, seems to persist. Cancelation can not be given by a jury in an action for money.<sup>1</sup> As in other cases of equitable relief,<sup>2</sup> cancelation is said not to be a matter of right, but to depend upon the discretion of the court of equity.<sup>3</sup> This is, of course, not a personal discretion, but a judicial discretion, governed by general principles, and exercised in order to do justice between the parties.<sup>4</sup>

It is generally said that this form of equitable relief, like other forms of equitable relief,<sup>5</sup> will be granted only if the remedy at law is not clear, adequate and complete.<sup>6</sup> While this form of statement is correct enough as an abstract proposition, it is of relatively little practical value, as it does not give any practical test for distinguishing between the cases in which equity regards the opportunity of interposing a defense at law as a clear, adequate and complete remedy, and those in which it does not. For this reason, a detailed examination of the facts, on which equity will grant cancelation, is necessary before we can understand the real meaning of the rule that equity will grant this relief if the legal remedy is not adequate.<sup>7</sup> If a more restricted remedy in equity will do justice between the parties, cancelation will be denied, although the legal remedy may be inadequate.<sup>8</sup>

<sup>1</sup> J. I. Case Threshing Machine Co. v. Mattingly, 142 Ky. 581, 134 S. W. 1131.

<sup>2</sup> See §§ 3346 et seq. and 3375.

<sup>3</sup> England. Clifford v. Brooke, 13 Ves. Jr. 131.

Illinois. Springfield & Northeastern Traction Co. v. Warrick, 249 Ill. 470, 94 N. E. 933.

New York. Calhoun v. Millard, 121 N. Y. 69, 8 L. R. A. 248, 24 N. E. 27.

Ohio. Kirby v. Harrison, 2 O. S. 326, 59 Am. Dec. 677.

Wisconsin. Douglas County v. Walbridge, 38 Wis. 179; Danielson v. Danielson, 165 Wis. 171, L. R. A. 1917D, 624, 161 N. W. 787; Weinhausen v.

Hayes, — Wis. —, 178 N. W. 780.

<sup>4</sup> Douglas County v. Walbridge, 38 Wis. 179; Danielson v. Danielson, 165 Wis. 171, L. R. A. 1917D, 624, 161 N. W. 787.

<sup>5</sup> See §§ 3346 et seq. and 3376.

<sup>6</sup> If ejectment will lie, cancelation will not be granted. Stewart v. Stewart, — Ala. —, 87 So. 799.

See § 3404.

<sup>7</sup> See § 3404, and cross references thereunder.

<sup>8</sup> Danielson v. Danielson, 165 Wis. 171, L. R. A. 1917D, 624, 161 N. W. 787.

**§ 3399. Facts for which cancelation may be granted—Mistake, fraud, etc.** The remedy of cancelation is frequently sought where the contract, or other transaction, is void from the beginning or is voidable, by reason of defects which inhere in the contract or transaction from the beginning; and it is granted in cases of this sort, if the opportunity to interpose such facts as a defense at law is not adequate. This question has been considered in connection with the various forms of defect in the formation of the contract. As has already been said, cancelation may be given for fraud in an essential element,<sup>1</sup> including forgery,<sup>2</sup> and cases in which the instrument was taken from the possession of the promisor or grantor without delivery.<sup>3</sup> It has been granted for mistake as to an essential element, if such mistake is operative.<sup>4</sup> In many jurisdictions, cancelation is denied where the party who seeks such relief has an opportunity to read the instrument, and where his mistake arises from his failure to read it or to appreciate the meaning thereof.<sup>5</sup> On the other hand, in some cases, cancelation has been granted for such mistake, if the mistake is discovered before the adversary party has altered his position in reliance thereon.<sup>6</sup> Cancelation has been granted for innocent misrepresentation,<sup>7</sup> for failure to disclose material facts which it was the duty of the adversary party to disclose,<sup>8</sup> for fraud as to a material col-

<sup>1</sup> See § 240.

<sup>2</sup> In re Fleming's Estate, 265 Pa. St. 399, 109 Atl. 265; Andre v. Hoffman, 81 W. Va. 620, 95 S. E. 84.

<sup>3</sup> Harroun v. Graham, 258 Pa. St. 245, 101 Atl. 985.

<sup>4</sup> Hoy v. Hoy, 93 Miss. 732, 25 L. R. A. (N.S.) 182, 17 Ann. Cas. 1137, 48 So. 903; Riegel v. American Life Ins. Co., 140 Pa. St. 193, 23 Am. St. Rep. 225, 11 L. R. A. 857, 21 Atl. 392; Lee v. Laprade, 106 Va. 594, 117 Am. St. Rep. 1021, 56 S. E. 719; Burton v. Harden, 108 Va. 51, 15 L. R. A. (N.S.) 1038, 60 S. E. 736.

See § 277.

<sup>5</sup> Tatum v. Coast Lumber Co., 16 Ida. 471, 23 L. R. A. (N.S.) 1109, 101 Pac. 957; Steinmeyer v. Schroepel, 226 Ill. 9, 10 L. R. A. (N.S.) 114, 80 N. E. 564; Wynn v. Kendall, — Miss.

—, 85 So. 85; Hale v. Hale, 62 W. Va. 609, 14 L. R. A. (N.S.) 221, 59 S. E. 1056.

Cancelation will not be granted where it is claimed that the parties did not intend the contract to take effect in accordance with its terms. Terwilliger v. McCorkle, — Kan. —, 196 Pac. 618.

Especially if such relief is not sought promptly. Wynn v. Kendall — Miss. —, 85 So. 85.

See §§ 271 et seq.

<sup>6</sup> Woldenberg v. Riphan, 166 Wis. 433, 166 N. W. 21.

See, however, §§ 271 et seq.

<sup>7</sup> See §

<sup>8</sup> Poole v Camden, 79 W. Va. 310, L. R. A. 1317E, 988, 92 S. E. 454.

See § 279.

lateral fact,<sup>9</sup> for innocent misrepresentation,<sup>10</sup> for duress,<sup>11</sup> or for undue influence.<sup>12</sup>

**§ 3400. Consideration and subject-matter.** If a contract is unenforceable because of want of consideration, equity may decree cancelation, if the promisor may be prevented from setting up such defense in an action at law,<sup>1</sup> as where the contract was negotiable,<sup>2</sup> or under seal.<sup>3</sup> Mere inadequacy of consideration is not ground for cancelation,<sup>4</sup> unless it is so gross as to indicate fraud,<sup>5</sup> which is often stated in the form that the inadequacy must be so gross as to shock the conscience of the chancellor.<sup>6</sup>

In some cases cancelation may be granted<sup>7</sup> because of illegality of the subject-matter,<sup>7</sup> although, in most cases, such relief is denied on the theory that equity will leave the parties in the position in which they have placed themselves.<sup>8</sup>

<sup>9</sup> *United States*. *Slater v. Ruggles*, 263 Fed. 1021.

*Arkansas*. *Hornsell v. Gilliland*, — Ark. —, 224 S. W. 722.

*Colorado*. *Carlson v. Rensink*, 65 Colo. 11, 3 A. L. R. 72, 173 Pac. 542.

*Kansas*. *Basye v. Paola Refining Co.*, 79 Kan. 755, 25 L. R. A. (N.S.) 1302, 101 Pac. 658.

*Massachusetts*. *Long v. Athol*, 196 Mass. 497, 17 L. R. A. (N.S.) 96, 82 N. E. 665; *Givens v. Powell*, — Mass. —, 131 N. E. 193.

*Missouri*. *Vodicka v. Sette*, — Mo. —, 223 S. W. 578.

*New York*. *Adams v. Gillig*, 199 N. Y. 314, 32 L. R. A. (N.S.) 127, 20 Ann. Cas. 910, 92 N. E. 670.

*North Carolina*. *Bell v. Harrison*, 179 N. Car. 190, 102 S. E. 200.

*Oklahoma*. *St. Louis & Sante Fe Ry. v. Richards*, 23 Okla. 256, 23 L. R. A. (N.S.) 1032, 102 Pac. 92.

See §§ 345 et seq.

<sup>10</sup> See § 375.

<sup>11</sup> *Kronmeyer v. Buck*, 258 Ill. 586, 45 L. R. A. (N.S.) 1182, 101 N. E. 935; *Givens v. Powell*, — Mass. —, 131 N. E. 193.

See § 504.

<sup>12</sup> See § 477.

<sup>1</sup> *Williamson v. Collins*, 243 Fed. 835, 156 C. C. A. 347; *Hodler v. Hodler*, 95 Or. 180, 185 Pac. 241, 187 Pac. 604; *O'Neill v. Mutual Life Insurance Co.*, 51 Utah 592, 172 Pac. 306.

<sup>2</sup> *Williamson v. Collins*, 243 Fed. 835, 156 C. C. A. 347; *Hodler v. Hodler*, 95 Or. 180, 185 Pac. 241, 187 Pac. 604.

<sup>3</sup> *O'Neill v. Mutual Life Insurance Co.*, 51 Utah 592, 172 Pac. 306.

<sup>4</sup> *McAdams v. Bailey*, 169 Ind. 518, 13 L. R. A. (N.S.) 1003, 82 N. E. 1057; *Alford v. Dennis*, 102 Kan. 403, 170 Pac. 1005; *Brink v. Canfield*, 78 Okla. 189, 187 Pac. 223.

See § 638.

<sup>5</sup> *Steltzer v. Compton*, 167 Ia. 266, 149 N. W. 243; *Brink v. Canfield*, 78 Okla. 189, 187 Pac. 223.

See § 638.

<sup>6</sup> *Brink v. Canfield*, 78 Okla. 189, 187 Pac. 223.

See § 638.

<sup>7</sup> *Hodler v. Hodler*, 95 Or. 180, 185 Pac. 241, 187 Pac. 604.

See §§ 1057 et seq.

<sup>8</sup> *Mounts v. Charles*, 187 Ky. 421, 219 S. W. 184.

See §§ 1057 et seq.

**§ 3401. Capacity, assignability, etc.** Cancellation may also be granted on account of infancy,<sup>1</sup> insanity, or weakness of mind,<sup>2</sup> or drunkenness.<sup>3</sup> In some jurisdictions cancellation may be granted if one of the parties to the transaction is a corporation, and the transaction is in excess of its powers.<sup>4</sup>

An attempted assignment of a right which can not be assigned may be canceled in equity.<sup>5</sup>

**§ 3402. Breach—Reasons for granting equitable relief.** If one of the parties to a contract has broken one or more of the covenants thereof, and the breach is of such a sort as to operate as a discharge,<sup>1</sup> and the party who is not in default brings a suit in equity, in which he seeks cancellation because of such breach, a question is presented, some phases of which are different from the questions which are presented when it is sought to cancel a contract for fraud and the like. As a rule, the executory covenants appear on the face of the contract, and a breach of such covenants may be shown in an action at law, brought by the party in default. The difficulty of showing a fact outside of the contract, which rendered it necessary to resort to equity for cancellation of a contract under seal, into which the obligor was induced to enter, by fraud, as to some collateral matter,<sup>2</sup> does not ordinarily exist if the defense at law is breach on the part of the plaintiff. The fact that the plaintiff's covenant is either precedent or concurrent and that it is a vital part of the contract can be shown at law, as well as in equity. Other considerations, however, may induce equity to grant cancellation because of breach. The party who is not in default may have conveyed land, or some interest therein; and he

<sup>1</sup> *International Land Company v. Marshall*, 22 Okla. 693, 19 L. R. A. (N.S.) 1056, 98 Pac. 951.

See § 1614.

<sup>2</sup> *Greene v. Maxwell*, 251 Ill. 335, 36 L. R. A. (N.S.) 418, 96 N. E. 227; *Barkley v. Barkley*, 182 Ind. 322, 106 N. E. 609 [sub nomine, *Barkey v. Barkey*, L. R. A. 1915B, 678]; *Brannon v. Hayes*, — Ind. —, 130 N. E. 803; *Sprinkle v. Wellborn*, 140 N. Car. 163, 3 L. R. A. (N.S.) 174, 52 S. E. 606.

See § 1635.

<sup>3</sup> *Kuhlman v. Wieben*, 129 Ia. 188, 2 L. R. A. (N.S.) 666, 105 N. W. 445; *Miller v. Sterringer*, 66 W. Va. 169, 25 L. R. A. (N.S.) 596, 66 S. E. 228.

<sup>4</sup> *McIlvaine v. Foreman*, 292 Ill. 224, 126 N. E. 749.

For the effect of ultra vires transactions in general, see §§ 1996 et seq.

<sup>5</sup> *Fournier v. Clutton*, 146 Mich. 298, 117 Am. St. Rep. 638, 7 L. R. A. (N. S.) 179, 10 Am. & Eng. Ann. Cas. 392, 109 N. W. 425 (decree for alimony).

<sup>1</sup> See §§ 2878 et seq.

<sup>2</sup> See § 346.

may be unable to avoid this conveyance at law.<sup>3</sup> He may have given a negotiable instrument in performance of the covenants on his part, and unless he is able to have such instrument surrendered and canceled, it may be transferred to a bona fide holder to whom he may be obliged to pay, although the payee of the instrument has not performed the covenants of the original contract.<sup>4</sup> In some cases, cancelation in equity will settle all rights under the transaction, while a refusal to grant this relief may result in a multiplicity of actions. The damages may be uncertain or inadequate.<sup>5</sup>

The foregoing considerations apply only to certain classes of contract. In addition, and applicable to all classes of contracts, is the consideration that the party in default may delay an action upon the contract until the party who is not in default has lost the evidence by which he could prove breach or non-performance on the part of the adversary party.

**§ 3403. Character of breach—Substantial breach—Vital covenant.** Cancelation will be given only for an actual breach. It will not be given because it is possible that the contract may be broken in the future.<sup>1</sup>

Cancelation will be granted only for a material or substantial breach, and not for a technical breach.<sup>2</sup> Unless the breach is one which may be treated as a discharge of a contract, cancelation will not be given.<sup>3</sup> If a substantial part of the contract has been performed, a breach of other covenants of the contract is not ground for cancelation,<sup>4</sup> unless the covenant which is broken is a vital part of the contract, without which the remaining covenants would not have been undertaken.<sup>5</sup> If A conveys to B in consideration of B's

<sup>3</sup> See §§ 3406 et seq.

<sup>4</sup> See §§ 2346 et seq.

<sup>5</sup> See §§ 3404 et seq.

<sup>1</sup> *Williams v. Shaver*, 100 Ark. 565, 140 S. W. 740; *Hanson v. Fox*, 155 Cal. 106, 20 L. R. A. (N.S.) 338, 99 Pac. 489.

<sup>2</sup> *Kays v. Little*, 103 Kan. 461, 1 A. L. R. 675, 175 Pac. 149 (delay in payment by mail).

<sup>3</sup> See §§ 2878 et seq and 2977 et seq.

<sup>4</sup> *California*. *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382.

*Illinois*. *Calkins v. Calkins*, 220 Ill. 111, 77 N. E. 102; *Jackson v. Jackson*,

222 Ill. 46, 6 L. R. A. (N.S.) 785, 78 N. E. 19.

*Missouri*. *Haydon v. St. Louis & San Francisco Ry.*, 222 Mo. 126, 121 S. W. 15.

*Texas*. *Moore v. Cross*, 87 Tex. 557, 29 S. W. 1051.

*Wisconsin*. *Forster v. Flack*, 140 Wis. 48, 121 N. W. 890.

<sup>5</sup> *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790; *Moreau v. Chauvin*, 8 Rob. (La.) 157; *Queensborough Land Co. v. Cazeaux*, 136 La. 724, L. R. A. 1916B,

promise to marry A and to be a kind wife, and B marries A, the conveyance will not be canceled for breach of the other covenant.<sup>6</sup> If A has conveyed to B in consideration of B's covenant to support A, to make certain payments to A and to pay certain encumbrances, and B has supported A until B's death, A can not have such conveyance canceled. His remedy is to file a claim against B's estate.<sup>7</sup> If A has conveyed land to a railroad, to be used as a switch, and the railroad breaks its covenant not to let cars stand on such switch on the crossing near A's house, A can not have cancelation.<sup>8</sup> If A has conveyed a mine to B in consideration of several covenants, one of which is that B will expend a certain amount of money in developing the mine, A can not have such conveyance canceled because of B's failure to expend such money in development.<sup>9</sup> If A has exchanged land for stock which belonged to B, in consideration, in part, of B's covenant that such stock would pay dividends, A cannot have cancelation because of failure of such stock to pay dividends.<sup>10</sup> If A has conveyed, for value, to B and A has also agreed to secure employment for B, and has promised that a railroad shop would be located near such land, B cannot have cancelation for non-performance of the latter covenants.<sup>11</sup>

On the other hand, a breach of a covenant to construct a railroad near the realty which is conveyed,<sup>12</sup> or to plant an orchard thereon,<sup>13</sup> or breach by the grantee of a covenant not to convey to a negro,<sup>14</sup> or of a covenant to erect a building upon the realty conveyed to him,<sup>15</sup> or breach of a covenant by the vendor of personal property, to cause the release of a mortgage thereon,<sup>16</sup> may in each

1201, Ann. Cas. 1916D, 1248, 67 So. 641; Willard v. Ford, 16 Neb. 543, 20 N. W. 859; Ihrke v. Continental Life Insurance & Investment Co., 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

<sup>6</sup> Jackson v. Jackson, 222 Ill. 46, 6 L. R. A. (N.S.) 785, 78 N. E. 19.

<sup>7</sup> Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102.

<sup>8</sup> Haydon v. St. Louis & San Francisco Ry., 222 Mo. 126, 121 S. W. 15.

<sup>9</sup> Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382.

<sup>10</sup> Forster v. Flack, 140 Wis. 48, 121 N. W. 890 (no evidence of fraud).

<sup>11</sup> Moore v. Cross, 87 Tex. 557, 29 S.

W. 1051 (such covenants probably not consideration for grantee's payment).

<sup>12</sup> Southern Colonization Co. v. Derfler, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

<sup>13</sup> Ihrke v. Continental Life Insurance & Investment Co., 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

<sup>14</sup> Queensborough Land Co. v. Cazeaux, 136 La. 724, L. R. A. 1916B, 1201, Ann. Cas. 1916D, 1248, 67 So. 641.

<sup>15</sup> Willard v. Ford, 16 Neb. 543, 20 N. W. 859.

<sup>16</sup> Moreau v. Chauvin, 8 Rob. (La.) 157.

case, result in cancelation if such covenant is vital, and if the remaining requisites of cancelation are present.

**§ 3404. Breach—Adequacy of legal remedy.** The fact that the breach for which cancelation is sought, possesses all the elements which have been enumerated heretofore,<sup>1</sup> does not mean that equity will grant cancelation mechanically or automatically. As applied to problems of breach, the broad principle that equity will grant relief only where the remedy at law is not clear, adequate and complete, has resulted in the rule that equity will grant cancelation because of breach, if the remedy at law, that is, the right of the party who is not in default, to set up the default of the adversary party as a defense to an action at law, brought by such adversary party, is not clear, adequate and complete,<sup>2</sup> and that

<sup>1</sup> See §§ 3373 et seq.

<sup>2</sup> **United States.** *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573; *Columbus v. Mercantile Trust & Deposit Co.*, 218 U. S. 645, 54 L. ed. 1193; *Stephens v. Daly*, 266 Fed. 1009.

**Alabama.** *Ferris v. Hoglan*, 121 Ala. 240, 25 So. 834; *Converse Bridge Co. v. Geneva County*, 168 Ala. 432, 53 So. 196.

**California.** *Smith v. Blandin*, 133 Cal. 441, 65 Pac. 894 (under statute); *Campbell v. Kennedy*, 177 Cal. 430, 170 Pac. 1107.

**Florida.** *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

**Georgia.** *Hughes v. Ellis*, 139 Ga. 406, 77 S. E. 584.

**Illinois.** *Rockafellow v. Newcomb*, 57 Ill. 186; *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559; *Fabrice v. Von der Brelie*, 190 Ill. 460, 60 N. E. 835; *Berry v. Heizer*, 271 Ill. 264, 111 N. E. 99.

**Indiana.** *Sherrin v. Flinn*, 155 Ind. 422, 58 N. E. 549.

**Michigan.** *Grand Haven v. Grand Haven Waterworks*, 99 Mich. 106, 57 N. W. 1075.

**Missouri.** *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726.

**New Mexico.** *Anderson v. Reed*, 20 N. M. 202, L. R. A. 1916B, 862, 148 Pac. 502.

**New York.** *Callanan v. Keeseville Ausable Chasm & Lake Champlain Ry.*, 199 N. Y. 268, 92 N. E. 747.

**Ohio.** *Reid v. Burns*, 13 O. S. 49.

**Oklahoma.** *Spangler v. Yarborough*, 23 Okla. 806, 138 Am. St. Rep. 856, 101 Pac. 1107.

**Oregon.** *Patton v. Nixon*, 33 Or. 159, 52 Pac. 1048.

**Tennessee.** *Steele v. Nashville Corporation*, 18 Tenn. (10 Yerg.) 295.

**Texas.** *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540, 40 L. R. A. 203, 44 S. W. 814.

**Virginia.** *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17; *Tysor v. Adams*, 116 Va. 239, 51 L. R. A. (N.S.) 1197, 81 S. E. 76.

**West Virginia.** *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730; *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423; *Lambert v. Lambert*, 66 W. Va. 520, 66 S. E. 689; *Chandler v. French*, 73 W. Va. 658, L. R. A. 1915B, 561, 81 S. E. 825.

**Wisconsin.** *Douglas County v. Walbridge*, 38 Wis. 179; *Mills v. Morris*, 156 Wis. 38, 145 N. W. 369.

cancellation will not be granted if the remedy at law is clear, adequate and complete.<sup>3</sup> In applying this formula, it is said that the party who seeks cancellation must be able to show that the remedy at law is not adequate.<sup>4</sup> Like other broad and general statements, this gives but little practical help in enabling us to determine for what classes of breach cancellation will be given. In the practical application of this general rule, the nature of the contract, its subject-matter, and the effect upon the party who is not in default, of the refusal of equity to grant this relief, are all of as much importance as the nature and character of the breach, provided, as said before,<sup>5</sup> that the breach is one for which the contract may be treated as discharged. A discussion of the various types of contract in detail is therefore necessary to show the general scope of this doctrine and the extent of its application.

**§ 3405. Effect of express conditions.** Whether an express condition subsequent providing for the termination of the contract in

<sup>3</sup> **United States.** *Kellar v. Craig*, 126 Fed. 630, 61 C. C. A. 366; *Dixie Cotton Picker Co. v. Bullock*, 188 Fed. 921.

**Alabama.** *Gardner v. Knight*, 124 Ala. 273, 27 So. 298; *Sewell v. Walkley*, 198 Ala. 152, 73 So. 422; *Birmingham Packing Co. v. Birmingham Belt Ry.*, 201 Ala. 180, 77 So. 706.

**Delaware.** *Killen v. Purdy*, — Del. —, 95 Atl. 908; *O'Neil v. Du Pont de Nemours & Co.*, — Del. —, 106 Atl. 50.

**Georgia.** *Hughes v. Ellis*, 139 Ga. 406, 77 S. E. 584.

**Illinois.** *Beebe v. Swartwout*, 8 Ill. 162.

**Iowa.** *Parsons v. Crocker*, 128 Ia. 641, 105 N. W. 162.

**Kansas.** *Howerton v. Kansas Natural Gas Co.*, 82 Kan. 367, 34 L. R. A. (N.S.) 46, 108 Pac. 813 [overruling, 81 Kan. 553, 34 L. R. A. (N.S.) 34, 106 Pac. 47].

**Mississippi.** *Dixon v. Milling*, 102 Miss. 449, 43 L. R. A. (N.S.) 916, 59 So. 804.

**Missouri.** *Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726.

**New Mexico.** *Reed v. Rogers*, 19 N. M. 177, 141 Pac. 611.

**New York.** *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; *Brunner v. Meigs*, 64 N. Y. 506.

**Ohio.** *Harris v. Ohio Oil Co.*, 57 O. S. 118, 48 N. E. 502.

**South Dakota.** *Roy v. Harney Peak Tin Mining, Milling & Mfg. Co.*, 21 S. D. 140, 130 Am. St. Rep. 706, 9 L. R. A. (N.S.) 529, 110 N. W. 106.

**Virginia.** *Thompson v. Jackson*, 24 Va. (3 Rand.) 504, 15 Am. Dec. 721.

**Washington.** *Murkowski v. Murkowski*, 61 Wash. 103, 112 Pac. 92 (obiter).

**West Virginia.** *Anderson v. Snyder*, 21 W. Va. 632; *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004; *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662; *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124.

**Wisconsin.** *Reuter v. Lawe*, 86 Wis. 106, 56 N. W. 472.

<sup>4</sup> *Howerton v. Kansas Natural Gas Co.*, 82 Kan. 367, 34 L. R. A. (N.S.) 46, 108 Pac. 813 [overruling, 81 Kan. 553, 34 L. R. A. (N.S.) 34, 106 Pac. 47].

<sup>5</sup> See § 3403.

case of breach, has any effect upon the right of cancelation, and what effect it has, if any, are questions upon which there is not a harmony of authority. It seems to be assumed that cancelation may be had where there is such an express provision for forfeiture, and the breach for which cancelation is sought, is a breach for which forfeiture could have been had.<sup>1</sup> A conveyance in consideration of support will be canceled, in many jurisdictions, for breach of the covenant to furnish such support;<sup>2</sup> and the presence of a forfeiture clause does not prevent equity from granting cancelation.<sup>3</sup> An express condition for forfeiture for breach of one covenant does not prevent cancelation for breach of another covenant.<sup>4</sup> Since a conveyance in consideration of support is generally canceled for breach,<sup>5</sup> a mortgage to secure performance of such covenant does not prevent the court from canceling the conveyance.<sup>6</sup>

On the other hand, cancelation has been denied where the contract contains an express provision for temporary resumption of possession in case of breach.<sup>7</sup>

**§ 3406. Contract for sale of land—Breach by vendor.** If land has been sold or conveyed, and the vendor or grantor is in default, cancelation will not be granted if the remedy at law is adequate.<sup>1</sup> The purchaser can not have cancelation of a contract of sale because the seller does not have title,<sup>2</sup> especially if such remedy is sought before the seller is bound to make title.<sup>3</sup> Cancelation can

<sup>1</sup> Sewell v. Walkley, 198 Ala. 152, 73 So. 422; Goldsmith v. Goldsmith, 46 W. Va. 426, 33 S. E. 266; Carney v. Barnes, 56 W. Va. 581, 49 S. E. 423.

See also, Laurel Creek Coal & Coke Co. v. Browning, 90 Va. 528, 39 S. E. 156, where the presence of a condition subsequent was not emphasized in granting cancellation.

<sup>2</sup> See § 3415.

<sup>3</sup> Goldsmith v. Goldsmith, 46 W. Va. 426, 33 S. E. 266.

<sup>4</sup> Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 Pac. 951.

Contra, Harris v. Ohio Oil Co., 57 O. S. 118, 48 N. E. 502.

<sup>5</sup> See § 3415.

<sup>6</sup> Knutson v. Bostrak, 99 Wis. 469, 75 N. W. 156.

<sup>7</sup> Okalona Mercantile Co. v. Gree-

son, 93 Ark. 295, 124 S. W. 257 (contract for sale of land).

<sup>1</sup> Illinois. Beebe v. Swartwout, 8 Ill. 162.

New Mexico. Reed v. Rogers, 19 N. M. 177, 141 Pac. 611.

New York. Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; Bruner v. Meigs, 64 N. Y. 506.

Virginia. Thompson v. Jackson, 24 Va. (3 Rand.) 504, 15 Am. Dec. 721; Rogers v. Pattie, 96 Va. 498, 31 S. E. 897.

West Virginia. Anderson v. Snyder, 21 W. Va. 632.

Wisconsin. Reuter v. Lawe, 86 Wis. 106, 56 N. W. 472.

<sup>2</sup> Bruner v. Meigs, 64 N. Y. 506.

<sup>3</sup> Hanson v. Fox, 155 Cal. 106, 20 L. R. A. (N.S.) 338, 99 Pac. 499.

not be granted for failure of title to property which has been conveyed, in the absence of fraud,<sup>4</sup> the legal remedy of the grantee, that is, an action upon his covenants, being regarded as adequate. If the purchaser has bought the land as a speculation and the title to part fails, he can not have cancelation,<sup>5</sup> but only compensation in equity, or an action at law on his covenants. The grantee can not have cancelation for a deficiency in quantity.<sup>6</sup> The grantee can not have cancelation for breach of a promise by the grantor which was not a consideration for the conveyance.<sup>7</sup>

In case of a sale or conveyance of land, cancelation may be granted for breach by the seller or grantor, if the legal remedy of the purchaser or grantee is not adequate.<sup>8</sup> The purchaser or grantee may have cancelation for breach by the vendor or grantor, of a covenant to plant an orchard upon the realty which is conveyed,<sup>9</sup> or for breach of his covenant to construct a railroad near such realty,<sup>10</sup> if such covenants are vital.

**§ 3407. Contract for sale of land—Breach by purchaser.** If a contract for the sale or conveyance of land is broken by the buyer, cancelation will not be granted if the remedy at law is adequate.<sup>1</sup> If A conveys to B in consideration of a nominal sum, and an

<sup>4</sup> *Illinois*. *Beebe v. Swartwout*, 8 Ill. 162.

*New Mexico*. *Reed v. Rogers*, 19 N. M. 177, 141 Pac. 611.

*New York*. *Abbott v. Allen*, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554.

*Virginia*. *Thompson v. Jackson*, 24 Va. (3 Rand.) 504, 15 Am. Dec. 721; *Rogers v. Pattie*, 96 Va. 498, 31 S. E. 897.

*Wisconsin*. *Reuter v. Lawe*, 86 Wis. 106, 56 N. W. 472.

<sup>5</sup> *Rogers v. Pattie*, 96 Va. 498, 31 S. E. 897.

<sup>6</sup> *Anderson v. Snyder*, 21 W. Va. 632.

<sup>7</sup> *Moore v. Cross*, 87 Tex. 557, 29 S. W. 1051 (promise to secure employment for purchaser, etc.).

<sup>8</sup> *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790; *Ihrke v. Continental Life Insurance & Investment Co.*, 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866;

*Mills v. Morris*, 156 Wis. 38, 145 N. W. 369.

<sup>9</sup> *Ihrke v. Continental Life Insurance & Investment Co.*, 91 Wash. 342, L. R. A. 1916F, 430, 157 Pac. 866.

<sup>10</sup> *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

<sup>1</sup> *Illinois*. *Calkins v. Calkins*, 220 Ill. 111, 77 N. E. 102.

*Iowa*. *Parsons v. Crocker*, 128 Ia. 641, 105 N. W. 162.

*Ohio*. *Cleveland v. Herron*, — Ohio —, 131 N. E. 489.

*South Dakota*. *Roy v. Harney Peak Tin Mining, Milling & Mfg. Co.*, 21 S. D. 140, 130 Am. St. Rep. 706, 9 L. R. A. (N.S.) 529, 110 N. W. 106 (possibly illegal).

*Washington*. *Murkowski v. Murkowski*, 61 Wash. 103, 112 Pac. 92 (obiter).

annual rent,<sup>2</sup> or for a payment of a certain amount each week,<sup>3</sup> or in consideration of B's agreement not to protest A's application for certain land,<sup>4</sup> cancelation will not be granted for breach of such covenants. Cancelation will not be granted where there is an express provision for temporary resumption of possession in case of breach.<sup>5</sup>

If the breach goes to only a part of the consideration, cancelation will not be granted.<sup>6</sup> If a release is to take effect only when executed by all of the parties in interest, and it is executed by all, the refusal of one of them to surrender it for record is not ground for cancelation,<sup>7</sup> the remedy, if any, being to compel the surrender of such instrument.<sup>8</sup>

If a contract for the sale of land is broken by the purchaser, or grantee, and the legal remedy of the seller or grantor is inadequate, such contract or conveyance will be canceled in equity.<sup>9</sup> If A has conveyed to B in consideration of B's covenant to construct a building on such realty, and to borrow money through A, out of which A is to be paid for the price of the land, A may have cancelation on B's refusal to continue to perform when he finds that the loan will not enable him to pay as much of his debt to A and the cost of the building as he had expected.<sup>10</sup> If A conveys to B in consideration of B's covenant to manage a newspaper and to

<sup>2</sup> *Parsons v. Crocker*, 128 Ia. 641, 105 N. W. 162.

<sup>3</sup> *Murkowski v. Murkowski*, 61 Wash. 103, 112 Pac. 92 (obiter, as conveyance was canceled for mistake).

<sup>4</sup> *Roy v. Harney Peak Tin Mining, Milling & Mfg. Co.*, 21 S. D. 140, 130 Am. St. Rep. 706, 9 L. R. A. (N.S.) 520, 110 N. W. 106 (possibly illegal).

<sup>5</sup> *Okolona Mercantile Co. v. Greeson*, 93 Ark. 295, 124 S. W. 257.

<sup>6</sup> *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382; *Calkins v. Calkins*, 220 Ill. 111, 77 N. E. 102; *Haydon v. St. Louis & San Francisco Ry.*, 222 Mo. 126, 121 S. W. 15; *Forster v. Flack*, 140 Wis. 48, 121 N. W. 890.

<sup>7</sup> *Wentworth v. Eichron*, 185 Mass. 6, 69 N. E. 366.

<sup>8</sup> *Wentworth v. Eichron*, 185 Mass. 6, 69 N. E. 366.

<sup>9</sup> *California. Smith v. Blandin*, 133 Cal. 441, 65 Pac. 894 (under statute); *Campbell v. Kennedy*, 177 Cal. 430, 170 Pac. 1107.

*Indiana. Burt v. Bowles*, 69 Ind. 1 (oral contract under statute of frauds).

*Kentucky. Harris v. Calmes*, 100 Ky. 272, 38 S. W. 6 (also, mistake in expression); *Thomas v. Sweet*, 111 Ky. 467, 63 S. W. 787, 65 S. W. 827 (also fraud).

*Louisiana. Queensborough Land Co. v. Cazeaux*, 136 La. 724, L. R. A. 1916B, 1201, Ann. Cas. 1916D, 1248, 67 So. 641.

*Minnesota. Staring v. Rossman*, 132 Minn. 209, 156 N. W. 120.

*Ohio. Kirby v. Harrison*, 2 O. S. 326, 59 Am. Dec. 677.

*Oklahoma. Bogard v. Sweet*, 17 Okla. 40, 87 Pac. 669.

<sup>10</sup> *Staring v. Rossman*, 132 Minn. 209, 156 N. W. 120.

advertise A's land, A may have cancelation of the conveyance of the contract if B abandons it.<sup>11</sup> Cancelation has been given because of failure of the buyer or grantee to pay in accordance with the terms of the contract.<sup>12</sup> Cancelation has been given for breach, by the purchaser, of a covenant to construct a building on the premises conveyed.<sup>13</sup> Cancelation may be granted because of the grantee's failure to perform his covenant to sell and to divide the profits with the grantor,<sup>14</sup> or for his breach of a covenant not to convey to a negro.<sup>15</sup> Cancelation of an exchange of land may be had if there is no such tract in existence as that for which the plaintiff has attempted to exchange his land.<sup>16</sup>

**§ 3408. Mortgage—Breach by mortgagee.** Cancelation of a mortgage because of the failure of the mortgagee to perform his covenants has been refused,<sup>1</sup> as where the conveyance was made as security for the grantees covenant to construct an improvement upon the realty and the grantee has failed to perform,<sup>2</sup> or where the mortgagee did not complete the loan to secure which the mortgage was given.<sup>3</sup> On the other hand, if the grantee has given a note and mortgage, and there is a total failure of title, the grantee may have such note and mortgage canceled.<sup>4</sup>

**§ 3409. Agricultural leases.** The covenants of a lease of agricultural land are, in many cases, of such a character that a breach thereof will work an irreparable injury upon the lessor; and accordingly cancelation is granted for a breach of this sort,<sup>1</sup> as for a

<sup>11</sup> Bogard v. Sweet, 17 Okla. 40, 87 Pac. 669.

<sup>12</sup> Smith v. Blandin, 133 Cal. 441, 65 Pac. 894 (special statutory provision); Burt v. Bowles, 69 Ind. 1 (oral contract within statute); Kirby v. Harrison, 2 O. S. 326, 59 Am. Dec. 677.

<sup>13</sup> Harris v. Calmes, 100 Ky. 272, 38 S. W. 6 (covenant to construct building omitted by mistake); Willard v. Ford, 16 Neb. 543, 20 N. W. 859.

<sup>14</sup> Campbell v. Kennedy, 177 Cal. 430, 170 Pac. 1107 (special statutory provision).

<sup>15</sup> Queensborough Land Co. v. Carreaux, 136 La. 724, L. R. A. 1916B, 1201, Ann. Cas. 1916D, 1248, 67 So. 641.

<sup>16</sup> Thomas v. Sweet, 111 Ky. 467, 63 S. W. 787, 65 S. W. 827 (also fraud).

<sup>1</sup> Sewell v. Walkley, 198 Ala. 152, 73 So. 422; Killen v. Purdy, — Del. —, 95 Atl. 908.

<sup>2</sup> Killen v. Purdy, — Del. —, 95 Atl. 908.

<sup>3</sup> Sewell v. Walkley, 198 Ala. 152, 73 So. 422.

<sup>4</sup> Mills v. Morris, 156 Wis. 38, 145 N. W. 369.

<sup>1</sup> Ferris v. Hoglan, 121 Ala. 240, 25 So. 834; Anderson v. Hammon, 19 Or. 446, 20 Am. St. Rep. 832, 24 Pac. 228; Hodges v. Price, 38 Wash. 1, 80 Pac. 202.

breach of a covenant with reference to the management and cultivation of the land, the breach of which will injure such land seriously.<sup>2</sup> If the co-owners agree that one of their number may manage the property, render an account thereof and pay certain obligations, his failure to render such account or to pay such obligations may be ground for cancelation.<sup>3</sup> A lease which contains a provision for raising the cattle of the lessor, and for dividing the profits, may be canceled if the lessee brands the cattle as his own, incurs unnecessary expenses and is insolvent.<sup>4</sup>

On the other hand, cancelation can not be granted for failure of the lessee to clear the land, if he has cleared a substantial part and if the time within which he is to clear the rest of the land has not elapsed.<sup>5</sup>

**§ 3410. Mining leases and timber leases.** The covenants of the lessee in a mining lease are usually of such a sort that a breach thereof will work an irreparable injury to the lessor; and accordingly the lessor may have cancelation therefor.<sup>1</sup> Cancelation may be granted for failure of the lessee to begin mining within a reasonable time,<sup>2</sup> or for delay which amounts to an abandonment,<sup>3</sup> or for failure of the lessee to begin mining in a certain time and to cause a railroad to be built.<sup>4</sup>

A lease of land for cutting timber may be canceled for the delay of the lessee to begin operations, if the lessor is to be paid out of the proceeds of such timber,<sup>5</sup> even if the lease contains a provision for forfeiture for delay in paying over the proceeds of the timber, after it is cut.<sup>6</sup>

<sup>2</sup> *Ferris v. Hoglan*, 121 Ala. 240, 25 So. 834 (vineyard); *Anderson v. Hammon*, 19 Or. 446, 20 Am. St. Rep. 832, 24 Pac. 228 (orchard).

<sup>3</sup> *Derouen v. Romero*, 110 La. 209, 34 So. 415.

<sup>4</sup> *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202.

<sup>5</sup> *Williams v. Shaver*, 100 Ark. 565, 140 S. W. 740.

<sup>1</sup> *Cowan v. Radford Iron Co.*, 83 Va. 547, 3 S. E. 120; *Shenandoah Land & Anthracite Coal Co. v. Hise*, 92 Va. 238, 23 S. E. 303; *Laurel Creek Coal & Coke Co. v. Browning*, 99 Va. 528; 39 S. E.

156; *Chandler v. French*, 73 W. Va. 658, L. R. A. 1915B, 561, 81 S. E. 825.

<sup>2</sup> *Chandler v. French*, 73 W. Va. 658, L. R. A. 1915B, 561, 81 S. E. 825.

<sup>3</sup> *Shenandoah Land & Anthracite Coal Co. v. Hise*, 92 Va. 238, 23 S. E. 303 (delay for forty years).

<sup>4</sup> *Laurel Creek Coal & Coke Co. v. Browning*, 99 Va. 528, 39 S. E. 156 (lessee insolvent).

<sup>5</sup> *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951.

<sup>6</sup> *Woodard v. Glenwood Lumber Co.*, 171 Cal. 513, 153 Pac. 951.

**§ 3411. Oil leases.** Cancellation of an oil lease will not be granted because of breach of one or more of the covenants thereof by the lessee, if the legal remedy is adequate.<sup>1</sup> In this case, too, there is a conflict of authority as to the nature of the breach, for which an action of damages will be an adequate remedy. Cancellation has been denied for failure of the lessee to drill oil wells, if it is not shown that the legal remedy is inadequate.<sup>2</sup> It is said that cancellation will not be granted for failure of the lessee to drill protecting wells.<sup>3</sup>

If the breach by the lessee is one for which the legal remedy of an action for damages will not give adequate relief, cancellation will be granted.<sup>4</sup> Cancellation may be granted for failure of the lessee to pay royalties due under the lease, if the lease makes such breach a condition subsequent.<sup>5</sup> If the lease gives to the lessee the option to drill certain wells or to pay a certain rental, the lessor may have cancellation if the lessee fails to do either.<sup>6</sup> Cancellation will not be given because of a technical default on the part of the lessee,<sup>7</sup> as where he has mailed the payment by registered letter in ample time under ordinary conditions, and such payment is delayed in the mail.<sup>8</sup>

If the lessee drains the land which he has leased by his own wells on adjoining territory, the lessor may have partial cancela-

<sup>1</sup> *Kellar v. Craig*, 126 Fed. 630, 61 C. C. A. 366; *Howerton v. Kansas Natural Gas Co.*, 82 Kan. 367, 34 L. R. A. (N.S.) 46, 108 Pac. 813 [overruling, 81 Kan. 553, 34 L. R. A. (N. S.) 34, 106 Pac. 47]; *Kays v. Little*, 103 Kan. 461, 1 A. L. R. 675, 175 Pac. 149; *Harris v. Ohio Oil Co.*, 57 O. S. 118, 48 N. E. 502; *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004; *Harness v. Eastern Oil Co.*, 49 W. Va. 232, 38 S. E. 662; *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124.

<sup>2</sup> *Howerton v. Kansas Natural Gas Co.*, 82 Kan. 367, 34 L. R. A. (N.S.) 46, 108 Pac. 813 [overruling, 81 Kan. 553, 34 L. R. A. (N.S.) 34, 106 Pac. 47].

<sup>3</sup> *Kellar v. Craig*, 126 Fed. 630, 61 C. C. A. 366; *Harris v. Ohio Oil Co.*, 57 O. S. 118, 48 N. E. 502; *Ammons v. South Penn Oil Co.*, 47 W. Va. 610, 35 S. E. 1004; *Harness v. Eastern Oil Co.*,

49 W. Va. 232, 38 S. E. 662; *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124.

<sup>4</sup> *Brown v. Wilson*, — Okla. —, L. R. A. 1917B, 1184, 160 Pac. 94; *Coffinberry v. Sun Oil Co.*, 68 O. S. 488, 67 N. E. 1069; *Kleppner v. Lemon*, 176 Pa. St. 502, 35 Atl. 109; *Colgan v. Forest Oil Co.*, 194 Pa. St. 234, 45 Atl. 119; *Young v. Forest Oil Co.*, 194 Pa. St. 243, 45 Atl. 121; *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423; *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124.

<sup>5</sup> *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423.

<sup>6</sup> *Brown v. Wilson*, — Okla. —, L. R. A. 1917B, 1184, 160 Pac. 94.

<sup>7</sup> *Kays v. Little*, 103 Kan. 461, 1 A. L. R. 675, 175 Pac. 149.

<sup>8</sup> *Kays v. Little*, 103 Kan. 461, 1 A. L. R. 675, 175 Pac. 149.

tion, at least,<sup>9</sup> but such conduct of the lessee must be shown clearly.<sup>10</sup> If the lessee fails to drill on a part of the land which he has leased, the lessor may have cancelation as to such part.<sup>11</sup>

**§ 3412. Contracts for personal property, personal services, etc.**

If A has sold goods to B which are to be delivered in installments, B's act in rejecting part of such goods wrongfully, and in refusing to pay therefor, and in threatening litigation, justifies cancelation on A's application.<sup>1</sup> On the other hand, failure on the part of the publisher to continue a series of law books is held not to entitle the purchaser to cancelation.<sup>2</sup> A contract for the sale of personal property may be canceled because of the failure of the seller to perform his covenant to cause the release of a mortgage thereon.<sup>3</sup> Failure to pay royalties under a contract for the assignment of an invention,<sup>4</sup> or for the granting of a license to make use of an invention,<sup>5</sup> is said not to be ground for canceling such contract. The fact that A, who has entered into a valid contract not to make machinery for B's competitors, has broken such covenant, does not entitle B to cancelation of the contract.<sup>6</sup> A contract for the adjustment of partnership transactions can not be canceled for failure of one of the parties thereto to perform.<sup>7</sup> If A has transferred possession of a railroad to B under a contract by which B is to convert it from a steam railroad to an electric railroad, A may have cancelation for B's failure to perform such contract,<sup>8</sup> and he may have restitution of the property.<sup>9</sup>

If a county has issued warrants for a public improvement which proves not to conform to the contract,<sup>10</sup> or if it issues negotiable

<sup>9</sup> *Kleppner v. Lemon*, 176 Pa. St. 502, 35 Atl. 109; *Colgan v. Forest Oil Co.*, 194 Pa. St. 234, 45 Atl. 119; *Young v. Forest Oil Co.*, 194 Pa. St. 243, 45 Atl. 121.

<sup>10</sup> *Hall v. South Penn Oil Co.*, 71 W. Va. 82, 76 S. E. 124.

<sup>11</sup> *Coffinberry v. Sun Oil Co.*, 68 O. S. 488, 67 N. E. 1069.

<sup>1</sup> *Steele v. Nashville Corporation*, 18 Tenn. (10 Yerg.) 206.

<sup>2</sup> *Bigelow v. Barnes*, 121 Minn. 148, 45 L. R. A. (N.S.) 203, 140 N. W. 1032 (no fraud shown).

<sup>3</sup> *Moreau v. Chauvin*, 8 Rob. (La.) 157.

<sup>4</sup> *O'Neil v. E. I. Dupont de Nemours & Co.*, — Del. —, 106 Atl. 50.

<sup>5</sup> *Dixie Cotton Picker Co. v. Bullock*, 188 Fed. 921.

<sup>6</sup> *Dixie Cotton Picker Co. v. Bullock*, 188 Fed. 921.

<sup>7</sup> *Omer v. Vollbracht*, 281 Ill. 188, 117 N. E. 1021 (obiter, as breach was not pleaded).

<sup>8</sup> *Callanan v. Keeseville Ausable Chasm & Lake Champlain Ry.*, 199 N. Y. 268, 92 N. E. 747.

<sup>9</sup> *Callanan v. Keeseville Ausable Chasm & Lake Champlain Ry.*, 199 N. Y. 268, 92 N. E. 747.

<sup>10</sup> *Converse Bridge Co. v. Geneva County*, 168 Ala. 432, 53 So. 196.

bonds as a subscription to a railroad which does not comply with the agreement under which such bonds were issued,<sup>11</sup> such warrants or bonds may be canceled.

**§ 3413. Contracts of public utilities.** The injury which will be inflicted by the breach of a contract entered into on the part of a public utility,<sup>1</sup> such as a public utility which agrees to furnish water,<sup>2</sup> are so serious that compensation in money damages is regarded as inadequate, and cancelation is granted.

**§ 3414. Contracts in consideration of marriage.** If A conveys property to B in consideration of B's covenant to marry A, and B breaks such covenant, A may have cancelation.<sup>1</sup> If B marries A and then abandons him, A can not have cancelation,<sup>2</sup> unless B intended to abandon A when the contract was made.<sup>3</sup> In the latter case relief is given on the theory of fraud, however, and not on the theory of breach.

**§ 3415. Conveyances under contract for support.** If A has conveyed property to B in consideration of B's covenant to support A, cancelation is ordinarily granted if B fails to perform such covenant,<sup>1</sup> whether he fails to furnish such sup-

<sup>11</sup> *Douglas County v. Walbridge*, 38 Wis. 179.

<sup>1</sup> *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573; *Columbus v. Mercantile Trust & Deposit Co.*, 218 U. S. 645, 54 L. ed. 1193; *Grand Haven v. Grand Haven Waterworks*, 99 Mich. 106, 57 N. W. 1075; *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540, 40 L. R. A. 203, 44 S. W. 814.

<sup>2</sup> *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573; *Columbus v. Mercantile Trust & Deposit Co.*, 218 U. S. 645, 54 L. ed. 1193; *Grand Haven v. Grand Haven Waterworks*, 99 Mich. 106, 57 N. W. 1075; *Palestine Water & Power Co. v. Palestine*, 91 Tex. 540, 40 L. R. A. 203, 44 S. W. 814.

<sup>1</sup> *Rockafellow v. Newcomb*, 57 Ill. 186; *Douthitt v. Applegate*, 33 Kan. 395, 52 Am. Rep. 533, 6 Pac. 575; *Lam-*

*bert v. Lambert*, 66 W. Va. 520, 66 S. E. 689.

<sup>2</sup> *Jackson v. Jackson*, 222 Ill. 46, 6 L. R. A. (N.S.) 785, 78 N. E. 19.

<sup>3</sup> *California. Brison v. Brison*, 75 Cal. 525, 17 Pac. 689.

*Colorado. Meldrum v. Meldrum*, 15 Colo. 478, 24 Pac. 1083.

*Illinois. Hursen v. Hursen*, 212 Ill. 377, 72 N. E. 391.

*Indiana. Basye v. Basye*, 152 Ind. 172, 52 N. E. 797.

*Missouri. Turner v. Turner*, 44 Mo. 535.

<sup>1</sup> *United States. Shephens v. Daly*, 266 Fed. 1009.

*Illinois. McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559; *Fabrice v. Von der Brelie*, 190 Ill. 460, 60 N. E. 835; *Berry v. Heiser*, 271 Ill. 264, 111 N. E. 99.

*Indiana. Sherrin v. Flinn*, 155 Ind. 422, 58 N. E. 549.

port,<sup>2</sup> or whether he treats the grantor in such a manner as to frighten him, and thus make him unwilling to receive such support.<sup>3</sup> Relief of this sort is given, even if the grantee has performed in part. The result which is reached in these cases, is thus different from that which is reached by the same courts in other cases of breach of executory covenants, especially after partial performance.

The willingness of courts to grant cancelation in a case of this sort, is sometimes explained on the theory that the grantee who is to furnish the support did not intend to perform, and was thus guilty of fraud,<sup>4</sup> and sometimes on the theory that the grantee was guilty of fraud by pretending to entertain feelings of love and esteem for the grantor.<sup>5</sup> Relief of this sort is given, however, even where there is no evidence which tends to show that the grantee was, in fact, guilty of either of these kinds of fraud. It is probably the serious consequences which would follow if the grantor were denied this relief in equity, and were driven to his action at law to recover the value of his support, either from time

Kentucky. *Humbles v. Harris*, 151 Ky. 685, 152 S. W. 797.

Minnesota. *Bruer v. Bruer*, 109 Minn. 260, 28 L. R. A. (N.S.) 608, 123 N. W. 813.

New Mexico. *Anderson v. Reed*, 20 N. M. 202, L. R. A. 1916B, 862, 148 Pac. 502.

Ohio. *Reid v. Burns*, 13 O. S. 49.

Oklahoma. *Spangler v. Yarborough*, 23 Okla. 806, 138 Am. St. Rep. 856, 101 Pac. 1107.

Virginia. *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17; *Tysor v. Adams*, 116 Va. 239, 51 L. R. A. (N.S.) 1197, 81 S. E. 76.

West Virginia. *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730; *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266; *White v. Bailey*, 65 W. Va. 573, 23 L. R. A. (N.S.) 232, 64 S. E. 1019.

Wisconsin. *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156; *Gall v. Gall*, 126 Wis. 390, 5 L. R. A. (N.S.) 603, 105 N. W. 953; *Young v. Young*, 157 Wis. 424, 147 N. W. 361.

<sup>2</sup> Illinois. *McClelland v. McClelland*, 176 Ill. 83, 51 N. E. 559; *Fabrice v. Von der Brelie*, 190 Ill. 460, 60 N. E. 835.

Minnesota. *Bruer v. Bruer*, 109 Minn. 260, 28 L. R. A. (N.S.) 608, 123 N. W. 813.

Ohio. *Reid v. Burns*, 13 O. S. 49.

Virginia. *Lowman v. Crawford*, 99 Va. 688, 40 S. E. 17.

West Virginia. *Wilfong v. Johnson*, 41 W. Va. 283, 23 S. E. 730; *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266.

Wisconsin. *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156.

<sup>3</sup> *Tysor v. Adams*, 116 Va. 239, 51 L. R. A. (N.S.) 1197, 81 S. E. 76.

<sup>4</sup> *Berry v. Heiser*, 271 Ill. 264, 111 N. E. 99; *Sherrin v. Flinn*, 155 Ind. 422, 58 N. E. 549; *Anderson v. Reed*, 20 N. M. 202, L. R. A. 1916B, 862, 148 Pac. 502; *Spangler v. Yarborough*, 23 Okla. 806, 138 Am. St. Rep. 856, 101 Pac. 1107.

<sup>5</sup> *Anderson v. Reed*, 20 N. M. 202, L. R. A. 1916B, 862, 148 Pac. 502.

to time or for the probable duration of the grantor's life, that has induced equity to grant relief of this sort. Cancellation has been granted where the transaction was not induced by any consideration of love and esteem between the parties.<sup>6</sup> If A assigns his rights under a land contract to B, in consideration of B's covenant to sell such land and to support A until such land is sold, A may have cancellation for B's failure to perform.<sup>7</sup> The desire of the courts to protect the grantor is shown by the fact that his support will be secured by a decree if cancellation is denied because of his breach, at least if such breach is excusable.<sup>8</sup>

Cancellation has been granted where the conveyance in consideration of support contains a clause forfeiting such conveyance in case of failure to furnish such support,<sup>9</sup> or where the grantee has given back a mortgage to secure performance on his part.<sup>10</sup>

In other jurisdictions, it is said that cancellation will not be granted because of the failure of the grantee to furnish support if the conveyance contains no express condition subsequent.<sup>11</sup>

**§ 3416. Negotiable instrument.** If the party who is not in default has given a negotiable instrument in performance of the contract, cancellation of such instrument will be granted, because of the consequences which would follow if it were transferred to a bona fide holder for value.<sup>1</sup> If a public corporation has issued a warrant in payment of a contract, before the breach thereof by the adversary party is discovered, and the public official on whom such warrant is drawn will be bound to pay it, cancellation of such warrant will be granted.<sup>2</sup>

<sup>6</sup> *Norgren v. Jordan*, 46 Wash. 437, 90 Pac. 597.

<sup>7</sup> *Norgren v. Jordan*, 46 Wash. 437, 90 Pac. 597.

<sup>8</sup> *Soper v. Cisco*, 85 N. J. Eq. 165, 95 Atl. 1016 (grantor feeble-minded when breach occurs).

<sup>9</sup> *Goldsmith v. Goldsmith*, 46 W. Va. 426, 33 S. E. 266.

<sup>10</sup> *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156.

<sup>11</sup> *Alabama. Gardner v. Knight*, 124 Ala. 273, 27 So. 298.

*Georgia. Hughes v. Ellis*, 139 Ga. 406, 77 S. E. 584.

*Mississippi. Dixon v. Milling*, 102 Miss. 449, 43 L. R. A. (N.S.) 916, 59 So. 804.

*Missouri. Anderson v. Gaines*, 156 Mo. 664, 57 S. W. 726.

*Oregon. Patton v. Nixon*, 33 Or. 159, 52 Pac. 1048.

<sup>1</sup> *Douglas County v. Walbridge*, 38 Wis. 179; *Mills v. Morris*, 156 Wis. 38, 145 N. W. 369.

<sup>2</sup> *Converse Bridge Co. v. Geneva County*, 168 Ala. 432, 53 So. 196.

**§ 3417. Insolvency.** The fact that the party who is in default is insolvent and unable to respond in damages seems to be regarded as a factor to be taken into consideration in determining whether or not cancelation shall be granted.<sup>1</sup>

**§ 3418. Impossibility.** Whether equity will grant cancelation in case one or more executory covenants become impossible of performance depends on the relation which such covenants bear to the entire contract. If the covenant, the performance of which becomes impossible, is practically the entire consideration, and if it has not been performed to any substantial degree, equity will decree cancelation, if the remaining facts make such relief proper.<sup>1</sup> If A has conveyed land to B in consideration of services to be performed by B as attorney, and B dies without performing such services, equity will decree cancelation.<sup>2</sup> If, on the other hand, the contract has been performed substantially, cancelation will be refused,<sup>3</sup> at least if the adversary party can not be placed in statu quo.<sup>4</sup> If A has conveyed land to a railroad, in consideration of a pass for life, A can not have cancelation on account of subsequent legislation which forbids a railroad to issue passes,<sup>5</sup> especially if the value of such land has increased greatly.<sup>6</sup> On the death of the party who was to furnish support before that of the party to be supported, equity may refuse cancelation, and, instead, award foreclosure of the mortgage conditioned on performance.<sup>7</sup>

**§ 3419. Obligations barred by Statute of Limitations.** The general principle that equity will not grant relief to one who has been guilty of inequitable conduct with reference to the transaction in which he seeks such relief, prevents equity from cancel-

<sup>1</sup> *Laurel Creek Coal & Coke Co. v. Browning*, 99 Va. 528, 39 S. E. 156; *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202; *Douglas County v. Walbridge*, 38 Wis. 179.

See on this question, *Williams v. Shaver*, 100 Ark. 565, 140 S. W. 740.

<sup>2</sup> *Callahan v. Shotwell*, 60 Mo. 398.

<sup>3</sup> *Callahan v. Shotwell*, 60 Mo. 398.

<sup>4</sup> *Cowley v. Northern Pacific Ry.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998.

<sup>4</sup> *Cowley v. Northern Pacific Ry.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998.

<sup>5</sup> *Cowley v. Northern Pacific Ry.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998.

<sup>6</sup> *Cowley v. Northern Pacific Ry.*, 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 998.

<sup>7</sup> *Danielson v. Danielson*, 165 Wis. 171, L. R. A. 1917D, 624, 161 N. W. 787.

ing liens, and the like, which secure debts which have not been paid but which have been barred by the Statute of Limitations.<sup>1</sup>

**§ 3420. Restitution.** Cancellation will not be granted if it is impossible to place the adversary party in statu quo, and if the party who seeks relief has received substantial benefits under the transaction.<sup>1</sup> If the party who is in default has refused to accept the consideration which he has furnished, it is not necessary that the party who seeks cancellation should make a formal tender before he brings suit.<sup>2</sup> Whether tender must be made before suit to cancel the transaction is brought, in cases where such tender is not waived, is a question upon which there is a conflict of authority. In some cases, it is held that such tender must be made.<sup>3</sup> In other cases, it is held that such tender need not be made since equity can protect the rights of the adversary party by its decree.<sup>4</sup> Restitution must be made before cancellation is granted.<sup>5</sup>

**§ 3421. Relief granted—Compensation.** Since the granting of cancellation is within the judicial discretion of the court, a more limited form of relief may be granted, even in cases in which total cancellation would ordinarily be granted. Partial cancellation,<sup>1</sup> or compensation,<sup>2</sup> may be granted, if such decree will do full justice as between the parties.

<sup>1</sup> Cassell v. Lowry, 164 Ind. 1, 72 N. E. 640; Tracy v. Wheeler, 15 N. D. 248, 6 L. R. A. (N.S.) 516, 107 N. W. 68; Bowman v. Retelieuk, 40 N. D. 134, 168 N. W. 576.

<sup>2</sup> Roy v. Harney Peak Tin Mining, Milling & Mfg. Co., 21 S. D. 140, 9 L. R. A. (N.S.) 529, 110 N. W. 106; Cowley v. Northern Pacific Ry., 68 Wash. 558, 41 L. R. A. (N.S.) 559, 123 Pac. 908.

<sup>3</sup> Fournier v. Clutton, 146 Mich. 298, 7 L. R. A. (N.S.) 179, 10 Ann. Cas. 392, 109 N. W. 425.

<sup>4</sup> Harkness v. Cleaves, 113 Ia. 140, 84 N. W. 1033; Gribben v. Maxwell, 34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584; Fournier v. Clutton, 146 Mich. 298, 7 L. R. A. (N.S.) 179, 10 Ann. Cas. 392, 109 N. W. 425; Davis v. Mitchell, 72 Or. 165, 142 Pac. 788.

<sup>5</sup> England. Barker v. Walters, 8 Beav. 92.

Iowa. Bettendorf v. Bettendorf, — Ia. —, 179 N. W. 444.

Kansas. Thayer v. Knotte, 59 Kan. 181, 52 Pac. 433.

Missouri. Custer v. Shackelford, — Mo. —, 225 S. W. 450.

Oregon. Owen v. Jones, 68 Or. 311, 136 Pac. 332.

Wisconsin. Hansen v. Allen, 117 Wis. 61, 93 N. W. 805; Hall v. Baldwin Bank, 143 Wis. 303, 127 N. W. 969.

See § 352.

<sup>6</sup> Watland v. Quaintance, 186 Ia. 1271, 171 N. W. 692.

<sup>7</sup> Coffinberry v. Sun Oil Co., 68 O. S. 488, 67 N. E. 1069; Kleppner v. Lemon, 176 Pa. St. 502, 35 Atl. 109.

<sup>8</sup> Illinois. Taylor v. Taylor, 259 Ill. 524, 102 N. E. 1086.

If cancelation proves to be impractical, damages may be awarded.<sup>3</sup> If necessary to do complete justice as between the parties, equity may grant compensation in addition to cancelation,<sup>4</sup> instead of compelling the injured party to bring an action at law for compensation in addition to a suit in equity for cancelation. Compensation may be given to a plaintiff who is in default, but whose default is excusable, and such compensation may be made a charge upon the realty, although the defendant's application for cancelation of a conveyance of such realty is denied.<sup>5</sup>

**§ 3422. Effect of cancelation.** Bringing suit to cancel a contract is said to be an election to avoid it,<sup>1</sup> so that an action to recover damages for the breach of such contract can not be maintained thereafter.<sup>2</sup> A decree concerning a deed operates as a cancelation of the contract under which such deed was given.<sup>3</sup> The fact that specific performance will not be granted, does not of itself show that the adversary party is entitled to cancelation. It is possible for a court of equity to refuse to interfere on behalf of either party, and to leave both of the parties to the remedies at law.<sup>4</sup>

**Iowa.** *Johnson v. Carter*, 143 Ia. 95, 120 N. W. 320.

**Minnesota.** *Bruer v. Bruer*, 109 Minn. 260, 28 L. R. A. (N.S.) 608, 123 N. W. 813.

**North Carolina.** *Sprinkle v. Well-born*, 140 N. Car. 163, 111 Am. St. Rep. 827, 3 L. R. A. (N.S.) 174, 52 S. E. 666.

**Wisconsin.** *Griffiths v. Cretney*, 143 Wis. 143, 126 N. W. 875.

<sup>3</sup>**California.** *Swan v. Talbot*, 152 Cal. 142, 17 L. R. A. (N.S.) 1066, 94 Pac. 238.

**Illinois.** *Taylor v. Taylor*, 259 Ill. 524, 102 N. E. 1086.

**Iowa.** *Lewis v. Wilcox*, 131 Ia. 268, 108 N. W. 536.

**Kansas.** *Epp v. Hinton*, 91 Kan. 513, L. R. A. 1915A, 675, 138 Pac. 576.

**North Carolina.** *Sprinkle v. Well-*

*born*, 140 N. Car. 163, 111 Am. St. Rep. 827, 3 L. R. A. (N.S.) 174, 52 S. E. 666.

**Wisconsin.** *Griffiths v. Cretney*, 143 Wis. 143, 126 N. W. 875.

<sup>4</sup>*Hack v. Norris*, 46 Mich. 587, 10 N. W. 104; *Braddy v. Elliott*, 146 N. Car. 578, 125 Am. St. Rep. 523, 16 L. R. A. (N.S.) 1121, 60 S. E. 507.

<sup>5</sup>*Soper v. Cisco*, 85 N. J. Eq. 165, 95 Atl. 1016 (contract for support: grantor weak-minded).

<sup>1</sup>*Grizzard v. Fite*, 137 Tenn. 103, L. R. A. 1917D, 652, 191 S. W. 969.

<sup>2</sup>*Grizzard v. Fite*, 137 Tenn. 103, L. R. A. 1917D, 652, 191 S. W. 969.

<sup>3</sup>*French v. McMillion*, 79 W. Va. 639, L. R. A. 1917D, 228, 91 S. E. 538.

<sup>4</sup>*Carter v. Schrader*, 187 Ia. 1245, 175 N. W. 329; *Rudisill v. Whitener*, 146 N. Car. 403, 15 L. R. A. (N.S.) 81, 59 S. E. 995.

## CHAPTER XCI

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## I

## ORIGIN AND NATURE OF STATUTE

§ 3423. **History of doctrine of limitations.** In common law, failure to pay a debt for a certain period of time gave rise to a presumption that the debt had been paid.<sup>1</sup> Lapse of time would not, however, operate as a bar to an action.<sup>2</sup> The period within which an action could be brought, was limited in practise, under the original theory of the function of the jury, by the fact that the jury were to return a verdict of their own knowledge,<sup>3</sup> but this in turn, was modified by the theory that a member of the jury could base his verdict on knowledge which he had received from an ancestor.<sup>4</sup> Some relief, but a very limited one, against stale claims was found in the tendency to limit the period of legal memory to one hundred years.<sup>5</sup>

The effect of lapse of time as a bar to an action is, therefore, purely statutory. The earlier rules on the subject dealt with rights of action to recover real property or interest therein; and they do not attempt to fix a time within which the action must be brought, but rather to fix some historical event back of which the plaintiff could not go.<sup>6</sup> Such a period of limitations would have little real value unless it were re-enacted frequently; and the failure of Parliament to pass legislation of this sort after the thirteenth century, left the coronation of Richard I in 1189 A. D., the historical

<sup>1</sup> See §§ 3531 et seq.

<sup>2</sup> *England. Llanelly Railway & Dock Co. v. London & North Western Ry.*, L. R. 7 H. L. 567; *In re Stucley*, [1906], 1 Ch. 67.

*United States. United States v. Thompson*, 98 U. S. 486.

*Indiana. Union Mutual Life Insurance Co. v. Buchanan*, 100 Ind. 64.

*New York. Green v. Disbrow*, 79 N. Y. 1, 35 Am. Rep. 496.

*Wyoming. Cowhick v. Shingle*, 5 Wyom. 87, 63 Am. St. Rep. 17, 25 L. R. A. 608, 37 Pac. 689.

"Until one (i. e., a statute of limitations) exists, there can be no bar arising from the lapse of time. A party entitled can sue whenever he chooses to do so, and he is clothed

with all the rights of any other litigant, asserting a claim where there is no statute of limitation applicable to the case." *Hauenstein v. Lynham*, 100 U. S. 483, 488, 25 L. ed. 628.

<sup>3</sup> See § 3172.

<sup>4</sup> See § 3172.

<sup>5</sup> *Salmond on Jurisprudence* (6th ed.), 149.

<sup>6</sup> As to actions for realty, see II Pollock and Maitland's *History of English Law*, 81; III Holdsworth's *History of English Law*, 135.

As to novel disseisin and mort d'ancestor, see II Pollock and Maitland's *History of English Law*, 50, 51 (original paging); III Holdsworth's *History of English Law*, 7.

event back of which claims could not go. In 1540 Parliament recognized the fact that it was above the remembrance of any living man truly to try and know the perfect certainty of events that extended into the time thus limited; and a statute was enacted,<sup>7</sup> which fixed a certain period of time, although a long one, within which actions to recover realty must be brought. No general statute was passed which provided for a period of limitations for other forms of action until the statute of James I.<sup>8</sup> This statute has, within many modifications and improvements, served as the basis of the statutes of limitation in the United States, though our statutes now, by reason of repeated amendment, have much less in common with the statute of James I than did our earlier statutes of limitation.

**§ 3424. Statute as one of repose.** One of the first questions to determine in ascertaining the effect of the Statute of Limitations was whether the statute was one of repose, that is, whether the mere fact of the lapse of the required time was a complete defense; or whether it was one of presumption only, that is, whether it merely fixed a shorter statutory time at the expiration of which the common law prima facie presumption of payment would arise, subject to be rebutted by evidence showing non-payment. The original view held by the English courts was that the statute was one of repose. This view was subsequently abandoned and the statute was held to be one of presumption merely. In turn, this view was abandoned, and the courts returned to the original view that the statute was one of repose. In the United States the modern view of the statute is that it is one of repose.<sup>1</sup> While the Statute of Limitations is not a statutory re-enactment of the equitable doctrine of laches,<sup>2</sup> it is based on the theory that the plain-

<sup>7</sup> 32 Hen VIII, c. 2.

<sup>8</sup> 21 Jac. I, c. 16.

<sup>1</sup> United States. *Bell v. Morrison*, 26 U. S. (1 Pet.) 351, 7 L. ed. 174; *Shepherd v. Thompson*, 122 U. S. 231, 30 L. ed. 1156.

*Idaho*. *Sterrett v. Sweeney*, 15 Ida. 416, 20 L. R. A. (N.S.) 963, 98 Pac. 418.

*Kansas*. *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051.

*Massachusetts*. *Gillingham v. Brown*,

178 Mass. 417, 55 L. R. A. 320, 60 N. E. 122.

*Oklahoma*. *Adams v. Coon*, 36 Okla. 644, 44 L. R. A. (N.S.) 624, 129 Pac. 851.

*Washington*. *Bettman v. Cowley*, 19 Wash. 207, 40 L. R. A. 815, 53 Pac. 53.

<sup>2</sup> Absence of laches does not prevent limitations from running. *Trail v. Firth*, — Cal. —, 198 Pac. 1033.

See §§ 3539 et seq.

tiff has been guilty of laches,<sup>3</sup> and that the defendant should be protected against stale claims.<sup>4</sup> The Statute of Limitations does not, therefore, begin to run until the party who asserts the claim has had an opportunity to bring an action thereon.<sup>5</sup>

**§ 3425. Meritorious character of defense.** Another question which must be determined in order to ascertain the true place of the statute is whether the statute is a wise measure founded on sound public policy and designed to prevent imposition by means of stale claims, and hence a defense to be treated as at least in as good standing in law as other defenses, or whether it is a technical defense devoid of merit and to be permitted only when required by the strict rules of law. In some of the earlier English and American cases, limitations has been regarded as a technical defense;<sup>1</sup> and, accordingly, such defense could not be set up by amendment if the defendant failed to plead it in the first instance.<sup>2</sup> In modern cases, limitations is treated as a defense which is as worthy of consideration as other defenses, and as meritorious;<sup>3</sup> and, accordingly, such defense may be set up by amendment whenever any other meritorious defense might thus be set up.<sup>4</sup> It has been held to be proper to open up a judgment which has been rendered on a power of attorney,<sup>5</sup> or which has been rendered by excusable de-

<sup>3</sup> Ward v. Meredith, 186 Ia. 1108, 173 N. W. 246.

<sup>4</sup> Sterrett v. Sweeney, 15 Ida. 416, 20 L. R. A. (N.S.) 963, 98 Pac. 418.

<sup>5</sup> See §§ 3429 et seq.

<sup>1</sup> "It is a strict defense, and if the party lets it slip, the court will not relieve him." Beach v. Fulton Bank, 3 Wend. (N. Y.) 573 [citing Hallagan v. Golden, 1 Wend. (N. Y.) 302, and Jackson v. Varick, 2 Wend. (N. Y.) 294; and quoted in Sheets v. Baldwin, 12 Oh. 120 (128)].

<sup>2</sup> Cox v. Rolt, 2 Wilson 253; Coit v. Skinner, 7 Cow. (N. Y.) 401; Beach v. Fulton Bank, 3 Wend. (N. Y.) 574.

<sup>3</sup> Erkenbrecher v. Grant, — Cal. —, 197 Pac. 120.

The statute is said to be a "wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to

afford security against stale demands after the true state of things may have been forgotten, or may be incapable of explanation by reason of the loss of evidence." Gillingham v. Brown, 178 Mass. 417, 421, 55 L. R. A. 320, 60 N. E. 122 [substantially quoting Bell v. Morrison, 26 U. S. (1 Pet.) 351, 7 L. ed. 174; which is also quoted in Campbell v. Haverhill, 155 U. S. 610, 39 L. ed. 280].

<sup>4</sup> Nelson v. First National Bank, 139 Ala. 578, 101 Am. St. Rep. 52, 36 So. 707; Harvey v. Rogers, 174 Ky. 176, 191 S. W. 894; Cullen v. Western Mortgage & Warranty Title Co., 47 Mont. 513, 134 Pac. 302; Whereatt v. Worth, 108 Wis. 291, 81 Am. St. Rep. 899, 84 N. W. 441.

<sup>5</sup> Kahn v. Lesser, 97 Wis. 217, 72 N. W. 739.

fault,<sup>6</sup> so as to allow the Statute of Limitations to be interposed as a defense. One who owns all of the stock in a corporation, and who controls it, may be regarded as identified with it, although the result will be to start the Statute of Limitations to running.<sup>7</sup>

**§ 3426. General effect of statute—Bar to remedy.** The Statute of Limitations operates as a bar to any action upon the contract; but, under most statutes, the contract is not thereby discharged nor is the contract debt extinguished.<sup>1</sup> The remedy alone is affected.<sup>2</sup> A Statute of Limitations will not be construed as destroying the right unless such intent clearly appears, from the

<sup>6</sup> *Wheeler v. Castor*, 11 N. D. 347, 61 L. R. A. 746, 92 N. W. 381.

<sup>7</sup> *Erkenbrecher v. Grant*, — Cal. —, 197 Pac. 120.

<sup>1</sup> *United States. Talbott v. Hill*, 261 Fed. 244.

*Florida. Wilson v. Davis*, — Fla. —, 86 So. 686.

*Missouri. Dobschutz v. McAlevey*, — Mo. —, 213 S. W. 82.

*New Jersey. Lembeck & Betz Eagle Brewing Co. v. Krause*, — N. J. —, 109 Atl. 293.

*Ohio. Fisher v. Mossman*, 11 O. S. 42.

*Virginia. United Cigarette Machine Co. v. Brown*, 119 Va. 813, L. R. A. 1917F, 1100, 89 S. E. 850.

"A debt secured by a note upon which the right of action was barred by the statute of limitations is not thereby extinguished or paid, but the debt still remains due; and if the person can, by resorting to any other means than an action upon the note, recover his money he may do so; and this because the debt is not regarded as paid, but as still due, though not enforceable by an ordinary action at law." *Hopper v. Hopper*, 61 S. C. 124, 138, 39 S. E. 366.

<sup>2</sup> *England. Williams v. Jones*, 13 East 439.

*United States. Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483; *Talbott v. Hill*, 261 Fed. 244.

*California. Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225; *Carter v. Canty*, 181 Cal. 749, 186 Pac. 346.

*Florida. Wilson v. Davis*, — Fla. —, 86 So. 686.

*Idaho. Sterrett v. Sweeney*, 15 Ida. 416, 20 L. R. A. (N.S.) 963, 98 Pac. 418.

*Iowa. Long v. Northwestern National Life Insurance Co.*, — Ia. —, 180 N. W. 1.

*Massachusetts. Shaw v. Silloway*, 145 Mass. 503, 14 N. E. 783; *Munroe v. Stanley*, 220 Mass. 438, 107 N. E. 1012.

*Missouri. Dobschutz v. McAlevey*, — Mo. —, 213 S. W. 82; *Bush v. Kansas City Life Insurance Co.*, — Mo. —, 214 S. W. 175.

*New Jersey. Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Lembeck & Betz Eagle Brewing Co. v. Krause*, — N. J. —, 109 Atl. 293.

*North Dakota. McCarty v. Goodman*, — N. D. —, L. R. A. 1918F, 160, 167 N. W. 503.

*Oregon. State Land Board v. Lee*, 84 Or. 431, 165 Pac. 372.

*Tennessee. Cocke v. Hoffman*, 5 Lea (Tenn.) 105, 40 Am. Rep. 23.

*Virginia. United Cigarette Machine Co. v. Brown*, 119 Va. 813, L. R. A. 1917F, 1100, 89 S. E. 850.

"Statutes of limitation of personal actions are laws affecting remedies only and not rights." *Michigan Insurance Bank v. Eldred*, 130 U. S. 693, 696.

language used.<sup>3</sup> A statute of this sort gives a defense, but it does not oust the jurisdiction of the trial court;<sup>4</sup> and, accordingly, a writ of prohibition will not issue to restrain the trial court from proceeding with such an action.<sup>5</sup>

A statute which specifies the period of time for which recovery can be had, is not treated as an ordinary Statute of Limitations,<sup>6</sup> especially if it is not contained in the chapter on limitation of actions.<sup>7</sup>

Where the statute is regarded as barring the remedy, an executor may deduct from the share of a distributee or legatee, a debt which such distributee or legatee owes to the decedent, although it is barred by limitations,<sup>8</sup> at least if the remedy of the distributee or legatee must be sought in equity. If a debt is secured by a lien or other security, the fact that the original debt is barred does not necessarily operate as a bar over the lien or security,<sup>9</sup> although this rule has been applied in jurisdictions in which it is said that the debt is extinguished by the operation of the Statute of Limitations.<sup>10</sup> This rule applies in cases in which the debt which is barred by limitations is secured by a mortgage on realty,<sup>11</sup> or by

<sup>3</sup> *Barnhardt v. Morrison*, 178 N. Car. 563, 101 S. E. 218.

<sup>4</sup> *State v. Superior Court*, 110 Wash. 255, 188 Pac. 391.

<sup>5</sup> *State v. Superior Court*, 110 Wash. 255, 188 Pac. 391.

<sup>6</sup> *Logan v. Davis*, — Ia. —, 180 N. W. 184 (action for use and occupation).

<sup>7</sup> *Logan v. Davis*, — Ia. —, 180 N. W. 184.

<sup>8</sup> *England. Courtenay v. Williams*, 3 Hare 539; *Coates v. Coates*, 33 Beav. 249.

*Alabama. Noble v. Tait*, 140 Ala. 469, 37 So. 278.

*Indiana. Holmes v. McPheeters*, 149 Ind. 587, 49 N. E. 452.

*Kansas. Holden v. Spier*, 65 Kan. 412, 70 Pac. 348.

*Vermont. Tinkham v. Smith*, 56 Vt. 187.

<sup>9</sup> *Colorado. Holmquist v. Gilbert*, 41 Colo. 113, 14 L. R. A. (N.S.) 479, 92 Pac. 232.

*Florida. Wilson v. Davis*, — Fla. —, 86 So. 686.

*Michigan. Stringer v. Stephens*, 146 Mich. 181, 8 L. R. A. (N.S.) 393, 109 N. W. 269.

*Missouri. Dobschutz v. McAlevy*, — Mo. —, 213 S. W. 82; *Bush v. Kansas City Life Insurance Co.*, — Mo. —, 214 S. W. 175.

*New Jersey. Lembeck & Betz Eagle Brewing Co. v. Krause*, — N. J. —, 109 Atl. 293.

*North Dakota. McCarty v. Goodman*, — N. D. —, L. R. A. 1918F, 160, 167 N. W. 503.

*Wisconsin. Bishop v. Douglass*, 25 Wis. 696; *Cerney v. Pawlot*, 66 Wis. 262, 28 N. W. 183; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614.

<sup>10</sup> *Bishop v. Douglass*, 25 Wis. 696; *Cerney v. Pawlot*, 66 Wis. 262, 28 N. W. 183; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614.

<sup>11</sup> *Holmquist v. Gilbert*, 41 Colo. 113, 14 L. R. A. (N.S.) 479, 92 Pac. 232; *Dobschutz v. McAlevy*, — Mo. —, 213

purchase money lien,<sup>12</sup> or by a lien created by the will by which such realty is devised,<sup>13</sup> or by a chattel mortgage,<sup>14</sup> or by a pledge of a life insurance policy,<sup>15</sup> or by the lien which a corporation has upon its stock to secure debts due to it from its stockholders.<sup>16</sup> After limitations has run against the foreclosure of a mortgage, the mortgagee may, nevertheless, sell under a power of sale contained therein.<sup>17</sup> Even if the Statute of Limitations has run against the lien as well as against the debt, equity will not quiet title as against the unpaid creditor,<sup>18</sup> even if the debt which is secured by such lien was never the personal obligation of anyone in the chain of legal title.<sup>19</sup> If the period which is fixed by the Statute of Limitations has run, the original obligation may serve as a consideration for a new promise.<sup>20</sup>

A right of action against a surety is barred when the right of action against the principal is barred.<sup>21</sup> This principle has been applied to an action against stockholders on their stock liability. Such right of action is barred when a right of action against the corporation is barred, that is, in three years from the time that the corporation suspended business, even though by statute no suit could have been brought against the stockholders during the first year after such suspension.<sup>22</sup> The fact that a right of action

S. W. 82; *McCarty v. Goodman*, — N. D. —, L. R. A. 1918F, 160, 167 N. W. 503.

See also, *Gaulden v. Warnock*, — Fla. —, 84 So. 603.

<sup>12</sup> *Wilson v. Davis*, — Fla. —, 86 So. 686.

<sup>13</sup> *Stringer v. Stephens*, 146 Mich. 181, 8 L. R. A. (N.S.) 393, 109 N. W. 269.

<sup>14</sup> *Lembeck & Betz Eagle Brewing Co. v. Krause*, — N. J. —, 109 Atl. 293.

<sup>15</sup> *Bush v. Kansas City Life Insurance Co.*, — Mo. —, 214 S. W. 175.

<sup>16</sup> *Brent v. Bank of Washington*, 35 U. S. (10 Pet.) 596, 9 L. ed. 547; *Sproul v. Standard Plate Glass Co.*, 201 Pa. St. 103, 50 Atl. 1003; *United Cigarette Machine Co. v. Brown*, 119 Va. 813, L. R. A. 1917F, 1100, 89 S. E. 850.

<sup>17</sup> *Menzel v. Hinton*, 132 N. Car. 660, 95 Am. St. Rep. 647, 44 S. E. 385.

<sup>18</sup> *Berkley v. Idol*, 91 Kan. 16, 136 Pac. 923; *Barney v. Chamberlain*, 85 Neb. 785, 124 N. W. 482; *Tracy v. Wheeler*, 15 N. D. 248, 6 L. R. A. (N. S.) 516, 107 N. W. 68; *Keller v. Souther*, 26 N. D. 358, L. R. A. 1916B, 1218, 144 N. W. 671.

*Contra*, *Cushing v. Spokane*, 45 Wash. 193, 122 Am. St. Rep. 890, 87 Pac. 1121.

<sup>19</sup> *Keller v. Souther*, 26 N. D. 358, L. R. A. 1916B, 1218, 144 N. W. 671.

<sup>20</sup> See §§ 320, 1673 to 1678.

<sup>21</sup> *Auchampaugh v. Schmidt*, 70 Ia. 642, 59 Am. Rep. 459, 27 N. W. 805; *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984.

*Contra*, *Charbonneau v. Bouvet*, 98 Tex. 167, 82 S. W. 460.

<sup>22</sup> *Pacific Elevator Co. v. Whitbeck*, 63 Kan. 102, 88 Am. St. Rep. 229, 64 Pac. 984.

against a surety is barred by a special Statute of Limitations does not operate as a bar in favor of the principal.<sup>23</sup>

If a cause of action is barred as to one of several joint debtors it has been held to be barred as to all.<sup>24</sup> If the liability is joint and several the bar of the statute in favor of one debtor does not enure to the benefit of the other.<sup>25</sup>

If a question of the conflict of laws is involved, the Statute of Limitations of the forum is applied in the absence of specific statutory provision.<sup>26</sup> A debt barred by limitations has been held available as a set-off,<sup>27</sup> or counterclaim,<sup>28</sup> even though it would be barred as an independent action.<sup>29</sup> This result has been reached under statutes which provide that a set-off or counterclaim, if not barred when the plaintiff's right arose, shall not be barred as against plaintiff's claim.<sup>30</sup> Such legislation makes the set-off or counterclaim run with the contract.<sup>31</sup> It is the general rule, whatever may be thought of its fairness, that in the absence of special statute, a set-off or counterclaim is barred as such, whenever it would have been barred as an independent claim.<sup>32</sup>

**§ 3427. Extinction of obligation.** In some jurisdictions, the Statute of Limitations is construed to operate so as to extinguish the obligation, and not merely to bar the remedy.<sup>1</sup> Where this

<sup>23</sup> *Berkin v. Marsh*, 18 Mont. 152, 56 Am. St. Rep. 565, 44 Pac. 528.

<sup>24</sup> *Askly v. Bell*, 80 Va. 811.

<sup>25</sup> *Harrison v. McCormick*, 122 Cal. 651, 55 Pac. 592; *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367 [affirming, 54 Ill. App. 457].

See, as to bar after death of one promisor, *Hard v. Mingle*, 206 N. Y. 179, 42 L. R. A. (N.S.) 1131, 99 N. E. 542.

<sup>26</sup> See § 3624.

<sup>27</sup> *Reddish v. John*, — Ia. —, 179 N. W. 951; *Long v. Northwestern Nat'l Life Ins. Co.*, — Ia. —, 180 N. W. 1.

<sup>28</sup> *Huggins v. Smith*, 141 Ark. 87, 216 S. W. 1.

<sup>29</sup> *Huggins v. Smith*, 141 Ark. 87, 216 S. W. 1.

<sup>30</sup> Set-off. *Wilson v. Montgomery Bank & Trust Co.*, 203 Ala. 340, 83 So. 64.

Counterclaim. *Matthys v. Donelson*, 179 Ia. 1111, 160 N. W. 944; *Mc-*

*Kenna v. Morgan*, 102 Kan. 478, 170 Pac. 998.

<sup>31</sup> *Wilson v. Montgomery Bank & Trust Co.*, 203 Ala. 340, 83 So. 64.

<sup>32</sup> *England. Hicks v. Hicks*, 3 East. 16.

*Arkansas. Stewart v. Simon*, 111 Ark. 358, 163 S. W. 1135.

*Idaho. Wonnacott v. Kootenai County*, 32 Ida. 342, 182 Pac. 353.

*Massachusetts. Tyler v. Boyce*, 135 Mass. 558.

*New York. Dieffenbach v. Roch*, 112 N. Y. 621, 2 L. R. A. 829, 20 N. E. 560.

*Pennsylvania. Rhone v. Keystone Coal Co.*, 250 Pa. St. 336.

*Texas. Nelson v. San Antonio Traction Co.*, 107 Tex. 180, 175 S. W. 434.

For effect on counterclaim or set-off of commencement of action, see § 3476.

<sup>1</sup> *California Savings Bank v. Parriah*, 116 Cal. 254, 48 Pac. 73; *McCracken County v. Mercantile Trust Co.*, 84 Ky.

view obtains, a lien can not be enforced if the claim which it secures is barred by limitations.<sup>2</sup> The same result is reached in some jurisdictions on the theory that the lien is a mere incident of the debt.<sup>3</sup> A judgment rendered under a power of attorney will be opened if the period of limitations has run against the obligation;<sup>4</sup> and if such judgment on power of attorney has been rendered in another state, equity will enjoin the enforcement of such judgment in the domicile of the debtor.<sup>5</sup> In some jurisdictions an executor may not deduct, from the share of a legatee or distributee, a debt due from him to the decedent, which is barred by the Statute of Limitations.<sup>6</sup> In some cases, this result is explained on the theory that the debt is extinguished, and in others it is explained on the theory that as a right of the distributee or legatee is a right which can now be enforced at law, the doctrines of equity no longer apply.

**§ 3428. Limitations as against the state.** Unless a Statute of Limitations purports to apply to the state, it will be construed as having no application to rights of action existing in favor of the state in its governmental capacity.<sup>1</sup> Accordingly, limitations does

344, 1 S. W. 585; *Hazel v. McCullough*, 188 Ky. 419, 222 S. W. 100; *Allen v. Edwards*, 136 Mass. 138; *Brown v. Parker*, 28 Wis. 21; *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739.

<sup>2</sup> *California Savings Bank v. Parrish*, 116 Cal. 254, 48 Pac. 73.

So, by special statute. *Faxon v. Hibernia Savings & Loan Society*, 166 Cal. 707, L. R. A. 1916B, 1209, 137 Pac. 919; *McCracken County v. Mercantile Trust Co.*, 84 Ky. 344, 1 S. W. 585; *Hazel v. McCullough*, 188 Ky. 419, 222 S. W. 100.

<sup>3</sup> *Jarl v. Pritchett*, — Ia. —, 179 N. W. 945.

<sup>4</sup> *Kahn v. Lesser*, 97 Wis. 217, 72 N. W. 739.

<sup>5</sup> *Brown v. Parker*, 28 Wis. 21.

<sup>6</sup> *Luscher v. Security Trust Co.*, 178 Ky. 593, L. R. A. 1918C, 615, 199 S. W. 613; *Holt v. Libby*, 80 Me. 329, 14 Atl. 201; *Allen v. Edwards*, 136 Mass.

138; *Light's Estate*, 136 Pa. St. 211, 20 Atl. 536.

<sup>1</sup> *United States v. Gibson v. Chouteau*, 80 U. S. (13 Wall.) 92, 20 L. ed. 534; *United States v. Thompson*, 98 U. S. 486, 25 L. ed. 194; *Grand Trunk Western Ry. v. United States*, 252 U. S. 112, 64 L. ed. 484; *United States v. Kendall*, 263 Fed. 126; *United States v. Kern River Co.*, 264 Fed. 412.

*Michigan*. *Board of Supervisors v. Bennett*, 185 Mich. 544, 152 N. W. 229, 153 N. W. 814.

*Oklahoma*. *State v. Smith*, 77 Okla. 277, 188 Pac. 96.

*South Dakota*. *Brink v. Dann*, 33 S. D. 81, 144 N. W. 734.

*Tennessee*. *Central Hospital for Insane v. Adams*, 134 Tenn. 429, L. R. A. 1916E, 94, 183 S. W. 1032.

*Wisconsin*. *State v. Northern Pacific Ry.*, 157 Wis. 73, 147 N. W. 219.

See *Nullum Tempus Occurrit Regi*, 13 American Law Register (N.S.), 465.

not run against the claim of a state agency,<sup>2</sup> such as the claim of a state hospital for the care of inmates.<sup>3</sup> This principle has been extended to actions by the state to liquidate insolvent corporations, of which it has taken charge,<sup>4</sup> such as banks.<sup>5</sup> A state Statute of Limitations does not apply to an action by the United States.<sup>6</sup>

If the action is brought by the state or an agency thereof, in its private capacity, the Statute of Limitations applies.<sup>7</sup> The claim of a county to recover improper payments from the public treasury is regarded as a claim in its private capacity, within the meaning of this rule.<sup>8</sup>

## II

### WHEN STATUTE BEGINS TO RUN

**§ 3429. Limitations runs from breach of contract.** The Statute of limitations begins to run upon a contract at the breach thereof, as soon as a right of action accrues.<sup>1</sup> Conversely, the Statute of

<sup>2</sup> *Central Hospital for Insane v. Adams*, 134 Tenn. 429, L. R. A. 1916E, 94, 183 S. W. 1032.

<sup>3</sup> *Central Hospital for Insane v. Adams*, 134 Tenn. 429, L. R. A. 1916E, 94, 183 S. W. 1032.

<sup>4</sup> *State v. Smith*, 77 Okla. 277, 188 Pac. 96.

<sup>5</sup> *State v. Smith*, 77 Okla. 277, 188 Pac. 96.

<sup>6</sup> *Chesapeake & Delaware Canal Co. v. United States*, 223 Fed. 926, L. R. A. 1916B, 734.

<sup>7</sup> *Woodward County v. Willett*, 49 Okla. 254, L. R. A. 1916E, 92, 152 Pac. 365.

<sup>8</sup> *Woodward County v. Willett*, 49 Okla. 254, L. R. A. 1916E, 92, 152 Pac. 365.

<sup>1</sup> *United States. Illinois Surety Co. v. United States*, 240 U. S. 214, 60 L. ed. 609 [modifying judgment, *Illinois Surety Co. v. United States*, 215 Fed. 334, 131 C. C. A. 476]; *In re Herbert*, 262 Fed. 682.

**Alabama.** *Russell v. Garrett*, 204 Ala. 98, 85 So. 420; *American Bonding Co. v. Fourth National Bank*, — Ala. —, 88 So. 838.

**California.** *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877; *Smith's Cash Store v. First National Bank*, 149 Cal. 32, 5 L. R. A. (N.S.) 870, 84 Pac. 663; *Miguel v. Miguel*, — Cal. —, 193 Pac. 935; *Erkenbrecher v. Grant*, — Cal. —, 197 Pac. 120.

**Colorado.** *Enos v. Anderson*, 40 Colo. 395, 15 L. R. A. (N.S.) 1087, 93 Pac. 475.

**Connecticut.** *State v. Northrop*, 93 Conn. 558, 106 Atl. 504; *Downey v. Guilfoile*, — Conn. —, 114 Atl. 73.

**Delaware.** *Standard Sewing Machine Co. v. Frame*, 2 Penne. (Del.) 430, 48 Atl. 188.

**Kansas.** *Engelbrecht v. Herrington*, 101 Kan. 720, L. R. A. 1918E, 785, 172 Pac. 715; *Leslie v. Compton*, 103 Kan. 92, L. R. A. 1918F, 706, 172 Pac. 1015; *Miles v. Hamilton*, 106 Kan. 804, 189 Pac. 926.

**Kentucky.** *McGovern v. Rectanus*, 139 Ky. 365, 14 L. R. A. (N.S.) 380, 105 S. W. 965.

**Louisiana.** *Littlefield v. Shreveport*, — La. —, 87 So. 714.

Limitations does not begin to run from the time at which the contract was made, but from the breach thereof, on which the action in question could have been brought.<sup>2</sup> If a contract is antedated,

**Maine.** *Manning v. Perkins*, 86 Me. 419, 29 Atl. 1114; *Hale v. Cushman*, 96 Me. 148, 51 Atl. 874.

**Maryland.** *Emerson v. Gaither*, 103 Md. 564, 8 L. R. A. (N.S.) 738, 64 Atl. 26; *Lang v. Wilmer*, 131 Md. 215, 2 A. L. R. 1698, 101 Atl. 706.

**Michigan.** *Volli v. Wirth*, 164 Mich. 21, 37 L. R. A. (N.S.) 297, 129 N. W. 9.

**Nebraska.** *Watson v. Heyn*, 62 Neb. 191, 86 N. W. 1064.

**Nevada.** *Miller v. Walser*, 42 Nev. 497, 181 Pac. 437.

**New York.** *Martin v. Camp*, 219 N. Y. 170, L. R. A. 1917F, 402, 114 N. E. 48.

**North Dakota.** *United States Fidelity & Guaranty Co. v. Citizens' State Bank*, 36 N. D. 16, L. R. A. 1918E, 326, 161 N. W. 562; *Donovan v. Dickson*, 37 N. D. 404, 164 N. W. 27.

**Oregon.** *Hurlbut v. Chrisman*, — Or. —, 197 Pac. 261.

**South Carolina.** *McLure v. Melton*, 34 S. Car. 377, 27 Am. St. Rep. 820, 13 L. R. A. 723, 13 S. E. 615.

**South Dakota.** *McCarthy v. First National Bank*, 23 S. D. 269, 23 L. R. A. (N.S.) 335, 121 N. W. 853.

**Tennessee.** *Cummings v. Stovall*, 76 Tenn. (Lea) 679.

**Vermont.** *Goodyear Metallic Rubber Shoe Co. v. Baker's Estate*, 81 Vt. 39, 69 Atl. 160 [sub nomine, *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, 17 L. R. A. (N.S.) 667].

**Washington.** *Cornell v. Edsen*, 78 Wash. 662, 51 L. R. A. (N.S.) 279, 139 Pac. 602; *McDonald v. Ward*, 99 Wash. 354, L. R. A. 1918F, 662, 169 Pac. 851; *State v. Miller*, 108 Wash. 390, 184 Pac. 352.

**West Virginia.** *Merchants' National Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828, 23 S. E. 681.

**Wisconsin.** *Darling v. Nelson*, 171

Wis. 337, 176 N. W. 847; *Wisconsin Trust Co. v. Cousins*, — Wis. —, 179 N. W. 801.

<sup>2</sup> **United States.** *Daniel v. Drury*, 267 Fed. 751.

**Arkansas.** *Cooper v. Rush*, 138 Ark. 602, 212 S. W. 94; *Hanson v. Brown*, 139 Ark. 60, 213 S. W. 12.

**California.** *Hurlbut v. Quigley*, 180 Cal. 265, 180 Pac. 613.

**Colorado.** *Enos v. Anderson*, 40 Colo. 395, 15 L. R. A. (N.S.) 1087, 93 Pac. 475; *Sweet v. Barnard*, 66 Colo. 526, 182 Pac. 22; *Dunkle v. Haight*, 68 Colo. 404, 189 Pac. 783.

**Connecticut.** *State v. Northrop*, 93 Conn. 558, 7 A. L. R. 1014, 106 Atl. 504.

**Illinois.** *John M. Smyth Co. v. Chicago*, — Ill. —, 128 N. E. 351.

**Iowa.** *Ward v. Meredith*, 186 Ia. 1108, 173 N. W. 246; *Stevens v. Pels*, 187 Ia. 443, 175 N. W. 303.

**Kansas.** *In re Lawless' Estate*, 107 Kan. 349, 191 Pac. 256.

**Maryland.** *Harford County v. Bel Air Suburban Improvement Association*, 134 Md. 548, 107 Atl. 348; *Sharp v. State*, 135 Md. 551, 109 Atl. 454.

**Minnesota.** *Newton v. Southern Colonization Co.*, 145 Minn. 164, 176 N. W. 501.

**Missouri.** *First National Bank v. Security Mutual Life Insurance Co.*, — Mo. —, 222 S. W. 832.

**Mississippi.** *New York Life Insurance Co. v. Brame*, 112 Miss. 828, L. R. A. 1918B, 86, 73 So. 806.

**New Jersey.** *D'Elizza v. D'Amato*, 85 N. J. Eq. 466, 97 Atl. 41; *Leonard v. Williamson*, 92 N. J. L. 535, 106 Atl. 372.

**New Mexico.** *Prichard v. Fulmer*, 25 N. M. 452, 184 Pac. 529.

See, also, *Beebe v. Fousse*, — N. M. —, 199 Pac. 364.

as where bonds were dated when authorized, but issued only when needed,<sup>3</sup> limitations runs against a suit for cancelation from the true date. In order to determine whether the Statute of Limitations has run or not, it is therefore necessary to determine whether or not the contract has been broken so that an action can be brought thereon. This depends, in part, upon the nature of the contract and the terms thereof, and in part upon the nature of the breach upon which the action is brought.<sup>4</sup> A right of action can not be said to accrue until there is a person in being who can maintain an action.<sup>5</sup> A right of action against a trustee, who has been removed, does not accrue until his successor has been appointed.<sup>6</sup> If an equitable action is necessary to determine the rights of the parties, before the amount due can be ascertained, it is said that limitations does not begin to run until such decree is entered.<sup>7</sup>

**§ 3430. Delay in discovering breach.** In the absence of a special statute, limitations runs from the breach of a contract, and not from the time that such breach is discovered.<sup>1</sup> An action against an attorney for breach of duty accrues when he commits

**North Carolina.** *Helsabeck v. Doub*, 167 N. Car. 205, L. R. A. 1917A, 1, 83 S. E. 241; *Chatham v. Mecklenburg Realty Co.*, 180 N. Car. 500, 106 S. E. 329.

**North Dakota.** *McCarty v. Goodman*, — N. D. —, L. R. A. 1918F, 160, 167 N. W. 503.

**Oklahoma.** *Probst v. Bearman*, — Okla. —, 183 Pac. 886.

**Vermont.** *Dyer v. Lalor*, — Vt. —, 109 Atl. 30.

**Virginia.** *Rector v. Hancock*, 127 Va. 101, 102 S. E. 663.

**Washington.** *Joergenson v. Joergenson*, 28 Wash. 477, 92 Am. St. Rep. 888, 68 Pac. 913; *Green v. Spokane County*, 55 Wash. 208, 25 L. R. A. (N. S.) 31, 104 Pac. 510; *Loewe v. Osner*, 109 Wash. 124, 186 Pac. 643; *Sibley v. Stetson & Post Lumber Co.*, 110 Wash. 204, 188 Pac. 389.

**Wisconsin.** *White v. Brotherhood Locomotive Firemen and Enginemen*, 167 Wis. 323, L. R. A. 1918D, 1185,

167 N. W. 457; *In re Leu's Estate*, — Wis. —, 179 N. W. 796.

<sup>3</sup> *Sechrist v. Rialto Irrigation District*, 129 Cal. 640, 62 Pac. 261.

<sup>4</sup> See §§ 2878 et seq.

<sup>5</sup> *State v. Northrop*, 93 Conn. 558, 7 A. L. R. 1014, 106 Atl. 504.

<sup>6</sup> *State v. Northrop*, 93 Conn. 558, 7 A. L. R. 1014, 106 Atl. 504.

<sup>7</sup> *Donovan v. Dickson*, 37 N. D. 404, 164 N. W. 27.

<sup>1</sup> *Aachen & Munich Fire Insurance Co. v. Morton*, 156 Fed. 654, 15 L. R. A. (N.S.) 156, 84 C. C. A. 366; *Ganser v. Ganser*, 83 Minn. 199, 85 Am. St. Rep. 461, 86 N. W. 18; *Goodyear Metallic Rubber Shoe Co. v. Baker's Estate*, 81 Vt. 39, 69 Atl. 160 [sub nomine, *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, 17 L. R. A. (N. S.) 667]; *Cornell v. Edsen*, 78 Wash. 662, 51 L. R. A. (N.S.) 279, 139 Pac. 602; *Darling v. Nelson*, 171 Wis. 337, 176 N. W. 847.

such breach and not when it is discovered; and limitations begins to run from the time of such breach.<sup>2</sup> Limitations begins to run against an action for giving a defective abstract at the time such defective report is made, though party to whom such report is made, who buys land in reliance thereon, is not deprived of such land until a suit is brought after the period of limitations against the cause of action for giving the defective abstract has expired.<sup>3</sup> Limitations begins to run against an action upon a guaranty of the genuineness on a signature, which proves to be a forgery, from the time at which such guaranty was broken and not from the time at which the forgery was discovered.<sup>4</sup> Limitations begins to run against a right of action for breach of warranty from the time at which such warranty was broken and not from the time at which it was discovered.<sup>5</sup> A right of action on a warranty given with the sale of a defective town warrant accrues when such warrant is sold, and not when its invalidity is subsequently discovered, there being no fraudulent concealment.<sup>6</sup> In some cases, however, it is held that limitations does not run until the breach of warranty is discovered, if the nature of the article is such that it can not be discovered until after performance has taken place.<sup>7</sup> If the warranty provides for a test, limitations does not begin to run until such test has been had.<sup>8</sup> If it is uncertain whether the defects can be remedied, and, accordingly, whether the defects operate as a discharge, limitations does not begin to run until the

<sup>2</sup> *Short v. McCarthy*, 3 Barn. & Ald. 626; *Fortune v. English*, 226 Ill. 262, 117 Am. St. Rep. 253, 12 L. R. A. (N. S.) 1005, 80 N. E. 781 (opinion as to title to realty); *Goodyear Metallic Rubber Shoe Co. v. Baker's Estate*, 81 Vt. 39, 69 Atl. 160 [sub nomine, *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, 17 L. R. A. (N.S.) 667] (for payment of money collected by attorney); *Cornell v. Edsen*, 78 Wash. 662, 51 L. R. A. (N.S.) 279, 139 Pac. 602 (fraudulent dismissal of action).

<sup>3</sup> *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545.

See *Russell v. Polk County Abstract*

*Co.*, 87 Ia. 233, 43 Am. St. Rep. 381, 54 N. W. 212.

<sup>4</sup> *Lehigh Coal & Navigation Co. v. Blakeslee*, 189 Pa. St. 13, 69 Am. St. Rep. 788, 41 Atl. 992.

<sup>5</sup> *Perkins v. Whelan*, 116 Mass. 542; *Allen v. Todd*, 6 Lans. (N. Y.) 222.

<sup>6</sup> *Merchants' National Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828, 23 S. E. 681.

<sup>7</sup> *Sheehy Co. v. Eastern Importing & Manufacturing Co.*, 44 D. C. App. 107, L. R. A. 1916F, 810 (canned goods); *Ingalls v. Angell*, 76 Wash. 692, 137 Pac. 309 (as to fruit trees).

<sup>8</sup> *Felt v. Reynolds*, 52 Mich. 602, 18 N. W. 378.

defects are found to be beyond remedy.<sup>9</sup> Limitations runs against an innocent breach of trust from its date and not from discovery.<sup>10</sup>

**§ 3431. Delay in infliction of damages.** If the damage occasioned by the breach of contract is not sustained until after the contract is broken, limitations begins to run from the date of the breach, and not from the time that damage is sustained.<sup>1</sup> An attorney agreed to collect a note for a client. He neglected to bring suit against a solvent indorser for over a year, and in bringing such suit finally, he committed a fatal misnomer of the plaintiff, for which a judgment against the indorser was reversed by the supreme court of the state. By that time the action against the indorser was barred by limitations. Suit was then brought by the holder of the note against the attorney for breach of his implied agreement to use due skill and diligence, one count alleging that no suit was brought until the note was barred and the other count alleging that the suit was defectively brought. It was held that limitations began to run against the first cause of action on failure to sue within a reasonable time after the note was received for collection, or at least after failure to collect from the maker, and against the second cause of action from the time that the blunder in pleading was made.<sup>2</sup> Limitations begins to run against an attorney who has been guilty of libel, which has resulted in a judgment against his client, from the time that he breaks his duty to his client by committing such libel, and not from the time at which such judgment was rendered.<sup>3</sup> Limitations runs against an action for wrongfully assigning a contract of insurance, from the

<sup>9</sup> Woodward-Wight & Co. v. Engel Land & Lumber Co., 123 La. 1094, 49 So. 719.

<sup>10</sup> Thorne v. Heard [1894], 1 Ch. 599.

As for negligence. Wisconsin Trust Co. v. Cousins, — Wis. —, 179 N. W. 801.

<sup>1</sup> United States. Aachen & Munich Fire Insurance Co. v. Morton, 156 Fed. 654, 15 L. R. A. (N.S.) 156, 84 C. C. A. 366; In re Herbert, 262 Fed. 682.

California. Lattin v. Gillette, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545.

Kentucky. Davis v. Brown, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534.

Maine. Manning v. Perkins, 86 Me. 419, 29 Atl. 1114.

Minnesota. Everett v. O'Leary, 90 Minn. 154, 95 N. W. 901.

Nebraska. Northern Assurance Co. v. Borgelt, 67 Neb. 282, 93 N. W. 226.

South Carolina. McLure v. Melton, 34 S. Car. 377, 27 Am. St. Rep. 820, 13 L. R. A. 723, 13-4. E. 615.

See, however, obiter in Douglass v. Ohio River Ry., 51 W. Va. 523, 41 S. E. 911.

<sup>2</sup> Wilcox v. Plummer, 29 U. S. (4 Pet.) 172, 7 L. ed. 821.

<sup>3</sup> Gould v. Palmer, 96 Ga. 798, 22 S. E. 583.

time that such wrongful assignment was made, and not from the time that the assignee recovered judgment against the insurer.<sup>4</sup> This may be the necessary result of the wording of our Statutes of Limitations. If so, special legislation would seem advisable.

**§ 3432. Contract to be performed at future time.** If a future definite time is fixed for the performance of the contract, limitations does not begin to run until such future time is reached.<sup>1</sup> Under a contract to pay money at a definite time in the future limitations does not begin to run until such time is reached.<sup>2</sup> A contract to pay money to a third person when he reaches the age of twenty-one, is not accelerated, by the death of such third person under such age.<sup>3</sup> The Statute of Limitations begins to run against an insurance policy upon its maturity.<sup>4</sup> If a policy provides that, in case of default in payment of premium, a paid-up policy will be issued upon the return of the original policy within six months after such default, limitations begins to run at the end of such six months' period.<sup>5</sup> If the law allows days of grace, limitations runs from the last day of grace.<sup>6</sup> Limitations begins to run against the liability of directors and officers of a corporation for creating indebtedness in excess of the capital stock from the date of the maturity of such debt and not from its creation.<sup>7</sup> Limitations runs against a vendor's lien from the maturity of the debt and not from the date of the conveyance.<sup>8</sup> Limitations runs against inter-

<sup>4</sup> *Aachen & Munich Fire Insurance Co. v. Morton*, 156 Fed. 654, 15 L. R. A. (N.S.) 156, 84 C. C. A. 366.

<sup>1</sup> *California. Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 Pac. 39.

*Iowa. Collman v. Equitable Life Assurance Society*, 133 Ia. 177, 8 L. R. A. (N.S.) 1019, 110 N. W. 444.

*Missouri. First National Bank v. Security Mutual Life Ins. Co.*, — Mo. —, 222 S. W. 832.

*Minnesota. Pinch v. McCulloch*, 72 Minn. 71, 74 N. W. 897.

*Mississippi. Gulfport Fertilizer Co. v. McMurphy*, 114 Miss. 250, 75 So. 113.

*Wisconsin. Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. 550.

<sup>2</sup> *Littlefield v. Shreveport*, — La. —, 87 So. 714; *French v. Higgins*, 66 N. J. L. 579, 50 Atl. 344.

<sup>3</sup> *Pierce v. Parks*, 76 Or. 58, 147 Pac. 929.

<sup>4</sup> *First National Bank v. Security Mutual Life Ins. Co.*, — Mo. —, 222 S. W. 832.

<sup>5</sup> *Collman v. Equitable Assurance Society*, 133 Ia. 177, 8 L. R. A. (N.S.) 1019, 110 N. W. 444.

<sup>6</sup> *Joergenson v. Joergenson*, 28 Wash. 477, 92 Am. St. Rep. 888, 68 Pac. 913.

<sup>7</sup> *Wolverton v. Taylor*, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007.

<sup>8</sup> *Poindexter v. Rawlings*, 106 Tenn. 97, 82 Am. St. Rep. 869, 59 S. W. 766.

est coupons from their maturity and not from the maturity of the debt.<sup>9</sup>

Limitations begins to run against a domestic judgment from the date of its rendition,<sup>10</sup> and not from the end of the period during which execution may issue,<sup>11</sup> or from the end of the period during which appeal might have been prosecuted.<sup>12</sup> Under a statute which provides that an action on a contractor's bond, can not be brought within a certain time after "final settlement," and that such action must be brought within a certain time thereafter, the final settlement is not the final payment, but the final determination by the proper authority, of the amount due.<sup>13</sup>

**§ 3433. Contract to be performed at future event.** If a contract is to be performed on the happening of some future event, the time of which can not be determined in advance, limitations does not begin until the happening of such event.<sup>1</sup> Limitations does not run against the right of a broker to recover for his serv-

<sup>9</sup> *Mather v. San Francisco*, 115 Fed. 37, 52 C. C. A. 631.

<sup>10</sup> *Lang v. Wilmer*, 131 Md. 215, 2 A. L. R. 1698, 101 Atl. 706; *Sweetser v. Fox*, 43 Utah 40, 47 L. R. A. (N.S.) 145, 134 Pac. 599; *Citizens' National Bank v. Lucas*, 26 Wash. 417, 90 Am. St. Rep. 748, 56 L. R. A. 812, 67 Pac. 252.

<sup>11</sup> *Citizens' National Bank v. Lucas*, 26 Wash. 417, 90 Am. St. Rep. 748, 56 L. R. A. 812, 67 Pac. 252. (This involves the doctrine that at common law the right of action on a judgment existed as soon as the judgment was rendered; and that execution is a cumulative statutory remedy.)

<sup>12</sup> *Sweetser v. Fox*, 43 Utah 40, 47 L. R. A. (N.S.) 145, 134 Pac. 599.

<sup>13</sup> *Illinois Surety Co. v. United States*, 240 U. S. 214, 60 L. ed. 609 [modifying judgment, *Illinois Surety Co. v. United States*, 215 Fed. 334, 131 C. C. A. 476].

See also, *United States v. Emery*, 225 Fed. 287; *American Bonding Co. v. United States*, 233 Fed. 364.

<sup>1</sup> *United States. Daniel v. Drury*, 267 Fed. 751.

*California. Van Buskirk v. Kuhns*, 164 Cal. 472, 44 L. R. A. (N.S.) 710, 129 Pac. 587.

*Colorado. Enos v. Anderson*, 40 Colo. 395, 15 L. R. A. (N.S.) 1087, 93 Pac. 475.

*Connecticut. Downey v. Guilfoile*, — Conn. —, 114 Atl. 73.

*Kansas. In re Lawless' Estate*, 107 Kan. 349, 191 Pac. 256.

*Maryland. Harford County v. Bel Air Suburban Improvement Association*, 134 Md. 548, 107 Atl. 348.

*Minnesota. Newton v. Southern Colonization Co.*, 145 Minn. 164, 176 N. W. 501.

*Mississippi. New York Life Insurance Co. v. Brame*, 112 Miss. 828, L. R. A. 1918B, 86, 73 So. 806.

*New Jersey. Leonard v. Williamson*, 92 N. J. L. 535, 106 Atl. 372.

*New Mexico. Prichard v. Fulmer*, 25 N. M. 452, 184 Pac. 529.

*North Carolina. Helsabeck v. Doub*, 167 N. Car. 205, L. R. A. 1917A, 1, 83 S. E. 241.

*Vermont. Goodyear Metallic Rubber Co. v. Baker's Estate*, 81 Vt. 39, 49 Atl. 160 [sub nomine, *Goodyear*

ices, from the date of the contract, but from the date at which he has earned his commission by securing a customer.<sup>2</sup>

Limitations does not run against a debt to be paid on the death of the debtor,<sup>3</sup> or on the death of another,<sup>4</sup> until such death, or until the appointment of an administrator of the estate of the debtor.<sup>5</sup> A contract to make a will is not broken until the death of the promisor, and limitations does not run till then,<sup>6</sup> whether the action is for damages,<sup>7</sup> or for a reasonable compensation for services rendered under such contract.<sup>8</sup>

Under a contract for the performance of services which contains no express provisions as to the time of payment, payment is due when the services have been performed; and limitations does not begin to run until that date.<sup>9</sup> Limitations begins to run against

**Metallic Rubber Shoe Co. v. Carpenter**, 17 L. R. A. (N.S.) 667; **Dyer v. Lalor**, — Vt. —, 109 Atl. 30.

**Virginia. Rector v. Hancock**, 127 Va. 101, 102 S. E. 663.

**Washington. Loewe v. Osner**, 109 Wash. 124, 186 Pac. 643.

**Wisconsin. In re Leu's Estate**, — Wis. —, 179 N. W. 796.

<sup>2</sup> **Daniel v. Drury**, 267 Fed. 751.

<sup>3</sup> **Indiana. Stanley's Estate v. Pence**, 160 Ind. 636, 66 N. E. 51 [rehearing denied, 160 Ind. 645, 67 N. E. 441].

**Iowa. Bennett v. Lutz**, 119 Ia. 215, 93 N. W. 288.

**Michigan. Davis v. Teachout**, 126 Mich. 135, 86 Am. St. Rep. 531, 85 N. W. 475.

**Minnesota. Savage v. Minnesota Loan & Trust Co.**, 142 Minn. 187, 171 N. W. 778; **Welsh v. Welsh**, — Minn. —, 181 N. W. 356.

**North Carolina. Helsabeck v. Doub**, 167 N. Car. 205, L. R. A. 1917A, 1, 83 S. E. 241.

**Wisconsin. Thoni v. Estate of McDonnell**, 166 Wis. 319, 165 N. W. 290.

If the debtor has the option to pay in cash or property under a continuing contract for services, such option ends at the death of the debtor, and limitations begins to run then. **Welsh v. Welsh**, — Minn. —, 181 N. W. 356.

<sup>4</sup> **Perkins v. Siegfried's Admr.**, 97 Va. 444, 34 S. E. 64; **In re Camp's Estate**, — Ia. —, 176 N. W. 795.

<sup>5</sup> **Hoiles v. Riddle**, 74 O. S. 173, 78 N. E. 219.

<sup>6</sup> **Connecticut. Downey v. Guilfoile**, — Conn. —, 114 Atl. 73.

**Indiana. Gullett v. Gullett**, 28 Ind. App. 670, 63 N. E. 782.

**Massachusetts. Morrissey v. Morrissey**, 180 Mass. 480, 62 N. E. 972.

**Minnesota. In re Hess**, 57 Minn. 282, 59 N. W. 193; **Colby v. Street**, — Minn. —, 178 N. W. 599.

**New Jersey. Stone v. Todd**, 49 N. J. L. 274, 8 Atl. 300; **Cooper v. Colson**, 66 N. J. Eq. 328, 105 Am. St. Rep. 660, 58 Atl. 337.

**West Virginia. Cann v. Cann**, 45 W. Va. 563, 31 S. E. 923 [s. c., 40 W. Va. 138, 20 S. E. 910].

**Wisconsin. In re Leu's Estate**, — Wis. —, 179 N. W. 796.

<sup>7</sup> **Manning v. Pippen**, 86 Ala. 357, 11 Am. St. Rep. 46, 5 So. 572.

<sup>8</sup> **Kauss v. Rohner**, 172 Pa. St. 481, 51 Am. St. Rep. 762, 33 Atl. 1016.

<sup>9</sup> **Martin v. Fox & Wisconsin River Improvement Co.**, 19 Wis. 552; **Loewe v. Osner**, 109 Wash. 124, 186 Pac. 643; **Prichard v. Fulmer**, 25 N. M. 452, 184 Pac. 529.

the right of an attorney to recover compensation with determination of the action in which he was employed;<sup>10</sup> and, in a foreclosure suit, this is the order of the confirmation of the sale and not the decree of foreclosure.<sup>11</sup> Limitations runs against an action on a building or a construction contract from the time that such contract has been performed, so that compensation is due.<sup>12</sup> Limitations begins to run against a contract to pay the debt of the adversary party to a third person, only from the time at which the promisee is obliged to pay such debt.<sup>13</sup> Limitations runs against a promise to pay when able, only from the time that ability to pay exists.<sup>14</sup> Under a subscription which is payable when a railroad is completed,<sup>15</sup> or a contract to pay for work when certain land is sold,<sup>16</sup> limitations runs from such events. Under a contract for winding up the affairs of a partnership and distributing the proceeds, limitations does not begin to run until liquidation of the partnership affairs and the determination of the liability of the retiring partner.<sup>17</sup> Under an agreement by a purchaser at a judicial sale to be liable for the loss, if any, on resale, limitations does not begin to run until the second sale has been confirmed by the court.<sup>18</sup>

If a loan is made and no time of payment is specified, limitations begins to run as soon as the loan is made, since in legal effect such loan is payable at once.<sup>19</sup> It is treated like a debt payable on

<sup>10</sup> *Loewe v. Osner*, 109 Wash. 124, 186 Pac. 643.

<sup>11</sup> *Prichard v. Fulmer*, 25 N. M. 452, 184 Pac. 529.

<sup>12</sup> *Harford County v. Bel Air Suburban Improvement Association*, 134 Md. 548, 107 Atl. 348.

<sup>13</sup> *Enos v. Anderson*, 40 Colo. 395, 15 L. R. A. (N.S.) 1087, 93 Pac. 475.

<sup>14</sup> *Van Buskirk v. Kuhns*, 164 Cal. 472, 44 L. R. A. (N.S.) 710, 129 Pac. 587. So of promise to pay "at earliest possible convenience." *Cuddihy v. Costigan*, 1 B. R. C. 110, Newfoundland Rep. (1897-1903) 567; *Cooper v. Colson*, 66 N. J. Eq. 328, 105 Am. St. Rep. 660, 58 Atl. 337.

The solution of this problem depends upon the effect of a promise to perform when able, when convenient, and the like; and of the time at which

the breach of such promise occurs. See § 2597.

<sup>15</sup> *McClaine v. Fairchild*, 23 Wash. 758, 63 Pac. 517.

<sup>16</sup> *Thompson v. Orena*, 134 Cal. 26, 66 Pac. 24.

<sup>17</sup> *In re Lawless' Estate*, 107 Kan. 349, 191 Pac. 256.

<sup>18</sup> *Leonard v. Williamson*, 92 N. J. L. 535, 106 Atl. 372.

<sup>19</sup> *England*. In re Brown [1893], 2 Ch. 300.

*California*. *Newhall v. Sherman*, 124 Cal. 509, 57 Pac. 387.

*Georgia*. *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113, 35 S. E. 782.

*Michigan*. *Howard v. Church*, 51 Mich. 125, 16 N. W. 307; *Volli v. Wirth*, 164 Mich. 21, 37 L. R. A. (N.S.) 297, 129 N. W. 9.

demand.<sup>20</sup> If no time is fixed for payment, the purchase price of realty is due at once and limitations runs from the conveyance.<sup>21</sup>

If the insured has disappeared, and is not known to be dead, limitations does not run against a policy on his life until the expiration of the period which the law requires for the presumption of death;<sup>22</sup> and limitations does not run against an action to recover assessments which have been paid after his disappearance, in order to prevent lapse of the policy, as long as the parties treat the contract as in effect,<sup>23</sup> even if the time after which death may be presumed has elapsed.<sup>24</sup>

It has been said that the running of the Statute of Limitations will not be postponed to the event fixed for performance, unless the contract by which such performance is postponed is valid and enforceable, and is the basis of the action.<sup>25</sup> If services and the like are rendered under a contract to make compensation therefor by a devise of realty, it is said that limitations runs from the rendition of the services, and not from the time fixed for performance, in a jurisdiction in which such contract is absolutely void under the Statute of Frauds.<sup>26</sup> If it is conceded that contracts of this sort are absolutely void, the rule that the Statute of Limitations begins to run when the services are rendered is probably unavoidable. The fact that this may result in barring recovery in quasi-contract for services performed under a contract which were always recognized as valid by both of the parties thereto, probably shows the absurdity of the theory that the contract is absolutely void.

**North Carolina.** *Ervin v. Brooks*, 111 N. Car. 358, 16 S. E. 240; *Caldwell v. Rodman*, 5 Jones L. (N. C.) 139.

See also, *American Bonding Co. v. Fourth National Bank*, — Ala. —, 88 So. 838.

See §§ 2098 and 3439.

<sup>20</sup> See § 3439.

<sup>21</sup> *Hemmingway v. Tong* (Ky.), 66 S. W. 278.

<sup>22</sup> *New York Life Insurance Co. v. Brame*, 112 Miss. 828, L. R. A. 1918B, 86, 73 So. 806 (seven years).

<sup>23</sup> *White v. Brotherhood Locomotive Firemen and Enginemen*, — Wis. —, L. R. A. 1918D, 1185, 167 N. W. 457.

<sup>24</sup> *White v. Brotherhood Locomotive*

*Firemen and Enginemen*, — Wis. —, L. R. A. 1918D, 1185, 167 N. W. 457.

<sup>25</sup> *In re, Estate of Kessler*, 87 Wis. 660, 59 N. W. 129; *Toper v. Sheldon*, 120 Wis. 26, 97 N. W. 524; *Nelson v. Christensen*, 169 Wis. 373, 172 N. W. 741.

<sup>26</sup> *In re, Estate of Kessler*, 87 Wis. 660, 59 N. W. 129; *Martin v. Martin's Estate*, 108 Wis. 284, 81 Am. St. Rep. 895, 84 N. W. 439; *Loper v. Estate of Sheldon*, 120 Wis. 26, 97 N. W. 524; *Nelson v. Christensen*, 169 Wis. 373, 172 N. W. 741.

The practical working of this rule is modified in the case of running accounts between the parties. See §§ 3443 et seq.

**§ 3434. Contract to be performed in reasonable time.** If performance is to be made at some time in the future but no time is fixed therefor, a reasonable time is ordinarily presumed to have been intended, and in such cases limitations runs from such reasonable time.<sup>1</sup> Under a contract which provides, in part, for raising funds by the sale of certain property, a reasonable time is to be allowed for the sale of such property, and limitations does not begin to run until the end of such reasonable time.<sup>2</sup> Under a contract to perform when a given dispute is settled, a reasonable time is to be allowed for settling such dispute; and limitations begins to run from the expiration of such reasonable time.<sup>3</sup> Since one who has collected money for another is bound to pay it over in a reasonable time, limitations begins to run from the expiration of a reasonable time after the collection.<sup>4</sup> If the parties, by mutual agreement, have extended the time originally fixed for performance, by giving a reasonable time in addition thereto, limitations does not begin to run until the expiration of such reasonable time.<sup>5</sup>

**§ 3435. Anticipatory breach—Acceleration by renunciation.** If a contract is broken by renunciation before the time for performance has arrived, the party who is not in default may, in most jurisdictions, maintain an action at law at once, without waiting for the time at which performance is due.<sup>1</sup> He may, however, elect to treat the contract as still in effect.<sup>2</sup> Whether the period of limitations begins to run after renunciation, or whether the party who is not in default may postpone its running by electing to treat the contract as still in effect, is a question upon which there is a conflict of authority. It is held in some jurisdictions that the party who is not in default is not bound to accept a renunciation as a discharge of the contract or as a breach for the purpose of accelerating the period of limitations.<sup>3</sup> If he does not

<sup>1</sup> *Muscatine v. Chicago, Rock Island & Pacific Ry. Co.*, 79 Ia. 645, 44 N. W. 909; *Rhines v. Evans*, 66 Pa. St. 192, 5 Am. Rep. 364; *Tasin v. Bastress*, — Pa. St. —, 110 Atl. 744; *Cummings v. Stovall*, 76 Tenn. (Lea) 679.

<sup>2</sup> *Tasin v. Bastress*, — Pa. St. —, 110 Atl. 744.

<sup>3</sup> *Bryant v. Atlantic Coast Line Ry. Co.*, 119 Ga. 607, 46 S. E. 829.

<sup>4</sup> *Goodyear Metallic Rubber Co. v.*

*Baker's Estate*, 81 Vt. 39, 69 Atl. 160 [sub nomine, *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, 17 L. R. A. (N.S.) 667].

<sup>5</sup> *Newton v. Southern Colonization Co.*, 145 Minn. 164, 176 N. W. 501.

<sup>1</sup> See §§ 2885 et seq.

<sup>2</sup> See §§ 2897 et seq.

<sup>3</sup> *Richter v. Union Land & Stock Co.*, 129 Cal. 367, 62 Pac. 39; *Heery v. Reed*, 80 Kan. 380, 103 Pac. 846; *Wold*

elect to treat such renunciation as a breach, the period of limitations will not run until the time which is fixed for performance by the terms of the contract has arrived.<sup>4</sup> Under a contract to make compensation by will, and the like, which is not to be performed until the death of the promisor, the renunciation by the promisor does not accelerate the period at which limitations begins to run; and it does not begin to run until the death of the promisor.<sup>5</sup>

In other cases, limitations is said to run at the renunciation of the contract, although the time for performance is not yet due.<sup>6</sup> This principle has been applied to the renunciation of a contract to make a will,<sup>7</sup> and to the renunciation of a contract for the employment of an attorney by his wrongful discharge, before the time fixed by the original contract, for payment of his compensation.<sup>8</sup>

**§ 3436. Act of creditor in postponing maturity.** A creditor can not defer the running of the Statute of Limitations indefinitely, by preventing the happening of an event upon which payment is due.<sup>1</sup> Limitations begins to run against a contract to repurchase articles at any time at the election of the purchaser, when the original contract of sale is made, and not when the purchaser demands such repurchase.<sup>2</sup> If, however, there is a contract to

v. Wold, 138 Minn. 409, 165 N. W. 229; Colby v. Street, — Minn. —, 178 N. W. 599; Ga Nun v. Palmer, 202 N. Y. 483, 36 L. R. A. (N.S.) 922, 96 N. E. 99.

See also §§ 2893 et seq.

<sup>4</sup>Heery v. Reed, 80 Kan. 380, 103 Pac. 846; Wold v. Wold, 138 Minn. 409, 165 N. W. 229; Colby v. Street, — Minn. —, 178 N. W. 599; Ga Nun v. Palmer, 202 N. Y. 483, 36 L. R. A. (N.S.) 922, 96 N. E. 99.

<sup>5</sup>Heery v. Reed, 80 Kan. 380, 103 Pac. 846; Wold v. Wold, 138 Minn. 409, 165 N. W. 229 (twenty eight years later); Colby v. Street, — Minn. —, 178 N. W. 599; Ga Nun v. Palmer, 202 N. Y. 483, 36 L. R. A. (N.S.) 922, 96 N. E. 99 (six years later).

<sup>6</sup>Engelbrecht v. Herrington, 101 Kan. 720, L. R. A. 1918E, 785, 172 Pac. 715; Martin v. Camp, 219 N. Y. 170, L. R. A. 1917F, 402, 114 N. E. 46;

Bonesteel v. Van Etten, 20 Hun. (N. Y.) 468.

<sup>7</sup>Bonesteel v. Van Etten, 20 Hun. (N. Y.) 468; Engelbrecht v. Herrington, 101 Kan. 720, L. R. A. 1918E, 785, 172 Pac. 715 (renunciation by conveyance to stranger, twenty-six years after performance by promisee).

<sup>8</sup>Martin v. Camp, 219 N. Y. 170, L. R. A. 1917F, 402, 114 N. E. 46.

<sup>1</sup>Sturdivant v. McCorley, 83 Ark. 278, 103 S. W. 732 [sub nomine, Sturdivant v. Reece, 11 L. R. A. (N.S.) 825]; McCollum v. Neimeyer, 142 Ark. 471, 219 S. W. 746; Miguel v. Miguel, — Cal. —, 193 Pac. 935; Darby v. Darby, 120 La. 847, 14 L. R. A. (N.S.) 1208, 45 So. 747. See §§ 3437 et seq.

<sup>2</sup>Brooks v. Trustee Co., 76 Wash. 589, 50 L. R. A. (N.S.) 594, 136 Pac. 1152.

repurchase on thirty days' notice, limitations runs thirty days after the first notice,<sup>3</sup> even though formal tender is not made until a later time.<sup>4</sup> If a note is given payable when the payee shall remove certain liens, he can not postpone the operation of the statute by omitting to remove such liens.<sup>5</sup> This question is frequently presented with regard to the necessity of demand.<sup>6</sup>

**§ 3437. Necessity of demand—General principles.** Whether demand is necessary to start the statute to running is a question on which there is a conflict of authority, which can be reconciled, in part, by distinguishing between the cases in which the demand is a part of the cause of action and those in which it is not. If the demand is not an essential part of the cause of action, the running of the Statute of Limitations is not postponed until such demand is made.<sup>1</sup> If the demand is an essential part of the cause of action, limitations does not run until such demand is made.<sup>2</sup> A note payable in work or property can not be the basis of an action until demand has been made, and accordingly limitations does not run until that time.<sup>3</sup> Limitations does not run against a bond to fur-

<sup>3</sup> *Weaver v. Collins*, 182 Mich. 255, 148 N. W. 712.

<sup>4</sup> *Weaver v. Collins*, 182 Mich. 255, 148 N. W. 712.

<sup>5</sup> *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570, 53 Atl. 378.

<sup>6</sup> See §§ 3437 et seq.

<sup>1</sup> *Arkansas. Sturdivant v. McCorley*, 83 Ark. 278, 103 S. W. 732 [sub nomine, *Sturdivant v. Reece*, 11 L. R. A. (N.S.) 825]; *McCollum v. Neimeyer*, 142 Ark. 471, 219 S. W. 746.

*California. Miguel v. Miguel*, — Cal. —, 193 Pac. 935.

*Kansas. Douglass v. Sargent*, 32 Kan. 413, 4 Pac. 861.

*Kentucky. Wurth v. Paducah*, 116 Ky. 403, 105 Am. St. Rep. 225, 76 S. W. 143.

*Louisiana. Darby v. Darby*, 120 La. 847, 14 L. R. A. (N.S.) 1208, 45 So. 747.

<sup>2</sup> *California. Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899.

*Colorado. Sweet v. Barnard*, 66 Colo. 527, 182 Pac. 22.

*Iowa. Owen v. Higgins*, 113 Ia. 735, 84 N. W. 713.

*Kentucky. Bank of Louisville v. Gray*, 84 Ky. 565, 2 S. W. 168.

*Minnesota. Horton v. Seymour*, 32 Minn. 535, 85 N. W. 551; *In re Fallon*, 110 Minn. 213, 32 L. R. A. (N.S.) 486, 124 N. W. 994.

*Missouri. Missouri Pacific Ry. Co. v. Continental National Bank*, 212 Mo. 505, 17 L. R. A. (N.S.) 994, 111 S. W. 574; *State v. Reynolds*, 278 Mo. 695, 213 S. W. 804.

*Pennsylvania. Cook v. Carpenter*, 212 Pa. St. 165, 1 L. R. A. (N.S.) 900, 61 Atl. 799; *In re Gardner*, 228 Pa. St. 282, 29 L. R. A. (N.S.) 685, 77 Atl. 509.

*Utah. Stevens v. Rogers*, 16 Utah 105, 51 Pac. 261.

*Wisconsin. Koelzer v. First National Bank*, 125 Wis. 595, 2 L. R. A. (N.S.) 571, 104 N. W. 838.

<sup>3</sup> *Lincoln v. Purcell*, 37 Tenn. (2 Head.) 143, 73 Am. Dec. 196.

nish support until demand and refusal.<sup>4</sup> The statute does not run against liability on subscriptions to corporate stock, payable on call, until a call is made.<sup>5</sup> If the corporation has become insolvent and its affairs are being wound up by a court of equity, limitations is said to run from the order of the court that a call should be made,<sup>6</sup> or in some courts as far as the claims of the creditors are concerned, from the time that the corporation becomes avowedly insolvent.<sup>7</sup> If the subscription to stock is payable as assessments are levied, and upon call, limitations begins to run when the assessment is made, and not when the call is made.<sup>8</sup> It has been held that the right of action against an officer of a corporation which has gone out of business begins when such corporation is dissolved, and is not postponed by omission to make demand, even though such demand is a condition precedent to an action.<sup>9</sup> Though demand is a condition precedent to an action for a dividend,<sup>10</sup> or, by statute, on swamp land warrants,<sup>11</sup> or a town order,<sup>12</sup> limitations begins to run when the right to make demand accrues, and is not postponed by omission to make demand. Limitations is said to run against a contract to repurchase bonds on demand from the date of the contract and not from the demand.<sup>13</sup>

**§ 3438. Deposits, certificates of deposit and checks.** Limitations does not run against the right of a general depositor to re-

<sup>4</sup>Portner v. Wilfahrt, 85 Minn. 73, 88 N. W. 418.

<sup>5</sup>Glenn v. Liggett, 135 U. S. 533, 34 L. ed. 264; Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184; Scoville v. Thayer, 105 U. S. 143, 26 L. ed. 968; Vermont Marble Co. v. Declez Granite Co., 135 Cal. 579, 87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057; Cook v. Carpenter, 212 Pa. St. 165, 1 L. R. A. (N.S.) 900, 61 Atl. 799.

<sup>6</sup>Glenn v. Marbury, 145 U. S. 499, 36 L. ed. 790; Glenn v. Williams, 60 Md. 93.

<sup>7</sup>West v. Savings Bank, 66 Kan. 524, 63 L. R. A. 137, 72 Pac. 252; Washington Savings Bank v. Butcher's and Drover's Bank, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644. (In this case time was extended by issuing to the creditor's of the corporation scrip

representing the indebtedness payable in three years.) The question was left undecided in Thompson v. Reno Savings Bank, 19 Nev. 171, 3 Am. St. Rep. 881, as the time had not expired on either theory.

<sup>8</sup>Sweet v. Barnard, 66 Colo. 527, 182 Pac. 22.

<sup>9</sup>Landis v. Saxton, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912.

<sup>10</sup>Winchester and Lexington Turnpike Co. v. Wickliffe, 100 Ky. 531, 66 Am. St. Rep. 356, 38 S. W. 866.

<sup>11</sup>Barnes v. Glide, 117 Cal. 1, 59 Am. St. Rep. 153, 48 Pac. 804.

<sup>12</sup>Schriber v. Richmond, 73 Wis. 5, 40 N. W. 644.

<sup>13</sup>Brooks v. Trustee Co., 76 Wash. 589, 50 L. R. A. (N.S.) 594, 136 Pac. 1152.

cover from a bank until demand upon the bank has been made;<sup>1</sup> nor does it run against a similar deposit in the hands of an individual not a banker, subject to the order of the depositor.<sup>2</sup> Between a principal and an agent authorized to hold money collected by him to his principal's order,<sup>3</sup> or between a husband who has put money into his wife's hands,<sup>4</sup> limitations does not run till demand.

A certificate of deposit is usually made payable on return of the certificate properly indorsed. Accordingly, some courts have held that such a certificate must be so returned and demand made before limitations begins to run,<sup>5</sup> especially if, by its terms, such

<sup>1</sup> *Georgia*. *Munnerlyn v. Augusta Savings Bank*, 88 Ga. 333, 30 Am. St. Rep. 159, 14 S. E. 554.

*Kentucky*. *Corbin Banking Co. v. Bryant*, 151 Ky. 194, 151 S. W. 393.

*Massachusetts*. *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070.

*Missouri*. *Missouri Pacific Ry. Co. v. Continental National Bank*, 212 Mo. 505, 17 L. R. A. (N.S.) 994, 111 S. W. 574; *State v. Reynolds*, 278 Mo. 695, 213 S. W. 804.

*Nebraska*. *Citizens' Bank v. Fromholz*, 64 Neb. 284, 89 N. W. 775.

*New York*. *Thomas v. Bank of British North America*, 82 N. Y. 1; *Bank of British North America v. Merchants National Bank*, 91 N. Y. 106.

*Oregon*. *Haines v. First National Bank*, 89 Or. 42, 172 Pac. 505.

*South Dakota*. *Tobin v. McKinney*, 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228 [affirmed on rehearing, 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572].

*Vermont*. *Goodell v. Brandon National Bank*, 63 Vt. 303, 25 Am. St. Rep. 766, 21 Atl. 956.

*Wisconsin*. *Koelzer v. First National Bank*, 125 Wis. 595, 2 L. R. A. (N.S.) 571, 104 N. W. 838.

<sup>2</sup> *England*. *In re Tidd* [1893], 3 Ch. 154.

*Minnesota*. *In re Fallon*, 110 Minn.

213, 32 L. R. A. (N.S.) 486, 124 N. W. 994.

*New Jersey*. *Gutch v. Fosdick*, 48 N. J. Eq. 353, 27 Am. St. Rep. 473, 22 Atl. 590.

*New Mexico*. *Luna v. Montoya*, 25 N. M. 430, 184 Pac. 533.

*Tennessee*. *Goodwin v. Ray*, 108 Tenn. 614, 91 Am. St. Rep. 761, 69 S. W. 730.

So as to a deposit of money in lieu of bail. (*City of*) *Savannah v. Kas-sell*, 115 Ga. 310, 41 S. E. 572.

<sup>3</sup> *Cole v. Baker*, 16 S. D. 1, 91 N. W. 324.

As between a principal and an attorney who has collected a claim for the principal, which is to be paid over in a reasonable time after collection, limitations is said to begin to run from the expiration of such reasonable time. *Goodyear Metallic Rubber Co. v. Baker's Estate*, 81 Vt. 39, 69 Atl. 160 [sub nomine, *Goodyear Metallic Rubber Shoe Co. v. Carpenter*, 17 L. R. A. (N.S.) 667].

<sup>4</sup> *Rucker v. Maddox*, 114 Ga. 899, 41 S. E. 68. And see *Fennell v. Drinkhouse*, 131 Cal. 447, 82 Am. St. Rep. 361, 63 Pac. 734.

<sup>5</sup> *Illinois*. *Brahm v. Adkins*, 77 Ill. 263.

*Indiana*. *Brown v. McElroy*, 52 Ind. 404; *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87, 6 N. E. 123.

certificate is not payable until its return;<sup>6</sup> while other courts treat it as equivalent to a demand note, and hold that limitations runs from its date.<sup>7</sup> A check is payable on demand, and as in the case of a demand note limitations is held to run from its date,<sup>8</sup> or at least after a reasonable time has elapsed within which such check should be presented for payment.<sup>9</sup> If the check is delivered in the same city as that in which the bank on which it is drawn is located, limitations is said to begin to run at the end of the business day following such delivery.<sup>10</sup> The running of limitations

**Massachusetts.** Dickinson v. Leominster Savings Bank, 152 Mass. 49, 25 N. E. 12.

**Nebraska.** Citizens' Bank v. Fromholz, 64 Neb. 284, 89 N. W. 775.

**New Mexico.** Bank of Commerce v. Harrison, 11 N. M. 50, 66 Pac. 460; Luna v. Montoya, 25 N. M. 430, 184 Pac. 533.

**New York.** Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176; Smiley v. Fry, 100 N. Y. 262, 3 N. E. 186; Cottle v. Marine Bank, 166 N. Y. 53, 59 N. E. 736.

**Pennsylvania.** McGough v. Jamison, 107 Pa. St. 336; Miller v. Western National Bank, 172 Pa. St. 197, 33 Atl. 684; In re Gardner, 228 Pa. St. 282, 29 L. R. A. (N.S.) 685, 77 Atl. 509.

**South Dakota.** Tobin v. McKinney, 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228 [affirmed on rehearing, 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572].

**Vermont.** Bellows Falls Bank v. County Bank, 40 Vt. 377.

In Iowa, limitations does not run until demand if the certificate merely provides for payment on return of the certificate properly indorsed; Elliott v. Capital City State Bank, 128 Ia. 275, 1 L. R. A. (N.S.) 1130, 103 N. W. 777 [overruling, Mereness v. First National Bank, 112 Ia. 11, 84 Am. St. Rep. 318, 51 L. R. A. 410, 83 N. W. 711]; while if it is payable in a certain time, on return of the certificate properly indorsed, limitations run

from the end of such period. Thompson v. Farmers' State Bank, 159 Ia. 662, 44 L. R. A. (N.S.) 550, 140 N. W. 877.

An instrument "I testify that in November 30, 1903, Santos Luna deposited \$600 in my care, I paying 5 per hundred of interest per annum. This money is guaranteed by me. Max H. Montoya," is regarded as a certificate of deposit; and limitations begin to run when demand for payment is made. Luna v. Montoya, 25 N. M. 430, 184 Pac. 533.

<sup>6</sup> Elliott v. Capital City State Bank, 128 Ia. 275, 1 L. R. A. (N.S.) 1130, 103 N. W. 777; In re Gardner, 228 Pa. St. 282, 29 L. R. A. (N.S.) 685, 77 Atl. 509.

<sup>7</sup> Brummagin v. Tallant, 20 Cal. 503, 89 Am. Dec. 61; Hunt v. Divine, 37 Ill. 137; Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910; Curran v. Witter, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705.

<sup>8</sup> Blades v. County Deposit Bank, (Ky.), 56 S. W. 415.

<sup>9</sup> Scroggin v. McClelland, 37 Neb. 644, 40 Am. St. Rep. 520, 22 L. R. A. 110, 56 N. W. 208; Wrigley v. Farmers' & Merchants' State Bank, 76 Neb. 862, 108 N. W. 132; Colwell v. Colwell, 92 Or. 103, 4 A. L. R. 876, 179 Pac. 916; Wagner v. Smith, 114 S. Car. 159, 103 S. E. 527.

<sup>10</sup> Colwell v. Colwell, 92 Or. 103, 4 A. L. R. 876, 179 Pac. 916.

against the maker of a check is especially clear where one or two, or more, joint makers has died, and as a result of such delay, the surviving maker will be liable for the entire amount unless he is protected by the Statute of Limitations.<sup>11</sup>

**§ 3439. Contract to be performed "on demand."** Limitations runs against an ordinary note payable "on demand" from the date of the note and not from the date of the demand.<sup>1</sup> The same rule applies to a note to be paid when called for,<sup>2</sup> or to one payable on demand after date.<sup>3</sup> Some authorities, however, hold that demand is necessary in such cases.<sup>4</sup>

The application of this principle is of course not limited to notes, but extends to all contracts to pay or perform on demand.<sup>5</sup>

If the note shows that demand was really contemplated by the parties before liability should attach, such demand must be made before limitations begins to run. Limitations does not begin to run until demand in case of a note payable at a certain time after

<sup>11</sup> *Wagner v. Smith*, 114 S. Car. 159, 103 S. E. 527.

<sup>1</sup> *Arkansas. McCollum v. Neimeyer*, 142 Ark. 471, 219 S. W. 746.

*California. O'Neil v. Magner*, 81 Cal. 631, 15 Am. St. Rep. 88, 22 Pac. 876.

*Connecticut. Old Alms-House Farm v. Smith*, 52 Conn. 434.

*Louisiana. Darby v. Darby*, 120 La. 847, 14 L. R. A. (N.S.) 1208, 45 So. 747.

*Maine. Blethen v. Murch*, 80 Me. 313, 14 Atl. 208.

*Massachusetts. Seward v. Hayden*, 150 Mass. 158, 15 Am. St. Rep. 183, 5 L. R. A. 844, 22 N. E. 629; *Fletcher v. Sturtevant*, — Mass. —, 126 N. E. 428.

*Missouri. St. Charles Savings Bank v. Thompson*, — Mo. —, 223 S. W. 734.

*New York. Mills v. Davis*, 113 N. Y. 243, 3 L. R. A. 394, 21 N. E. 68.

*Ohio. Hill v. Henry*, 17 Ohio 9.

*Pennsylvania. Smith v. Bell*, 107 Pa. St. 352; *Homewood People's Bank v. Hastings*, 263 Pa. St. 260, 106 Atl. 308.

*Tennessee. Collier v. Gray*, 1 Tenn. (1 Overt.) 110.

<sup>2</sup> *Kraft v. Thomas*, 123 Ind. 513, 18 Am. St. Rep. 345, 24 N. E. 346.

<sup>3</sup> *Fenno v. Gay*, 146 Mass. 118, 15 N. E. 87.

<sup>4</sup> *Due-bill payable on demand. Nash v. Woodward*, 62 S. Car. 418, 40 S. E. 895.

A note payable "on demand as he may want to use the same." *Stanton v. Stanton*, 37 Vt. 411.

Order drawn by school district payable on demand. *Blaisdell v. School District*, 72 Vt. 63, 47 Atl. 173; *Nott v. State National Bank*, 51 La. Ann. 871, 25 So. 475.

<sup>5</sup> *Miguel v. Miguel*, — Cal. —, 193 Pac. 935; *Douglass v. Sargent*, 32 Kan. 413, 4 Pac. 861.

*Loan. Sturdivant v. McCorley*, 83 Ark. 278, 103 S. W. 732 [sub nomine, *Sturdivant v. Reece*, 11 L. R. A. (N.S.) 825]; *Hall v. Letts*, 21 Ia. 596. *Mortgage; Martin v. Stoddard*, 127 N. Y. 61, 27 N. E. 285; *County warrant. Crudup v. Ramsey*, 54 Ark. 168, 15 S. W. 458.

demand.<sup>6</sup> A contract of guaranty which binds the guarantor to pay certain sums on thirty days' notice is one on which no right of action accrues and limitations does not begin to run until thirty days after demand.<sup>7</sup> Under a contract for issuing a paid-up policy on default of payments on the original policy, in case of the return of the original policy within six months after the default, limitations begins to run at the expiration of the period of six months.<sup>8</sup> Limitations does not run against a note given for corporate stock, "payable in such installments and at such times as the directors may require,"<sup>9</sup> or made payable on call by some similar form of expression,<sup>10</sup> until demand has been made. If demand is properly made and refused,<sup>11</sup> as in case of demand for performance of a contract to transfer stock,<sup>12</sup> or demand for the payment of a certified check,<sup>13</sup> limitations begins to run. Demand upon one joint contractor and his refusal starts limitations to running in favor of all.<sup>14</sup> A demand made and withdrawn before refusal does not start limitations to running.<sup>15</sup>

**§ 3440. Payment in installments.** If a debt is payable in installments, the Statute of Limitations begins to run as to each separate installment from its maturity.<sup>1</sup> If a judgment is to be

<sup>6</sup> *Cooke v. Pomeroy*, 65 Conn. 466, 32 Atl. 935; *Codman v. Rogers*, 27 Mass. (10 Pick.) 112; *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267, 28 Am. Dec. 464.

Contra, *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 605; *Oleson v. Wilson*, 20 Mont. 544, 63 Am. St. Rep. 639, 52 Pac. 372.

<sup>7</sup> *Hooper v. Hooper*, 81 Md. 155, 48 Am. St. Rep. 496, 31 Atl. 508.

<sup>8</sup> *Collman v. Equitable Life Assurance Society*, 133 Ia. 177, 8 L. R. A. (N.S.) 1919, 110 N. W. 444.

<sup>9</sup> *New England Fire Ins. Co. v. Haynes*, 71 Vt. 306, 76 Am. St. Rep. 771, 45 Atl. 221. See to the same effect, *Bigelow v. Libby*, 117 Mass. 359; *Langworthy v. Flouring Mills Co.*, 77 Minn. 256, 79 N. W. 974; *Kilbreath v. Gaylord*, 34 O. S. 305; *Crafoot v. Thatcher*, 19 Utah 212, 75 Am. St. Rep. 725, 57 Pac. 171.

On the general question of limita-

tions in cases of stock subscriptions, see, *Cook v. Carpenter*, 212 Pa. St. 165, 1 L. R. A. (N.S.) 900, 61 Atl. 799. See also § 3437.

<sup>10</sup> *Wardle v. Hudson*, 96 Mich. 432, 55 N. W. 992; *Eichman v. Hersker*, 170 Pa. St. 402, 33 Atl. 229.

<sup>11</sup> *Mifflin County National Bank v. Bank*, 199 Pa. St. 459, 49 Atl. 213.

<sup>12</sup> *Rhind v. Hyndman*, 54 Md. 527, 39 Am. Rep. 402.

<sup>13</sup> *Blades v. Bank (Ky.)* 56 S. W. 415.

<sup>14</sup> *Rhind v. Hyndman*, 54 Md. 527, 39 Am. Rep. 402. (Contract for sale of stock.)

<sup>15</sup> *Lydig v. Braman*, 177 Mass. 212, 58 N. E. 696.

<sup>1</sup> *United States. Fellows v. National Can Co.*, 257 Fed. 970.

*Idaho. Simonton v. Simonton*, — Ida. —, 193 Pac. 386.

*Michigan. Staffon v. Lyon*, 110 Mich. 260, 68 N. W. 151.

paid in installments, the Statute of Limitations runs as to each installment, when it becomes due.<sup>2</sup> If several notes are secured by one mortgage, limitations runs as to each note from its maturity.<sup>3</sup>

**§ 3441. Acceleration of maturity of installment contracts.** If the note or other instrument contains a provision that default in payment of an installment or of interest should make the entire debt due forthwith, without providing that default should have such effect at the option of the creditor, such default is held to start the Statute of Limitations to running.<sup>1</sup> If a bond contains a provision that in case of failure to pay any installment of interest within ninety days after the demand, the principal shall become due and payable at once, and it does not appear that such provision is to take effect at the election of the creditor, the Statute of Limitations begins running as against the principal ninety days after default in paying any installment of interest on demand.<sup>2</sup>

If the provision is that in case of default in one installment the entire debt shall become due at the option of the creditor, the Statute of Limitations does not begin to run until he has exercised his option, and thus made the entire debt fall due.<sup>3</sup> If the note

**Nebraska.** Nares v. Bell 66 Neb. 606, 92 N. W. 571.

**Ohio.** Pelton v. Bemis, 44 O. S. 51, 4 N. E. 714.

**Pennsylvania.** Bush v. Stowell, 71 Pa. St. 208, 10 Am. Rep. 694.

**Vermont.** New England Fire Insurance Co. v. Haynes, 71 Vt. 306, 76 Am. St. Rep. 771, 45 Atl. 221.

**Washington.** George v. Butler, 26 Wash. 456, 57 L. R. A. 396, 67 Pac. 263. For acceleration on default of payment of an installment see § 3441. For continuing contracts see § 3444.

<sup>2</sup> Simonton v. Simonton, —Ida.—, 193 Pac. 386.

<sup>3</sup> George v. Butler, 26 Wash. 456, 90 Am. St. Rep. 756, 57 L. R. A. 396, 67 Pac. 263.

<sup>1</sup> England. Reeves v. Butcher [1891], 2 Q. B. 509.

**Idaho.** Canadian Birkbeck Investment & Savings Co. v. Williamson, 32 Ida. 624, 186 Pac. 916

**Kansas.** Reed v. Culp, 63 Kan. 595, 66 Pac. 616; Snyder v. Miller, 71 Kan.

410, 69 L. R. A. 250, 80 Pac. 970; Miles v. Hamilton, 106 Kan. 804, 189 Pac. 926.

**Kentucky.** Ryan v. Caldwell, 106 Ky. 543, 50 S. W. 966.

**Mississippi.** Central Trust Co. v. Meridian Light & Ry. Co., 106 Miss. 431, 51 L. R. A. (N.S.) 151, 63 So. 575, 64 So. 216.

**New Mexico.** Buss v. Kemp Lumber Co., 23 N. M. 567, L. R. A. 1918C, 1015, 170 Pac. 54.

**Texas.** Harrison Machine Works v. Reigor, 64 Tex. 89; San Antonio Real Estate, Building & Loan Association v. Stewart, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386; Dodge v. Signor, 18 Tex. Civ. App. 45, 44 S. W. 926.

<sup>2</sup> Central Trust Co. v. Meridian Light & Railway Co., 106 Miss. 431, 51 L. R. A. (N.S.) 151, 63 So. 575.

<sup>3</sup> United States. Moline Plow Co. v. Webb, 141 U. S. 616, 35 L. ed. 879.

**California.** Richards v. Daly, 116 Cal. 336, 48 Pac. 220; Mason v. Luce, 116 Cal. 232, 48 Pac. 72.

provides that "in default of payment of interest when due the principal is to become due and collectible," but recites that it is secured by a deed of trust; and the deed provided that in case of default the entire debt should become due "at the option" of the holder of the notes, it is held that limitations does not begin to run unless the holder of the notes elects to treat the entire debt as due.<sup>4</sup> A power to the creditor to sell the mortgaged realty in case of default in the payment of any installment, does not operate to make the entire principal due;<sup>5</sup> and accordingly the exercise of such power of sale does not start the Statute of Limitations to running as against the installments which are not yet due.<sup>6</sup> The creditor's act in bringing suit on the entire debt is an exercise of his option to declare it all due, though such suit is dismissed after his death.<sup>7</sup>

If the creditor elects to treat the entire debt as due in case of default, it is said that limitations runs from the time of the default, and not from the time at which such election is exercised.<sup>8</sup>

Some authorities treat a provision giving the creditor power to enforce the debt in case of default in one installment as a power which makes limitations run from default even if the creditor does not exercise such power. Thus a loan for five years was made with power to the creditor to call the loan if the interest which was due quarterly was not paid within twenty-one days after it came due. Default in payment of interest was held to start limitations to running twenty-one days after the day on which the quarterly installment of interest in which default was made fell due.<sup>9</sup>

**Indiana.** Ins. Co. of North America v. Martin, 151 Ind. 209, 51 N. E. 361.

**Iowa.** Watts v. Creighton, 85 Ia. 154, 52 N. W. 12.

**Kansas.** Linn County Bank v. Gris-ham, 105 Kan. 460, 185 Pac. 54.

**Nebraska.** Lowenstein v. Phelan, 17 Neb. 429, 22 N. W. 561.

**North Carolina.** Standard Dry Eila Co. v. Ellington, 172 N. Car. 481, 90 S. E. 564 (obiter).

**North Dakota.** McCarty v. Goodman, 39 N. D. 389, L. R. A. 1918F, 160, 167 N. W. 503.

**Tennessee.** Batey v. Walter (Tenn. Ch. App.), 46 S. W. 1024.

<sup>4</sup> Moline Plow Co. v. Webb, 141 U. S. 616, 35 L. ed. 879.

<sup>5</sup> Hall v. Jameson, 151 Cal. 606, 12 L. R. A. (N.S.) 1190, 91 Pac. 518; Trask v. Karrick, — Vt. —, 108 Atl. 846.

<sup>6</sup> Hall v. Jameson, 151 Cal. 606 12 L. R. A. (N.S.) 1190, 91 Pac. 518; Trask v. Karrick, — Vt. —, 108 Atl. 846.

<sup>7</sup> Westcott v. Whiteside, 63 Kan. 49, 64 Pac. 1032.

<sup>8</sup> Lovell v. Goss, 45 Colo. 304, 22 L. R. A. (N.S.) 1110, 101 Pac. 72.

<sup>9</sup> Reeves v. Butcher [1891], 2 Q. B. 509 (following Hemp v. Garland, 4 Q. B. 519).

**§ 3442. Waiver of right of acceleration.** A provision that default in payment of one installment shall make future installments due and payable at once,<sup>1</sup> or that default in paying taxes on mortgaged property shall make the mortgage debt due at once,<sup>2</sup> may be waived by the conduct of the parties if each leads the other to believe that the default will not be insisted on,<sup>3</sup> or by the voluntary payment by the debtor of all delinquencies, the creditor acquiescing therein,<sup>4</sup> so that limitations does not run from such default. Even if the holder of the note after default in payment of interest presents the entire amount of principal and interest as a claim for the amount due at that time, which is before the maturity of the note, such presentation is not an exercise of the right to treat the entire amount as due, or if it is, his subsequent acquiescence in the continued running of the debt waives such right.<sup>5</sup>

Such a waiver affects the time at which limitations begins to run, and is not a new promise or acknowledgment, and hence may be oral even if the statute requires a new promise or acknowledgment to be in writing.<sup>6</sup> It is said, however, that if the contract makes the entire principal due on default in interest, limitations begins running on such default; and it is not suspended by the fact that the debtor subsequently pays interest and part of the principal, even under a gratuitous contract for the extension of time to the original period of maturity.<sup>7</sup>

**§ 3443. Accounts.** If an account is a unit, by the mutual dealings of the parties thereto, it is not barred until the last item thereof is barred,<sup>1</sup> on the theory that the charging of each item is

<sup>1</sup> San Antonio Real Estate, Building & Loan Association v. Stewart, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386.

<sup>2</sup> Douthitt v. Farrell, 60 Kan. 195, 56 Pac. 9.

<sup>3</sup> San Antonio Real Estate, Building & Loan Association v. Stewart, 94 Tex. 441, 86 Am. St. Rep. 864, 65 S. W. 665.

<sup>4</sup> California Savings & Loan Society v. Culver, 127 Cal. 107, 59 Pac. 292; Douthitt v. Farrell, 60 Kan. 195, 56 Pac. 9.

<sup>5</sup> Moore v. Russell, 133 Cal. 297, 85 Am. St. Rep. 166, 65 Pac. 624.

<sup>6</sup> San Antonio Real Estate, Building & Loan Association v. Stewart, 94 Tex.

441, 86 Am. St. Rep. 864, 65 S. W. 665.

<sup>7</sup> Miles v. Hamilton, 106 Kan. 804, 189 Pac. 926.

<sup>1</sup> Illinois. Carpenter v. Plagge, 192 Ill. 82, 61 N. E. 530.

Iowa. Padden v. Clark, 124 Ia. 94, 99 N. W. 152; Hartje v. Borstelman, — Ia. —, 179 N. W. 88.

Maine. Rogers v. Davis, 103 Me. 405, 19 L. R. A. (N.S.) 126, 69 Atl. 618 (statute).

Nevada. Rickard v. Geach, 26 Nev. 444, 69 Pac. 861.

North Carolina. Hollingsworth v. Allen, 176 N. Car. 629, 97 S. E. 625; English Lumber Co. v. Wachovia Bank

an admission of liability,<sup>2</sup> or that it is understood that no action is to be brought until the balance is ascertained.<sup>3</sup> This rule does not apply to cross-demands or set-offs between the parties.<sup>4</sup> If there is a mutual account between the parties, a right to recover a penalty for usury will not be barred until the expiration of the statutory period after the last item on such account.<sup>5</sup> If limitations has not run against an account, an item which consists of a charge on credit, on one side, and a payment of the amount thus charged by the other side, a short time thereafter, is sufficient to start the period of limitations to running again.<sup>6</sup>

If there are, however, two separate and distinct accounts between the same parties, each is barred when the last item is barred, and the later one can not be added to the earlier one to extend the period of limitations as to the earlier.<sup>7</sup>

If there is a material and substantial interruption in the transactions between the parties, the two distinct sets of transactions can not be treated as a mutual account, for the purpose of the running of the Statute of Limitations.<sup>8</sup> The fact that the debtor delivers to the creditor an article to be applied on account, or makes payments on an account, does not make the account between them a mutual one.<sup>9</sup>

& Trust Co., 179 N. Car. 211, 102 S. E. 205.

**Oregon.** The Victorian, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040.

**Pennsylvania.** Davidson v. Davidson, 262 Pa. St. 520, 106 Atl. 64.

**West Virginia.** Koen v. Koen, — W. Va. —, 103 S. E. 322.

**Wisconsin.** Laughnan v. Estate of Laughnan, 165 Wis. 348, 162 N. W. 169.

**Wyoming.** Hay v. Peterson, 6 Wyom. 419, 34 L. R. A. 581, 45 Pac. 1073.

Contra, Courson v. Courson, 19 O. S. 454.

<sup>2</sup> Miller v. Cinnamon, 168 Ill. 447, 48 N. E. 45.

<sup>3</sup> Sumter v. Morse, 2 Hill Eq. (S. Car.) 87.

<sup>4</sup> Ware v. Manning, 86 Ala. 238, 5 So. 682; Reddish v. John, — Ia. —, 179 N. W. 951; Eldridge v. Smith, 144 Mass. 35, 10 N. E. 717.

<sup>5</sup> English Lumber Co. v. Wachovia Bank & Trust Co., 179 N. Car. 211, 102 S. E. 205.

<sup>6</sup> Rogers v. Davis, 103 Me. 405, 19 L. R. A. (N.S.) 126, 69 Atl. 618.

<sup>7</sup> Graham v. Stanton, 177 Mass. 321, 58 N. E. 1023; Harding v. Covell, 217 Mass. 120, 104 N. E. 452; Moore v. Blackman, 109 Wis. 528, 85 N. W. 429.

<sup>8</sup> Gavin v. Bischoff, 80 Ia. 605, 45 N. W. 306; Nelson v. Christensen, 169 Wis. 373, 172 N. W. 741.

<sup>9</sup> California. Rocca v. Klein, 74 Cal. 526, 16 Pac. 323.

**Illinois.** Miller v. Cinnamon, 168 Ill. 447, 48 N. E. 45 (reversing 61 Ill. App. 429).

**Massachusetts.** Parker v. Schwartz, 136 Mass. 30.

**Michigan.** Goodsole v. Jeffery, 202 Mich. 201, 1 A. L. R. 1057, 168 N. W. 461.

**New York.** Green v. Disbrow, 79 N. Y. 1, 35 Am. Rep. 496.

Agreement between the parties to a mutual account fixing the amount due thereon and making it an account stated is in legal effect a new promise and starts limitations to running anew.<sup>10</sup> With the settlement of an account it ceases to be a continuous running account and limitations begins to run against the balance due on each settlement, from the date of such settlement.<sup>11</sup> Carrying a balance due on an earlier account into a subsequent account by mutual agreement makes it subject to the limitation applicable to the second account.<sup>12</sup>

**§ 3444. Continuing contracts.** Limitations does not run against a continuing contract,<sup>1</sup> such as a contract for services,<sup>2</sup> as one between a sheriff and his deputy,<sup>3</sup> or a contract to work for compensation, no time being specified either for payment or for the termination of the contract,<sup>4</sup> or a contract for board and lodging, without a definite agreement as to the time for payment, or for the end of the contract,<sup>5</sup> until the termination thereof. If a con-

**South Dakota.** *McArthur v. McCoy*, 21 S. D. 314, 112 N. W. 155.

**Contra,** *Hollywood v. Reed*, 55 Mich. 308, 21 N. W. 313; *Hay v. Peterson*, 6 Wyom. 419, 34 L. R. A. 581, 45 Pac. 1073.

If personal property has been leased under a contract, by which the lessee may elect to purchase and to apply the installments of rent to the purchase price, the lessors' entry of rent and credit of payment does not make a mutual open account. *Goodsole v. Jeffery*, 202 Mich. 201, 1 A. L. R. 1057, 168 N. W. 461.

<sup>10</sup> *Kahn v. Edwards*, 75 Cal. 192, 7 Am. St. Rep. 141, 16 Pac. 779.

<sup>11</sup> *Dameron v. Harris*, 281 Mo. 247, 219 S. W. 954.

<sup>12</sup> *Ready v. McDonald*, 128 Cal. 663, 79 Am. St. Rep. 76, 61 Pac. 272.

**Indiana.** *Schoonover v. Vachon*, 121 Ind. 3, 22 N. E. 777.

**Iowa.** *McCay v. McDowell*, 80 Ia. 146, 45 N. W. 730; *Bowie v. Trowbridge*, 175 Ia. 118, L. R. A. 1916D, 1260, 156 N. W. 977.

**Minnesota.** *Welsh v. Welsh*, — Minn. —, 181 N. W. 356.

**Mississippi.** *Gaulden v. Ramsey*, 123 Miss. 1, 85 So. 109.

**Ohio.** *Snider v. Rollins*, — Ohio —, 131 N. E. 733.

**Washington.** *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352; *Sibley v. Stetson & Post Lumber Co.*, 110 Wash. 204, 188 Pac. 389.

**West Virginia.** *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544; *Douglass v. Ohio River Ry. Co.*, 51 W. Va. 523, 41 S. E. 911; *Koen v. Koen*, — W. Va. —, 103 S. E. 322.

<sup>2</sup> *Bowie v. Trowbridge*, 175 Ia. 118, L. R. A. 1916D, 1260, 156 N. W. 977; *Welsh v. Welsh*, — Minn. —, 181 N. W. 356; *Snider v. Rollins*, — Ohio —, 131 N. E. 733; *Sibley v. Stetson & Post Lumber Co.*, 110 Wash. 204, 188 Pac. 389 (even if salary was payable monthly and a bonus was payable annually).

<sup>3</sup> *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544.

<sup>4</sup> *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352.

<sup>5</sup> *Gaulden v. Ramsey*, 123 Miss. 1, 85 So. 109.

tract of agency involves a number of transactions extending over a period of time, limitations begins to run from the end of the agency and not from the time of each transaction.<sup>6</sup> Breach by a railway company of its contract to keep up a crossing is a continuing breach.<sup>7</sup> Under a statute which provides that the directors are personally liable for the debts of a corporation if they fail to file annual reports of its financial condition, limitations runs as to each action for liability with the failure to file such report;<sup>8</sup> and a failure to file a report for a given year does not start the Statute of Limitations to running so as to bar an action for failure to file a report in a subsequent year.<sup>9</sup>

On the other hand, a breach of a continuous contract which may give a right of action for entire damages is said to start limitations.<sup>10</sup>

**§ 3445. Debt payable out of specific fund.** If a claim is to be paid only out of a certain fund, the Statute of Limitations does not begin to run against such claim until such fund has been created.<sup>1</sup> The most frequent illustration of this principle is against a public corporation or a quasi-corporation,<sup>2</sup> such as a

<sup>6</sup> *Koen v. Koen*, —W. Va. —, 103 S. E. 322.

<sup>7</sup> *Douglass v. Ohio River Ry. Co.*, 51 W. Va. 523, 41 S. E. 911.

<sup>8</sup> *Perini v. Continental Oil Co.*, 68 Colo. 564, 190 Pac. 532.

<sup>9</sup> *Perini v. Continental Oil Co.*, 68 Colo. 564, 190 Pac. 532.

<sup>10</sup> *Davis v. Brown*, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534.

<sup>1</sup> *United States. King Iron Bridge Co. v. Otoe County*, 124 U. S. 459, 31 L. ed. 514; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. ed. 766; *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96.

*California. Sawyer v. Colgan*, 102 Cal. 283, 36 Pac. 580.

*Kansas. Hubbell v. South Hutchinson*, 64 Kan. 645, 68 Pac. 52.

*Michigan. McDermott v. Alger*, 186 Mich. 278, 152 N. W. 991.

*Nevada. Davis v. Simpson*, 25 Nev. 123, 83 Am. St. Rep. 570, 58 Pac. 146.

*Oklahoma. Kee v. Satterfield*, 46 Okla. 660, 149 Pac. 243.

*South Dakota. Brannon v. White Lake Township*, 17 S. D. 83, 95 N. W. 284.

*Vermont. Brown v. Hitchcock*, 69 Vt. 197, 37 Atl. 292.

*Virginia. Sayers v. Sayers*, 90 Va. 755, 19 S. E. 844; *Andrews v. Roanoke Building Association and Investment Co.*, 98 Va. 445, 36 S. E. 531.

*Washington. Potter v. New Whatcom*, 20 Wash. 589, 72 Am. St. Rep. 135, 56 Pac. 304.

<sup>2</sup> *United States. King Iron Bridge Co. v. Otoe County*, 124 U. S. 459, 31 L. ed. 514; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. ed. 766; *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96.

*California. Sawyer v. Colgan*, 102 Cal. 283, 36 Pac. 580.

*Kansas. Hubbell v. South Hutchinson*, 64 Kan. 645, 68 Pac. 52.

*Michigan. McDermott v. Alger*, 186 Mich. 278, 152 N. W. 991.

*Nevada. Davis v. Simpson*, 25 Nev. 123, 83 Am. St. Rep. 570, 58 Pac. 146.

city,<sup>3</sup> or county,<sup>4</sup> or township,<sup>5</sup> which is enforceable only out of a particular fund, and not against the corporation generally, until such fund has been provided. If a warrant is issued by a public corporation, payable out of a specified fund, limitations does not begin to run against such warrant until the money is in the treasury to the credit of such fund.<sup>6</sup> It has been held apparently by some authorities that the proper officer of the corporation must give notice to the creditor of the existence and sufficiency of such fund, in order to start the Statute of Limitations to running.<sup>7</sup>

This principle is not, however, limited to public corporations. It applies to all contracts to make a payment out of a specific fund, such as a promise to pay a debt out of the proceeds of certain property,<sup>8</sup> or the contract of a building and loan association to pay retiring stockholders out of funds of a certain class.<sup>9</sup> In such cases limitations does not begin to run until the fund from which such payment is to be made comes into existence.

If the cause of action exists before the fund is created, and the creation of the fund is merely a convenient means of paying such obligation, the period of limitations begins to run when the right of action accrues and it is not postponed until the creation of the fund.<sup>10</sup>

**§ 3446. Official and surety bonds.** Limitations begins to run on an official or surety bond from the breach thereof,<sup>1</sup> and not

**South Dakota.** *Brannon v. White Lake Township*, 17 S. D. 83, 95 N. W. 284.

**Washington.** *Potter v. New Whatcom*, 20 Wash. 589, 72 Am. St. Rep. 135, 56 Pac. 394.

<sup>3</sup> *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96.

<sup>4</sup> *Wetmore v. Monona County*, 73 Ia. 88, 34 N. W. 751; *Davis v. Simpson*, 25 Nev. 123, 83 Am. St. Rep. 570, 58 Pac. 146.

<sup>5</sup> *Brannon v. White Lake Township*, 17 S. D. 83, 95 N. W. 284.

<sup>6</sup> *Grayson v. Latham*, 84 Ala. 546, 4 So. 200, 866; *Wetmore v. Monona County*, 73 Ia. 88, 34 N. W. 751; *Hubbell v. South Hutchinson*, 64 Kan. 645, 68 Pac. 52; *Fernandez v. New Orleans*, 46 La. Ann. 1130, 15 So. 378.

<sup>7</sup> *Potter v. New Whatcom*, 20 Wash.

589, 72 Am. St. Rep. 135, 56 Pac. 394.

<sup>8</sup> *Brown v. Hitchcock*, 69 Vt. 197, 37 Atl. 292; *Sayers v. Sayers*, 90 Va. 755, 19 S. E. 844.

<sup>9</sup> *Andrews v. Roanoke Building Association & Inv. Co.*, 98 Va. 445, 36 S. E. 531.

<sup>10</sup> *Bodman v. Johnson County*, 115 Ia. 296, 88 N. W. 331; *Schoenhoeft v. Kearny County*, 76 Kan. 883, 16 L. R. A. (N.S.) 803, 92 Pac. 1097.

<sup>1</sup> **Kentucky.** *McGovern v. Rectanus*, 139 Ky. 365, 14 L. R. A. (N.S.) 380, 105 S. W. 965.

**Maryland.** *Sharp v. State*, 135 Md. 551, 109 Atl. 454.

**Massachusetts.** *McKim v. Glover*, 161 Mass. 418, 37 N. E. 443.

**Nebraska.** *Northern Assurance Co. v. Borgelt*, 67 Neb. 282, 93 N. W. 226.

from its date.<sup>2</sup> It is said that limitations does not begin to run on the bond of a public officer until his term of office, for which such bond was given has expired, even if the wrongful conversion took place some time before.<sup>3</sup> Limitations begins to run on the bond of an administrator when the court renders a decree showing the balance due based upon the administrator's report.<sup>4</sup> Until his account is filed and acted upon limitations does not run, and his failure to file such account does not set limitations to running in his favor.<sup>5</sup> Limitations on a guardian's bond is said to run from the date of the order removing or discharging a guardian after an account.<sup>6</sup> If the ward has died limitations runs from the death of the ward, as to the sureties, even though no action can be brought on the bond until the guardian files his final report and this is confirmed.<sup>1</sup>

**§ 3447. Trusts.** If property is received under an express trust, the possession of the trustee is rightful, and no cause of action exists against him until he renounces the trust. The Statute of Limitations begins to run, therefore, at the date of such renunciation and not at the date that the fund is received.<sup>1</sup> As between

**North Dakota.** *United States Fidelity & Guaranty Co. v. Citizens' State Bank*, 36 N. D. 16, L. R. A. 1918E, 326, 161 N. W. 562.

Action on official bond of policeman. *McGovern v. Rectanus*, 139 Ky. 365, 14 L. R. A. (N.S.) 380, 105 S. W. 965.

<sup>2</sup> *Sharp v. State*, 135 Md. 551, 109 Atl. 454.

<sup>3</sup> *People v. Van Ness*, 79 Cal. 84, 12 Am. St. Rep. 134, 21 Pac. 554.

<sup>4</sup> *Williams v. Flippin*, 68 Miss. 680, 24 Am. St. Rep. 297, 10 So. 52; *Mortenson v. Bergthold*, 64 Neb. 208, 89 N. W. 742.

<sup>5</sup> *In re Saunderson*, 74 Cal. 199, 15 Pac. 753; *McLaughlin v. Daniel*, 38 Ky. (8 Dana) 182.

<sup>6</sup> *United States Fidelity & Guaranty Co. v. Citizens' State Bank*, 36 N. D. 16, L. R. A. 1918E, 326, 161 N. H. 562.

<sup>7</sup> *Berkin v. Marsh*, 18 Mont. 152, 56 Am. St. Rep. 565, 44 Pac. 528.

<sup>1</sup> *United States. New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96.

**Arkansas.** *Williams v. Young*, 71 Ark. 164, 71 S. W. 669.

**California.** *Fox v. Tay*, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897; *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482; *White v. Costigan*, 138 Cal. 564, 72 Pac. 178.

**Georgia.** *McDowell v. Donaldson*, 149 Ga. 600, 101 S. E. 578.

**Indiana.** *Stanley's Estate v. Pence*, 160 Ind. 636, 66 N. E. 51 [rehearing denied, 160 Ind. 645, 67 N. E. 441]; *Talbott v. Barber*, 11 Ind. App. 1, 54 Am. St. Rep. 491, 38 N. E. 487.

**Iowa.** *Johnson v. Foust*, 158 Ia. 195, 139 N. W. 451; *Carter v. Cohen Bros.*, 181 Ia. 588, 164 N. W. 1040; *In re Parker's Estate*, — Ia. —, 179 N. W. 525.

**Kentucky.** *Martin v. Martin*, 186 Ky. 782, 217 S. W. 1026.

**Massachusetts.** *Jones v. McDermott*, 114 Mass. 400; *Boston & Naumkeog St. Ry. Co. v. Goodell*, 233 Mass. 428, 124 N. E. 260; *Glover v. Waltham Laundry Co.*, — Mass. —, 127 N. E. 420.

**Nebraska.** *Dovey v. Schlater*, — Neb. —, 175 N. W. 888.

husband and wife,<sup>2</sup> or parent and child,<sup>3</sup> including not only the cases in which the title is taken in the name of the parent,<sup>4</sup> but also those in which it is taken in the name of the child,<sup>5</sup> limitations does not begin to run until the trustee has renounced the trust. If a deed, absolute in form, has been given to secure a debt, it is said that limitations does not begin to run until the grantee has renounced the trust.<sup>6</sup> A contract whereby a married woman releases her dower in consideration that the grantee will hold one-ninth of the proceeds of the land for her is one against which limitations runs from the disavowal of the trust and not from the date of the sale.<sup>7</sup> It has been held that if an executor gives to his co-executor his note and mortgage for funds received by him from the estate, limitations does not run until such executor repudiates the trust.<sup>8</sup> If a city has collected a special fund to pay certain warrants, limitations does not run until it repudiates its obligation and diverts such fund, to the knowledge of the creditor.<sup>9</sup>

On the other hand, limitations begins to run at the time of the breach of trust,<sup>10</sup> even if such breach consists in lending trust funds on insufficient security and no loss is suffered until long after.<sup>11</sup>

In an implied trust, created by the operation of the law, and not by the agreement of the parties, limitations begins to run at once.<sup>12</sup>

**South Dakota.** *Stianson v. Stianson*, 40 S. D. 322, 6 A. L. R. 280, 167 N. W. 237.

**Utah.** *Anderson v. Cercone*, 54 Utah 345, 180 Pac. 586.

**Washington.** *Irwin v. Holbrook*, 26 Wash. 89, 66 Pac. 116.

See also, *Buchner v. Cannell*, — Ia. —, 175 N. W. 843; *Case v. Sipes*, 280 Mo. 110, 217 S. W. 306; *Kingston v. Kingston Coal Co.*, 265 Pa. St. 232, 108 Atl. 718.

<sup>2</sup> *McDowell v. Donalson*, 149 Ga. 600, 101 S. E. 578; *Glover v. Waltham Laundry Co.* — Mass. —, 127 N. E. 420; *Anderson v. Cercone*, 54 Utah 345, 180 Pac. 586.

<sup>3</sup> *Martin v. Martin*, 186 Ky. 782, 217 S. W. 1026; *Dovey v. Schlater*, — Neb. —, 175 N. W. 888.

<sup>4</sup> *Martin v. Martin*, 186 Ky. 782, 217 S. W. 1026.

<sup>5</sup> *Dovey v. Schlater*, — Neb. —, 175 N. W. 888.

<sup>6</sup> *Carter v. Cohen*, 181 Ia. 588, 164 N. W. 1040.

<sup>7</sup> *Talbott v. Barber*, 11 Ind. App. 1, 54 Am. St. Rep. 491, 38 N. E. 487.

<sup>8</sup> *Fox v. Tay*, 89 Cal. 339, 23 Am. St. Rep. 474, 24 Pac. 855, 26 Pac. 897.

<sup>9</sup> *New Orleans v. Warner*, 170 U. S. 120, 44 L. ed. 96; *New York Security & Trust Co. v. Tacoma*, 30 Wash. 661, 71 Pac. 194.

<sup>10</sup> *Thorne v. Heard* [1894], 1 Ch. 599.

<sup>11</sup> *In re Somerset* [1894], 1 Ch. 231. See § 3430.

<sup>12</sup> *Barker v. Hurley*, 132 Cal. 21, 63 Pac. 1071; *Redford v. Clarke*, 100 Va. 115, 40 S. E. 630; *Beecher v. Foster*, 51 W. Va. 605, 42 S. E. 647; *Buttles v. De Baun*, 116 Wis. 323, 93 N. W. 5.

**§ 3448. Agent as trustee.** An agent is not ordinarily a trustee for his principal within the meaning of this rule.<sup>1</sup> Money held by the secretary of a corporation which has gone out of business is not held in trust within the meaning of this rule; and limitations runs from the dissolution of the corporation.<sup>2</sup> If an agent having merely authority to collect and pay over to his principal collects money belonging to his principal, limitations runs in his favor from the time that the principal knows that such collection has been made.<sup>3</sup> This rule applies to money collected by an attorney for his client, there being no fraudulent concealment of the fact of collection.<sup>4</sup>

Under special circumstances, an agent may be a trustee for his principal.<sup>5</sup> If an agent becomes administrator or executor for his principal before he has acted for a pending transaction, limitations does not run in his favor as against his principal's estate.<sup>6</sup> A factor having in his possession funds of his principal with authority to invest and reinvest them is a trustee within the meaning of this rule, so that limitations does not run in his favor until demand and refusal.<sup>7</sup>

**§ 3449. Quasi-contract.** In the absence of special statute, limitations begins to run against a right of action in quasi-contract when such right of action accrues.<sup>1</sup> The Statute of Limitations

<sup>1</sup> *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113, 35 S. E. 782; *Landis v. Saxton*, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912; *Douglas v. Corry*, 46 O. S. 349, 15 Am. St. Rep. 604, 21 N. E. 440; *Stianson v. Stianson*, 40 S. D. 322, 6 A. L. R. 280, 167 N. W. 237.

<sup>2</sup> *Landis v. Saxton*, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912.

<sup>3</sup> *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113, 35 S. E. 782; *Stianson v. Stianson*, 40 S. D. 322, 6 A. L. R. 280, 167 N. W. 237.

<sup>4</sup> *Douglas v. Corry*, 46 O. S. 349, 15 Am. St. Rep. 604, 21 N. E. 440.

<sup>5</sup> *In re Parker's Estate*, — Ia. —, 179 N. W. 525.

<sup>6</sup> *In re Parker's Estate*, — Ia. —, 179 N. W. 525.

<sup>7</sup> *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113, 35 S. E. 782.

<sup>1</sup> *United States. Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 26, 32 L. ed. 342.

*California. Hurlbut v. Quigley*, 180 Cal. 265, 180 Pac. 613.

*Colorado. Dunkle v. Haight*, 68 Colo. 404, 189 Pac. 783.

*Illinois. John M. Smyth Co. v. Chicago*, 294 Ill. 136, 128 N. E. 351.

*Iowa. West v. Fry*, 134 Ia. 675, 11 L. R. A. (N.S.) 1191, 112 N. W. 184; *Stevens v. Pels*, — Ia. —, 175 N. W. 303.

*Kansas. Orozem v. McNeill*, 103 Kan. 429, 3 A. L. R. 1598, 175 Pac. 633.

*Mississippi. Warren-Godwin Lumber Co. v. Lumber Mineral Co.*, 120 Miss. 346, 82 So. 257.

*Nebraska. Frew v. Scoular*, 101 Neb. 131, L. R. A. 1917F, 1065, 162 N. W. 496.

runs against the right to recover money paid by mistake when such payment is made, and not from the time that demand is made.<sup>2</sup> If a forged check is paid by mistake, limitations runs from the date of payment.<sup>3</sup> Under a special statute which provides that an action which is based on mistake, shall be regarded as accruing when the mistake is discovered, limitations begins to run when such mistake could have been discovered by the use of reasonable diligence.<sup>4</sup> Limitations runs against the right to recover money paid by compulsion from the time that such payment is made.<sup>5</sup> Limitations does not run against a right to recover money which has been paid under an erroneous judgment, until such judgment has been reversed.<sup>6</sup>

If a surety has been compelled to pay his principal's debt, limitations begins to run against his right to exoneration by his principal,<sup>7</sup> or to contribution from a co-surety,<sup>8</sup> from the time that

**North Carolina.** Chatham v. Mecklenburg Realty Co., 180 N. Car. 500, 105 S. E. 329.

**Oklahoma.** Probst v. Bearman, 76 Okla. 71, 183 Pac. 886.

**Washington.** Green v. Spokane County, 55 Wash. 308, 25 L. R. A. (N. S.) 31, 104 Pac. 510.

<sup>2</sup> Bree v. Holbech, 2 Doug. 654; Bank of the United States v. Daniel, 37 U. S. (12 Pet.) 32, 9 L. ed. 618; Sturgis v. Preston, 134 Mass. 372; Murphy v. Omaha, 1 Neb. (unofficial) 488, 95 N. W. 680.

<sup>3</sup> Leather Manufacturers' Bank v. Merchants' Bank, 128 U. S. 26, 32 L. ed. 342.

<sup>4</sup> West v. Fry, 134 Ia. 675, 11 L. R. A. (N.S.) 1191, 112 N. W. 184.

<sup>5</sup> England. Wolmerhausen v. Gullick [1893], 2 Ch. 514.

**Arkansas.** Cooper v. Rush, 138 Ark. 602, 212 S. W. 94.

**California.** Loewenthal v. Coonan, 135 Cal. 381, 87 Am. St. Rep. 115, 67 Pac. 324.

**Colorado.** Dunkle v. Haight, 68 Colo. 404, 189 Pac. 783.

**Kansas.** Mentzer v. Burlingame, 78 Kan. 219, 18 L. R. A. (N.S.) 585, 97 Pac. 371.

**Michigan.** Kelly v. Sproul, 153 Mich. 691, 117 N. W. 327.

**Nebraska.** Frew v. Scoular, 101 Neb. 131, L. R. A. 1917F, 1065, 162 N. W. 496.

**New Hampshire.** Sibley v. McAllaster, 8 N. H. 389.

**New York.** Hard v. Mingle, 206 N. Y. 179, 42 L. R. A. (N.S.) 1131, 99 N. E. 542.

**Ohio.** Camp v. Bostwick, 20 O. S. 337, 5 Am. Rep. 669.

**Texas.** Willis v. Chowning, 90 Tex. 617, 59 Am. St. Rep. 842, 40 S. W. 395.

**Vermont.** Norton v. Hall, 41 Vt. 471.

**West Virginia.** Smith v. Davis, 71 W. Va. 316, 43 L. R. A. (N.S.) 614, 76 S. E. 670.

<sup>6</sup> Green v. Spokane County, 55 Wash. 308, 25 L. R. A. (N.S.) 31, 104 Pac. 510.

<sup>7</sup> Loewenthal v. Coonan, 135 Cal. 381, 87 Am. St. Rep. 115, 67 Pac. 324; Sibley v. McAllaster, 8 N. H. 389; Willis v. Chowning, 90 Tex. 617, 59 Am. St. Rep. 842, 40 S. W. 395; Norton v. Hall, 41 Vt. 471.

<sup>8</sup> England. Wolmerhausen v. Gullick [1893], 2 Ch. 514.

**Arkansas.** Cooper v. Rush, 138 Ark. 602, 212 S. W. 94.

he pays the principal's debt, and not from the maturity of such debt against the principal debtor. This rule does not apply to a guarantor who has entered into an independent contract without the consent of the maker and without his knowledge; and in this case limitations runs from the maturity of the original debt.<sup>8</sup> The right of an indorser to exoneration from the principal debtor,<sup>9</sup> or to contribution from joint indorsers,<sup>11</sup> begins only when he has paid the debt or more than his share of it; and limitations runs from that time.

If in case of conversion the injured party elects to waive the tort and sue in assumpsit, limitations runs from the time that the wrongdoer receives from his vendee the money for which the injured party sues,<sup>12</sup> provided that such sale is made and such money is received before the injured party's right of action against the wrongdoer has been barred by limitations and title has thus been perfected in the wrongdoer. Limitations does not run against the right to recover the value of the products of realty, or the value of minerals, gas and oils taken therefrom, until final judgment in an action to determine the validity of the claims thereto.<sup>13</sup> Under some statutes, limitations begins to run against an action to recover usurious interest from the maturity of the contract,<sup>14</sup> and under other statutes from the payment of the usurious interest.<sup>15</sup> Limitations does not begin to run at the date of the original note.<sup>16</sup> In some cases limitations is said to run from the

**Colorado.** *Dunkle v. Haight*, 68 Colo. 404, 189 Pac. 783.

**Kansas.** *Mentzer v. Burlingame*, 78 Kan. 219, 18 L. R. A. (N.S.) 585, 97 Pac. 371.

**Michigan.** *Kelly v. Sproul*, 153 Mich. 691, 117 N. W. 327.

**Nebraska.** *Frew v. Scoular*, 101 Neb. 131, L. R. A. 1917F, 1065, 162 N. W. 496.

**New York.** *Hard v. Mingle*, 206 N. Y. 179, 42 L. R. A. (N.S.) 1131, 99 N. E. 542.

**Ohio.** *Camp v. Bostwick*, 20 O. S. 337, 5 Am. Rep. 669.

<sup>8</sup> *Leslie v. Compton*, 103 Kan. 92, L. R. A. 1918F, 706, 172 Pac. 1015.

<sup>9</sup> *Hurlbut v. Quigley*, 180 Cal. 265, 180 Pac. 618; *Strauss v. Denny*, 95 Md. 690, 53 Atl. 571.

<sup>11</sup> *Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853; *Camp v. Bostwick*, 20 O. S. 337, 5 Am. Rep. 669.

<sup>12</sup> *Miller v. Miller*, 24 Mass. (7 Pick.) 133, 19 Am. Dec. 264.

<sup>13</sup> *Probst v. Bearman*, 76 Okla. 71, 183 Pac. 886 (gas and oils).

<sup>14</sup> *Ardmore State Bank v. Lee*, 61 Okla. 169, 159 Pac. 903; *First State Bank v. Pool*, — Okla. —, 167 Pac. 760.

<sup>15</sup> *Lee v. King*, 142 Ga. 609, 83 S. E. 272; *King v. Moore*, 147 Ga. 43, 92 S. E. 757; *Breckenridge v. Churchill*, 26 Ky. (3 J. J. Mar.) 11; *Marion National Bank v. Thompson*, 101 Ky. 277; *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320.

<sup>16</sup> *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320.

payment of each installment of usury,<sup>17</sup> while in others it is said not to run until the amount lawfully due has been paid, and payments made under the usurious contract in excess thereof.<sup>18</sup> If a widow has collected rents on the assumption that she was to take under the will, and she subsequently elects to take under the law, limitations begins to run against a right of action to recover such rents from her, at such election.<sup>19</sup> Limitations does not begin to run against a right of a creditor of a corporation to recover its assets from stockholders who have divided them, until he has obtained judgment against the corporation, and a writ of execution has been returned, showing that no goods were found.<sup>20</sup>

Limitations does not run against an action to recover money which has been deposited to protect a city against certain claims, until such claims are barred by the lapse of time.<sup>21</sup>

### III

#### EXCEPTIONS TO STATUTE

**§ 3450. Exceptions to statute must be statutory.** Since the rule, that no action can be brought upon certain specified causes of action after specified times is a statutory rule, it follows that any exceptions thereto on account of the disability of either party, or of special hardships arising out of particular cases, must be made by statute,<sup>1</sup> except in cases in which the state has itself, in some way, prevented the prosecution of the action.<sup>2</sup> Apart from this exception, the court has no right to create an exception to

<sup>17</sup> *Harvey v. National Insurance Co.*, 60 Vt. 209, 14 Atl. 7.

<sup>18</sup> *Neal v. Rouse*, 93 Ky. 151, 19 S. W. 171; *Hill v. Cornwall*, 95 Ky. 512, 536, 26 S. W. 540; *Taulbee v. Hargis*, 173 Ky. 433, 191 S. W. 320; *Smith v. Glanton*, 39 Tex. 365, 19 Am. Rep. 31; *Williams v. Wilder*, 37 Vt. 613.

<sup>19</sup> *Stevens v. Pels*, — Ia. —, 175 N. W. 303.

<sup>20</sup> *Chatham v. Mecklenburg Realty Co.*, 180 N. Car. 500, 105 S. E. 329.

<sup>21</sup> *John M. Smyth Co. v. Chicago*, 294 Ill. 136, 128 N. E. 351.

<sup>1</sup> "The exemptions from the operation of statutes of limitations usually accorded to infants and married

women do not rest upon any general doctrine of the law that they can not be subjected to their action, but in every instance upon language in those statutes giving them time after majority or after cessation of coverture to assert their rights." *Vance v. Vance*, 108 U. S. 514, 521, 27 L. ed. 808.

<sup>2</sup> See § 3452.

The civil law maxim, "*Contra non valentem, agere non currit prescriptio*," includes cases which fall outside of the common law exceptions to the statute.

See, *Hyman v. Hibernia Bank & Trust Co.*, 139 La. 411, 71 So. 598.

such a statutory rule, to conform to its own ideas of justice.<sup>3</sup> Whatever the reasons may be for making exceptions to the statute, considerations of this sort should be addressed to the legislature and not to the courts.

Accordingly, in the absence of a statute which specifically provides therefor, the courts can not create an exception because of the disability of the plaintiff,<sup>4</sup> as in the case of coverture,<sup>5</sup> or infancy.<sup>6</sup> In the absence of a statute specifically providing therefor, the fact that the plaintiff does not know of the existence of the cause of action in his favor,<sup>7</sup> or does not know that it is possible to serve the defendant with process,<sup>8</sup> or the fact that the plaintiff is so poor as to be practically unable to institute litigation,<sup>9</sup> or that he is unable to obtain evidence sufficient to establish his case,<sup>10</sup> or is unable to file his claim against the United States in the court of claims because of the aid which he gave to the rebellion,<sup>11</sup> or that the defendant was imprisoned,<sup>12</sup> none of them prevent the Statute of Limitations from running in favor of the

<sup>3</sup> **United States.** *Amy v. Watertown*, 130 U. S. 320, 32 L. ed. 953; *Smith v. Smith*, 210 Fed. 947.

**Arkansas.** *Martin v. Conner*, 115 Ark. 359, 171 S. W. 125; *Holloway v. Eagle*, 135 Ark. 206, 205 S. W. 113.

**California.** *Davis v. Hart*, 123 Cal. 384, 55 Pac. 1060.

**Illinois.** *Hibernian Banking Association v. Bank*, 157 Ill. 524, 41 N. E. 919, 41 N. E. 918.

**Iowa.** *Miller v. Lesser*, 71 Ia. 147, 32 N. W. 250.

**Missouri.** *Collins v. Pease*, 146 Mo. 135, 47 S. W. 925.

**Virginia.** *Johnson v. Merritt*, 125 Va. 162, 99 S. E. 785.

**Wisconsin.** *Parker v. Kelly*, 61 Wis. 552, 21 N. W. 539.

<sup>4</sup> *Holloway v. Eagle*, 135 Ark. 206, 205 S. W. 113; *Masterson v. Marshall*, 35 Ky. (5 Dana) 412; *Johnson v. Merritt*, 125 Va. 162, 99 S. E. 785.

<sup>5</sup> *Holloway v. Eagle*, 135 Ark. 206, 205 S. W. 113; *Masterson v. Marshall*, 35 Ky. (5 Dana) 412.

<sup>6</sup> *Johnson v. Merritt*, 125 Va. 162, 99 S. E. 785.

<sup>7</sup> **Alabama.** *Kelley v. Shropshire*, 199 Ala. 602, 75 So. 291.

**California.** *Lattin v. Gillette*, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545.

**Indiana.** *Fidelity & Casualty Co. v. Jasper Furniture Co.*, 186 Ind. 566, 117 N. E. 258.

**Iowa.** *Russell v. Polk County Abstract Co.*, 87 Ia. 233, 43 Am. St. Rep. 381, 54 N. W. 212.

**Kentucky.** *Reuff-Griffin Decorating Co. v. Wilkes*, 173 Ky. 566, 191 S. W. 443 (tort).

**Ohio.** *State v. Standard Oil Co.*, 49 O. S. 137, 34 Am. St. Rep. 541, 30 N. E. 279.

**Tennessee.** *Ramsey v. Quillen*, 73 Tenn. (5 Lea) 184.

<sup>8</sup> *Home Life Insurance Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334.

<sup>9</sup> *Voight v. Raby*, 90 Va. 799, 20 S. E. 824.

<sup>10</sup> *McIver v. Ragan*, 15 U. S. (2 Wheat.) 25, 4 L. ed. 175.

<sup>11</sup> *Kendall v. United States*, 107 U. S. 123, 27 L. ed. 437.

<sup>12</sup> *In re Griffith*, 35 Kan. 377, 11 Pac. 174.

defendant against the plaintiff. In the absence of statutory provision therefor, the fact that the defendant makes it practically impossible to commence the action, as by concealing himself so that process can not be served upon him,<sup>13</sup> or otherwise evading the service of process, does not prevent limitations from running in favor of the defendant. In many states, however, the statutes cover at least the more extreme and objectionable kinds of conduct of the defendant delaying or preventing litigation.<sup>14</sup>

A demand by the creditor upon the debtor,<sup>15</sup> or upon the executor of the debtor,<sup>16</sup> does not of itself stop the running of the statute. A denial by a bank of liability on a lost certificate of deposit does not prevent limitations from running though the bank knows that it is liable.<sup>17</sup>

The creditor's attempt to avoid the transaction whereby the debt is incurred, does not prevent limitations from running against such debt. An attorney compromised a suit for his client, collected money as a result of such compromise, and kept it. The client refused to ratify the compromise and brought suit to have it set aside, but failed to do so. Such conduct on the part of the client was held not to prevent limitations from running in favor of the attorney.<sup>18</sup>

**§ 3451. Statutory exceptions not applicable to contractual provisions.** These statutory exceptions, furthermore, are exceptions to the statute, but they are not exceptions to contractual provisions limiting the time within which either party may sue the other upon such contract, if such provisions do not refer to such exceptions.<sup>1</sup>

<sup>13</sup> *Amy v. Watertown*, 130 U. S. 320, 32 L. ed. 953; *Engel v. Fischer*, 102 N. Y. 400, 55 Am. Rep. 818, 7 N. E. 300.

<sup>14</sup> See §§ 3465 et seq.

<sup>15</sup> *Mereness v. First National Bank of Charles City, Iowa*, 112 Ia. 11, 84 Am. St. Rep. 318, 51 L. R. A. 410, 83 N. W. 711.

<sup>16</sup> *Keyser's Appeal*, 124 Pa. St. 80, 2 L. R. A. 159.

<sup>17</sup> *Mereness v. First National Bank of Charles City, Iowa*, 112 Ia. 11, 84 Am. St. Rep. 318, 51 L. R. A. 410, 83 N. W. 711.

<sup>18</sup> *Schofield v. Woolley*, 98 Ga. 548, 58 Am. St. Rep. 315, 25 S. E. 769.

<sup>1</sup> *United States. Riddlesbarger v. Hartford Insurance Co.*, 74 U. S. (7 Wall.) 386, 19 L. ed. 257.

*Massachusetts. Paul v. Fidelity & Casualty Co.*, 186 Mass. 413, 104 Am. St. Rep. 594, 71 N. E. 801.

*New York. Wilkinson v. First National Fire Ins. Co.*, 72 N. Y. 499, 28 Am. Rep. 166; *Arthur v. Homestead Fire Insurance Co.*, 78 N. Y. 462, 34 Am. Rep. 550.

*Pennsylvania. Farmers' Mutual Fire Insurance Co. v. Barr*, 94 Pa. St. 345;

A statute which provides for deducting from the period for which limitations has run, the period during which the plaintiff was enjoined from prosecuting his legal action, is said not to apply to a contractual provision which fixes the time within which such action is to be brought.<sup>2</sup> The results which are reached by the application of this theory are sufficient to show that covenants of this sort ought not to be recognized or enforced.<sup>3</sup> The Statute of Limitations is of such importance that the legislature ought to enact it after careful investigation and after watching the results of former legislative experiments, making use of such results to build up a set of exceptions to the general rule. The parties ought not to be permitted to fix special periods by their voluntary agreement. It may be that the period of limitations is too long. It may be that the statute should provide for a shorter period of limitations if the debtor demands immediate legal action than if the debtor and creditor are both willing to postpone legal action. The act of the legislature and not the act of the parties should, however, determine these questions.

**§ 3452. Invincible necessity—Action forbidden by state.** There is one important class of exceptions to the general rule that exceptions to the Statute of Limitations must of themselves be statutory. This class of exceptions is said by some courts to be those arising out of "invincible necessity,"<sup>1</sup> an expression which, though suggestive, is not exact enough to serve as a definite rule. Included within this principle are cases where it is impossible to sue, not on account of any personal disqualification or disability of either party, but because the action of the state in some way has prevented or delayed the institution and progress of litigation. If in some way the paramount authority of the state forbids a

National Insurance Co. v. Brown, 128 Pa. St. 386, 18 Atl. 389; Hocking v. Howard Insurance Co., 130 Pa. St. 170, 18 Atl. 614.

Rhode Island. Brown v. Hartford Insurance Co., 7 R. I. 301.

Tennessee. Guthrie v. Indemnity Association, 101 Tenn. 643, 49 S. W. 829.

<sup>2</sup> Paul v. Fidelity & Casualty Co., 186 Mass. 413, 104 Am. St. Rep. 594, 71 N. E. 801 (obiter, as injunction was dissolved before expiration of period limited); Wilkinson v. First National

Fire Ins. Co., 72 N. Y. 499, 28 Am. Rep. 166 (obiter, as it was held that injunction did not prevent the bringing of the action).

<sup>3</sup> See §§ 732 et seq.

<sup>1</sup> Thus inability of the creditor to sue "happening by an invincible necessity constitutes an exception from the statute of limitations and is to be taken to have the same effect as those disabilities which are expressly excepted from the statute." Hill v. Phillips, 14 R. I. 93.

suit to be brought, limitations does not run against the plaintiff until such prohibition ceases, and it becomes possible once more to maintain the action.<sup>2</sup> Under a statute which prevents suit from being brought against the executor or administrator upon any liability of the decedent for a certain period after the appointment of such executor or administrator, such period of time is usually not counted in determining whether limitations has run.<sup>3</sup> Under some statutes, limitations is suspended from the death of the debtor until the expiration of a reasonable time for appointing an administrator.<sup>4</sup> If the state has abolished the charter of a city, and has not granted a new one for some time thereafter, limitations does not run against a cause of action against the city during such period.<sup>5</sup>

It would seem that if, for any other reason, the state furnishes no court of appropriate jurisdiction for determining the validity of the claim in question, limitations does not run until such court is furnished. If a suit to recover a tax once paid can be maintained only after an appeal to the commissioner of internal revenue, the time necessary for such appeal can not be counted in determining whether limitations has run.<sup>6</sup>

**§ 3453. War.** If the state of foreign war exists, and the courts are suspended thereby, the period of time during which such suspension lasts is to be deducted from the entire time which has passed since the cause of action accrued.<sup>1</sup> The civil war in England, in the reign of Charles I, was said not to suspend the running of the Statute of Limitations,<sup>2</sup> but at modern law this principle is applied to a civil war as well as to a foreign war;<sup>3</sup> and it is generally held that any state of war which suspends the administration of justice, suspends at the same time the running of the

<sup>2</sup> *Braun v. Sauerwein*, 77 U. S. (10 Wall.) 218, 19 L. ed. 895.

<sup>3</sup> *Goldsmith v. Eichold*, 94 Ala. 116, 33 Am. St. Rep. 97, 10 So. 80; *Blaskower v. Steel*, 23 Or. 106, 31 Pac. 253.

<sup>4</sup> *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316.

<sup>5</sup> *Broadfoot v. Fayetteville*, 124 N. Car. 478, 70 Am. St. Rep. 610, 32 S. E. 804.

<sup>6</sup> *Braun v. Sauerwein*, 77 U. S. (10 Wall.) 218, 19 L. ed. 895.

<sup>1</sup> *Hopkirk v. Bell*, 7 U. S. (3 Cranch) 454, 2 L. ed. 497; *Wall v. Robson*, 2 Nott & M'C. (S. Car.) 497, 10 Am. Dec. 623.

<sup>2</sup> *Weller v. Prideaux*, 1 Keb. 157 [apparently the same case sub nomine, *Prideaux v. Webber*, 1 Lev. 31]; *Hall v. Wybourn*, 2 Salk. 420.

<sup>3</sup> *Hiatt v. Brown*, 82 U. S. (15 Wall.) 177, 21 L. ed. 128; *Perkins v. Rogers*, 35 Ind. 124, 9 Am. Rep. 639; *Ahnert v. Zaun*, 40 Wis. 622.

Statute of Limitations.<sup>4</sup> War discharges a contractual provision which fixes the time within which the action is to be brought, and does not merely suspend its operation.<sup>5</sup> If such contractual provisions are to be upheld, this is undoubtedly the right method of treating them. It is in marked contrast with the rule on the subject of other exceptions to the operation of the Statute of Limitations.<sup>6</sup> The rule that war suspends the operation of the Statute of Limitations applies to claims of private citizens,<sup>7</sup> and to claims of the United States.<sup>8</sup>

**§ 3454. Injunction restraining action at law—Common law and equity rule.** If the plaintiff has been enjoined from prosecuting his action, a number of questions have arisen which have been answered in different ways in some jurisdictions.

According to a number of jurisdictions, a distinction must be made between the cases in which the injunction has been issued on the application of the debtor, and those cases in which the injunction has been issued on the application of some other party. The practical outcome of the case is likely to be affected by a statute which provides, in express terms, that the time during which the creditor was enjoined from prosecuting his action should be deducted from the period which has elapsed after his cause of action has accrued.

It would seem that these distinctions ought to be unnecessary. If the state, through its court, forbids a party to prosecute an action, and then, through the combined action of its legislature and its court, tells him that he can never prosecute his action because he obeyed the first order which forbade him to prosecute, the result does not seem to be just. Its injustice is especially clear where orders are made by the courts of the same state, but the injustice seems but little less if the orders are made by courts of different states.

For these reasons, it has been held, in some jurisdictions, that the time for which the creditor is enjoined from prosecuting his action is to be deducted without the express provisions of a

<sup>4</sup>The Protector, 76 U. S. (9 Wall.) 687, 19 L. ed. 812; Hanger v. Abbott, 73 U. S. (6 Wall.) 532, 18 L. ed. 939; Selden v. Preston, 74 Ky. (11 Bush.) 191; Yancy v. Yancy, 52 Tenn. (5 Heisk.) 353, 13 Am. Rep. 5.

<sup>5</sup>Semmes v. Hartford Ins. Co., 80 U. S. (13 Wall.) 158, 20 L. ed. 490.

<sup>6</sup>See §§ 3456 et seq.

<sup>7</sup>The Protector, 76 U. S. (9 Wall.) 687, 19 L. ed. 812; Hanger v. Abbott, 73 U. S. (6 Wall.) 532, 18 L. ed. 939.

<sup>8</sup>United States v. Wiley, 78 U. S. (11 Wall.) 508, 20 L. ed. 211.

statute, and even though the debtor did not procure such injunction.<sup>1</sup> An injunction which restrains a sale under a trust deed has been held to stop the running of the Statute of Limitations on the deed secured thereby.<sup>2</sup> If a mortgagee is prevented from enforcing his mortgage lien, by a proceeding to quiet title brought by a third person to which the mortgagor and mortgagee are made parties, the period of time for which the mortgagee is thus prevented is to be deducted.<sup>3</sup> This principle seems to be recognized in some cases in which the judgment was obtained by the adversary party,<sup>4</sup> since, in these cases, no emphasis is placed upon the fact that the adversary party procured the injunction,<sup>5</sup> or the opinion does not show by whom the injunction was obtained.<sup>6</sup> It is held, accordingly, that the time during which a judgment creditor is enjoined from enforcing his judgment lien is to be deducted from the period for which such lien is to last.<sup>7</sup>

If the institution of proceedings in bankruptcy prevents the prosecution of claims against the bankrupt, the time during which such prosecution is so prevented is not counted in determining whether limitations has run.<sup>8</sup>

In a number of cases the foregoing considerations have been ignored; and it has been held that the running of the Statute of Limitations is not suspended by an injunction which restrains the creditor from enforcing his claim, at least if such injunction is not obtained by the debtor.<sup>9</sup> By these courts, the right to deduct such

<sup>1</sup> *Georgia*. *Georgia Ry. & Banking Co. v. Wright*, 124 Ga. 596, 53 S. E. 251. (Debtor party to injunction suit, but injunction not issued on his application.)

*Kansas*. *Hutchinson v. Hutchinson*, 92 Kan. 518, 52 L. R. A. (N.S.) 1165, 141 Pac. 589.

*Michigan*. *Steele v. Bliss*, 166 Mich. 593, 37 L. R. A. (N.S.) 859, 132 N. W. 345.

*Texas*. *Williams v. Pouns*, 48 Tex. 141.

*Washington*. *Hensen v. Peter*, 95 Wash. 628, L. R. A. 1918F, 682, 164 Pac. 512.

<sup>2</sup> *Williams v. Pouns*, 48 Tex. 141.

<sup>3</sup> *Hutchinson v. Hutchinson*, 92 Kan.

518, 52 L. R. A. (N.S.) 1165, 141 Pac. 589.

<sup>4</sup> *Steele v. Bliss*, 166 Mich. 593, 37 L. R. A. (N.S.) 859, 132 N. W. 345; *Hensen v. Peter*, 95 Wash. 628, L. R. A. 1918F, 682, 164 Pac. 512.

<sup>5</sup> *Hensen v. Peter*, 95 Wash. 628, L. R. A. 1918F, 682, 164 Pac. 512.

<sup>6</sup> *Steele v. Bliss*, 166 Mich. 593, 37 L. R. A. (N.S.) 859, 132 N. W. 345.

<sup>7</sup> *Hensen v. Peter*, 95 Wash. 628, L. R. A. 1918F, 682, 164 Pac. 512.

<sup>8</sup> *Hall v. Greenbaum*, 33 Fed. 22; *Parker v. Sanborn*, 73 Mass. (7 Gray) 191.

<sup>9</sup> *Massachusetts*. *Paul v. Fidelity & Casualty Co.*, 186 Mass. 413, 104 Am. St. Rep. 594, 71 N. E. 801.

period is placed upon the unsatisfactory ground of estoppel; and it is said that the creditor will not be estopped if he did not procure the injunction.<sup>10</sup> The courts that take this position justify their result by a literal interpretation of the statute. They do not, as a rule, attempt to show why an implied exception can be made to the statutes where the courts are closed to the creditors generally, while no implied exception can be made where the particular creditor is enjoined from prosecuting his claim. An injunction obtained by the mortgagor against the prosecution of foreclosure proceedings, is said not to suspend the running of the statute against the mortgagee.<sup>11</sup>

In most cases, in equity at least, some relief will be given to a creditor who has been enjoined from prosecuting his rights, on the application of the debtor, until he has been barred by limitations.<sup>12</sup> The time for which stay of execution has been obtained on the application of the judgment debtor, is to be deducted from the time for which such judgment lien is to exist.<sup>13</sup> This appears to have been the common-law rule.<sup>14</sup> If the owner of the property secures an injunction against the enforcement of a lien, such period is to be deducted after the death of such party, as against his heir.<sup>15</sup> If the creditor has been enjoined from enforcing his right of action on the application of the debtor, the creditor may in turn enjoin the debtor from pleading the Statute of Limitations, after such injunction has been dissolved.<sup>16</sup> The result thus reached is

**Mississippi.** *Robertson v. Alford*, 21 Miss. 509.

**New Jersey.** *Dekay v. Darrah*, 14 N. J. L. 288.

**New York.** *Barker v. Millard*, 16 Wend. (N. Y.) 572.

**Ohio.** *Hunter v. Niagara Falls Insurance Co.*, 73 O. S. 110, 3 L. R. A. (N.S.) 1187, 76 N. E. 563.

**Texas.** *Davis v. Andrews*, 88 Tex. 524, 30 S. W. 432, 32 S. W. 513.

<sup>10</sup> *Hunter v. Niagara Falls Insurance Co.*, 73 O. S. 110, 3 L. R. A. (N.S.) 1187, 76 N. E. 563.

<sup>11</sup> *Teigen v. Drake*, 13 N. D. 502, 101 N. W. 893.

<sup>12</sup> **England.** *Michell v. Cue*, 2 Burr. 660.

**Minnesota.** *Wakefield v. Brown*, 38

Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788.

**New Jersey.** *Lamb v. Ryan*, 40 N. J. Eq. 67.

**New York.** *Barker v. Millard*, 16 Wend. (N. Y.) 572.

**Tennessee.** *Carney v. Carney*, 138 Tenn. 647, 200 S. W. 517.

**Virginia.** *Hutsonpiller v. Stover*, 53 Va. (12 Gratt.) 579.

<sup>13</sup> *Wakefield v. Brown*, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788.

<sup>14</sup> *Michell v. Cue*, 2 Burr. 660; *Hutsonpiller v. Stover*, 53 Va. (12 Gratt.) 579.

<sup>15</sup> *Carney v. Carney*, 138 Tenn. 647, 200 S. W. 517.

<sup>16</sup> *Lamb v. Ryan*, 40 N. J. Eq. 67; *Barker v. Millard*, 16 Wend. (N. Y.) 572.

undoubtedly just. The only objection to this method of reaching it is the fact that the creditor is driven under this theory to bring a suit in equity to protect his right, which, it would seem, should be recognized by the courts of law.

If an injunction has been obtained which restrains the debtor from performing the contract and he uses this as an excuse to the creditor for delay, the debtor can not claim the benefit of the Statute of Limitations for the time during which such injunction was enforced.<sup>17</sup>

If an injunction has been obtained which restrains the creditor from making use of a given remedy, but leaves him free to make use of other remedies, such period is not to be deducted.<sup>18</sup>

If the original contract contains a provision limiting the time within which an action is to be brought, and the creditor is enjoined from bringing an action upon such contract, it has been said that such injunction discharges such contractual limitation and does not merely suspend its operation.<sup>19</sup> On the other hand, it has been said that such injunction would not suspend the operation of such contractual provision and that limitations could be pleaded at law; and as a result, equity has taken jurisdiction over such action and has given complete relief.<sup>20</sup>

**§ 3455. Statutory rule.** The injustice of the common-law rule has induced the legislature in a number of states to provide by statutes that the time during which the creditor was enjoined from prosecuting his action, is to be deducted from the time which has elapsed since the cause of action accrued.<sup>1</sup> This statute applies only if the injunction has been entered regularly, since the injunction is not otherwise in effect.<sup>2</sup> One who is not a party to the injunction suit, and is not bound by the decree, can not use the injunction as suspending the running of limitations.<sup>3</sup> As some of these statutes are drawn, and as they are construed by the courts,

<sup>17</sup> *Rose v. Foord*, 96 Cal. 152, 30 Pac. 1114.

<sup>18</sup> *McLure v. Melton*, 34 S. Car. 377, 13 L. R. A. 723, 13 S. E. 615.

<sup>19</sup> *Earnshaw v. Baltimore Sun Mutual Aid Society*, 68 Md. 465, 6 Am. St. Rep. 460, 12 Atl. 884.

<sup>20</sup> *North British and Mercantile Ins. Co. v. Lathrop*, 70 Fed. 429.

<sup>1</sup> *Reed v. Illinois Central Ry.*, 182

Ky. 455, 206 S. W. 794; *Brehm v. New York*, 104 N. Y. 186, 10 N. E. 158; *Hutsonpiller v. Stover*, 53 Va. (12 Gratt.) 579.

<sup>2</sup> *Delle v. Boss*, 164 Wis. 392, 160 N. W. 179.

<sup>3</sup> *West Michigan Park Association v. Pere Marquette Ry.*, 172 Mich. 179, 137 N. W. 799.

they apply only to injunctions which are obtained at the application of the judgment debtor.<sup>4</sup>

**§ 3456. Disability of plaintiff—Infancy.** The exact language of the exceptions to the Statute of Limitations created by the statute itself, depends of course upon the wording of the particular statute laying down such rule of limitations and the exception thereto. No exact statement therefore can be made of the general effect of all statutes, and a specific discussion of the separate statutes of each state would not fall within the scope of this work. The general principles, however, underlying the most of the state statutes, are substantially alike, and those general principles will be discussed here. The statutory exceptions to the Statute of Limitations may be roughly grouped under two headings: (1) Those arising by reason of some specific disability of the plaintiff; and, (2) those arising out of specific conduct of the defendant. The common classes of disability of the plaintiff enumerated in the statute are here discussed.

It must be noticed, however, that if the statute omits one of these classes, the court can not, for reasons already given, supply such omissions, no matter how unreasonable to have omitted such exception.<sup>1</sup> An exception in favor of an infant can not be read into a statute in which no such exception is found, although a similar exception is found in other statutes relating to other classes of causes of action.<sup>2</sup>

<sup>4</sup> *Sage v. Rudnick*, 91 Minn. 325, 98 N. W. 89; *Lagerman v. Casserly*, 107 Minn. 491, 23 L. R. A. (N.S.) 673, 120 N. W. 1086; *Van Wagoner v. Terpenning*, 122 N. Y. 222, 25 N. E. 254; *Terrill v. Ingersoll*, 78 Tenn. (10 Lea) 77.

"The rule that, whenever a person is prevented from exercising his legal remedy by some paramount authority, the time for which he is thus prevented must not be counted against him in determining whether the statute of limitations has barred his right, applies only when such paramount authority is invoked and the restraint induced by the debtor. A court of equity can not read an exception into the statute of limitations, although it

may under certain circumstances, acting in personam, restrain a debtor from pleading the statute. The statutory provision suspending the running of the period of limitation during the time the beginning of an action is stayed by injunction or other statutory prohibition applies only between parties to the suit, and not where the injunction is granted in a suit to which the debtor is not a party." *Lagerman v. Casserly*, 107 Minn. 491, 23 L. R. A. (N.S.) 673, 120 N. W. 1086.

<sup>1</sup> See § 3450.

<sup>2</sup> *Johnson v. Merritt*, 125 Va. 162, 99 S. E. 785.

If the plaintiff is an infant when the cause of action accrues, the statutes generally provide either that limitation shall not run during his minority, or that after he reaches full age, a certain time shall be given to him within which to maintain an action.<sup>3</sup> Under some statutes, limitations does not begin to run against an infant until he reaches majority,<sup>4</sup> especially if the contract is one which he can disaffirm finally during minority.<sup>5</sup> In other jurisdictions, it seems that the Statute of Limitations runs against the infant, but an additional time is granted to him to maintain an action after he reaches majority.<sup>6</sup>

Where an exception in favor of infancy is made, the fact that the minor has a guardian who could maintain the action on behalf of the minor, does not make limitations run against the infant.<sup>7</sup>

**§ 3457. Insanity.** If the plaintiff is insane when the cause of action accrues, the statutes generally provide either that limitations does not run until he regains sanity, or that after he regains sanity certain additional time shall be allowed him within which to maintain his action.<sup>1</sup> It is not necessary that there be an adju-

<sup>3</sup> **Alabama.** *Winsett v. Winsett*, 203 Ala. 373, 83 So. 117.

**Arkansas.** *Falls v. Wright*, 55 Ark. 562, 29 Am. St. Rep. 74, 18 S. W. 1044; *Holloway v. Eagle*, 135 Ark. 206, 205 S. W. 113.

**California.** *Maier v. Harbor Center Land Co.*, 41 Cal. App. 79, 182 Pac. 345.

**Indiana.** *Lambert v. Billheimer*, 125 Ind. 519, 25 N. E. 451.

**Kentucky.** *Myers v. Korb* (Ky.), 50 S. W. 1108; *Furey v. Gallagher*, 180 Ky. 231, 202 S. W. 641.

**New Jersey.** *Smith v. Felter*, 61 N. J. L. 102, 38 Atl. 746.

**New York.** *Darrow v. Calkins*, 154 N. Y. 503, 61 Am. St. Rep. 637, 49 N. E. 61.

**North Carolina.** *Carroll v. Montgomery*, 128 N. Car. 278, 38 S. E. 874.

**Oklahoma.** *Glory v. Bagby*, 79 Okla. 155, 188 Pac. 881.

**Tennessee.** *Ferguson v. Prince*, 136 Tenn. 543, 190 S. W. 548.

<sup>4</sup> *Maier v. Harbor Center Land Co.*, 41 Cal. App. 79, 182 Pac. 345.

<sup>5</sup> *Maier v. Harbor Center Land Co.*, 41 Cal. App. 79, 182 Pac. 345.

<sup>6</sup> *Chavers v. Mayo*, 202 Ala. 128, 79 So. 594; *Wandschneider v. Wandschneider*, 282 Ill. 286, 118 N. E. 486; *Kiplinger v. Joslyn*, 93 Neb. 40, 139 N. W. 1019.

<sup>7</sup> *Grimsby v. Hudnell*, 76 Ga. 378, 2 Am. St. Rep. 46; *Glory v. Bagby*, 79 Okla. 155, 188 Pac. 881; *Fassitt v. Seip*, 249 Pa. St. 576, 95 Atl. 273.

<sup>1</sup> **Arizona.** *Fleming v. Black Warrior Copper Co.*, 15 Ariz. 1, 51 L. R. A. (N.S.) 99, 136 Pac. 273.

**Georgia.** *Brown v. Carmichael*, 149 Ga. 548, 101 S. E. 124.

**Kansas.** *Lantis v. Davidson*, 60 Kan. 389, 56 Pac. 745.

**Maryland.** *Funk v. Wingert*, 134 Md. 523, 107 Atl. 345.

**Minnesota.** *Kelley v. Gallup*, 67 Minn. 169, 69 N. W. 812.

**Missouri.** *Faris v. Moore*, 256 Mo. 123, 165 S. W. 311.

dication of insanity in order to bring the plaintiff within this exception.<sup>2</sup> This statutory exception exists even if a guardian has been appointed for the insane person by whom such action could be maintained.<sup>3</sup>

**§ 3458. Coverture.** The courts have no power to make coverture an exception to the Statute of Limitations if the legislature has not done so.<sup>1</sup> When the common-law theory of the relation between husband and wife, and the effect of marriage upon the status of the wife was in force, the statutes generally contained a specific provision that limitations should not run against a married woman.<sup>2</sup> Under the modern theory of the relation between the husband and wife, and the power of a married woman, a question has arisen as to the propriety of the former statutory exception of a married woman from the operation of the Statutes of Limitation. Of course as long as no modification of any sort has been made by statute, the courts have no power to repeal the statutory exception on the ground that they think it no longer wise or necessary. On the other hand, if the statutes of limitation is amended, and the class of married women is specifically omitted from the list of statutory exceptions, there can be no question that limitations runs against her.<sup>3</sup>

The question which presents difficulty arises where the Statute of Limitations is not itself amended, but married women's acts had been passed, giving her full control over her property, and providing that she can sue and be sued as if she were unmarried. In such cases the weight of authority holds that the married woman's act operates as an implied modification of the Statute of Limitations.<sup>4</sup> Some authorities, however, hold that the married

<sup>2</sup> *Lantis v. Davidson*, 60 Kan. 389, 56 Pac. 745.

<sup>3</sup> *Funk v. Wingert*, 134 Md. 523, 107 Atl. 345.

<sup>1</sup> *Holloway v. Eagle*, 135 Ark. 206, 205 S. W. 113.

See § 3450.

<sup>2</sup> *Arkansas. Rowland v. Taylor*, 134 Ark. 183, 203 S. W. 1034; *Dorsey Land & Lumber Co. v. Silvia*, — Ark. —, 224 S. W. 969.

*Indiana. Wright v. Tichenor*, 104 Ind. 185, 3 N. E. 853.

*Kentucky. Henson v. Culp*, 157 Ky. 442, 163 S. W. 455.

*Missouri. Bobb v. Taylor*, — Mo. —, 184 S. W. 1028.

*New York. Dunham v. Sage*, 52 N. Y. 229.

*North Carolina. Johnson v. Edwards*, 109 N. Car. 466, 26 Am. St. Rep. 580.

*South Carolina. Stokes v. Murray*, 102 S. Car. 395, 87 S. E. 71.

*Tennessee. Harris v. Smith*, 98 Tenn. 286, 39 S. W. 343.

<sup>3</sup> *Clark v. Gibbons*, 83 N. Y. 107; *Holmes v. Carr*, 172 N. Car. 213, 90 S. E. 152.

<sup>4</sup> *England. Lowe v. Fox*, L. R. 15 Q. B. Div. 667.

woman's act does not affect the statute of limitations, and that the married woman is still exempt from the general operation of the Statute of Limitations.<sup>5</sup> Most of the cases last cited, however, were under statutes giving the married woman power to sue but not removing her disabilities generally. A married woman who is registered as a free-trader and has thus by statute the power of contracting as a feme sole, is still protected by the statutes of limitation.<sup>6</sup> In any event, this amendment can not affect vested rights.<sup>7</sup>

**§ 3459. Limitations as between husband and wife.** At common law neither husband nor wife could maintain an action against the other. Accordingly, if the adversary parties to a contract intermarry, the right to maintain an action on such contract is suspended by the paramount authority of the law, and limitations does not run,<sup>1</sup> even if the right itself is not extinguished.<sup>2</sup> Where a cause of action can exist in favor of a wife against her husband, limitations does not run during coverture,<sup>3</sup> but begins to run at the death of the husband.<sup>4</sup>

**United States.** Kibbe v. Ditto, 93 U. S. 674, 23 L. ed. 1005 (under Illinois law).

**California.** Cameron v. Smith, 50 Cal. 303.

**Georgia.** Perkins v. Crompton, 69 Ga. 736.

**Illinois.** Castner v. Walrod, 83 Ill. 171, 25 Am. Rep. 369.

**Michigan.** Curbay v. Bellemer, 70 Mich. 106, 37 N. W. 911.

**Mississippi.** Wyatt v. Wyatt, 81 Miss. 219, 32 So. 317.

**Nebraska.** Murphy v. J. H. Evans City Steam Laundry Co., 52 Neb. 593, 72 N. W. 960.

**North Carolina.** Graves v. Howard, 159 N. Car. 594, 75 S. E. 998.

**Tennessee.** McIrvin v. Lincoln Memorial University, 138 Tenn. 260, L. R. A. 1918C, 191, 197 S. W. 862.

**Arkansas.** Rowland v. McGuire, 64 Ark. 412, 42 S. W. 1068; Dorsey Land & Lumber Co. v. Silvia, — Ark. —, 224 S. W. 969.

**Missouri.** Lindell Real Estate Co. v. Lindell, 142 Mo. 61, 43 S. W. 368.

**North Carolina.** Campbell v. Crater,

95 N. Car. 156 (since modified by statute. See note 2, supra).

**Ohio.** Ashley v. Rockwell, 43 O. S. 386, 2 N. E. 437.

**Wisconsin.** Wiesner v. Zaun, 39 Wis. 188.

**Wyoming.** Bliler v. Boswell, 9 Wyom. 57, 59 Pac. 798, 61 Pac. 867.

<sup>5</sup> Wilkes v. Allen, 131 N. Car. 279, 42 S. E. 616.

<sup>7</sup> Powell v. Bowen, 279 Mo. 280, 214 S. W. 142.

<sup>1</sup> Parrett v. Palmer, 8 Ind. App. 356, 52 Am. St. Rep. 479, 35 N. E. 713; Fawcett v. Fawcett, 85 Wis. 332, 39 Am. St. Rep. 844, 55 N. W. 405; Second National Bank v. Merrill, 81 Wis. 151, 29 Am. St. Rep. 877, 50 N. W. 505.

<sup>2</sup> See § 2571.

<sup>3</sup> Gudden v. Gudden's Estate, 113 Wis. 297, 89 N. W. 111; Flanagan's Estate v. Flanagan's Estate, 169 Wis. 537, 173 N. W. 297.

<sup>4</sup> Gracie's Estate, 158 Pa. St. 521, 27 Atl. 1083; Flanagan's Estate v. Flanagan's Estate, 169 Wis. 537, 173 N. W. 297.

**§ 3460. Imprisonment of plaintiff.** If imprisonment is not made a statutory exception to the Statute of Limitations, the courts can not add it,<sup>1</sup> although it is held to be included under the general term "disability."<sup>2</sup> If the plaintiff is imprisoned when the cause of action accrues in his favor, it is expressly provided in most statutes that limitations shall not run against him during such imprisonment.<sup>3</sup>

**§ 3461. Absence of plaintiff.** Some of the earlier statutes provided that if when the cause of action accrued in his favor the plaintiff was "beyond the seas,"<sup>1</sup> the statutes of limitation do not run against him until his return. The expression "beyond the seas" is held in England to mean "out of the realm,"<sup>2</sup> and, in the United States, it generally means "without the limits of the state,"<sup>3</sup> and in one case it was construed absolutely literally so as not to apply to one who is domiciled in Canada.<sup>4</sup>

<sup>1</sup> Mosgrave v. McManus, 24 N. M. 227, 173 Pac. 196.

<sup>2</sup> State v. Calhoun, 50 Kan. 523, 34 Am. St. Rep. 141, 18 L. R. A. 838, 32 Pac. 38.

<sup>3</sup> Matilda v. Crenshaw, 12 Tenn. (4 Yerg.) 299; Downs v. Allen, 78 Tenn. (10 Lea.) 652.

A free person who is kept in slavery is imprisoned within the meaning of this statute. Matilda v. Crenshaw, 10 Tenn. (4 Yerg.) 299.

A slave who enjoys de facto freedom is not imprisoned within the meaning of this statute. Downs v. Allen, 78 Tenn. (10 Lea.) 652.

<sup>1</sup> Under 21 Jac. I. C. 16. Strithorst v. Graeme, 2 W. Bl. 723.

<sup>2</sup> It was held to include Ireland. Anonymous, 1 Shower 91.

That it included Scotland before the union of England and Scotland, see Pancoast v. Addison, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520.

<sup>3</sup> United States. Bank of Alexandria v. Dyer, 39 U. S. (14 Pet.) 141, 10 L. ed. 391 (under Maryland law).

Indiana. Stephenson v. Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489.

Ohio. Richardson v. Richardson, 6 Ohio 125, 25 Am. Dec. 745.

South Carolina. Forbes v. Foot, 2 McCord (S. Car.) 331, 13 Am. Dec. 732. For a discussion of this question see, Shelby v. Guy, 24 U. S. (11 Wheat.) 361, 6 L. ed. 495, although it is taken more literally as meaning "beyond the limits of the United States"; Davie v. Briggs, 97 U. S. 628, 24 L. ed. 1086 (under North Carolina Statute); Mason v. Johnson, 24 Ill. 159, 76 Am. Dec. 740; Marvin v. Bates, 13 Mo. 217 [overruling, King v. Lane, 7 Mo. 241, 37 Am. Dec. 187]; State v. Harris, 71 N. Car. 174.

For a discussion of the history of this phrase, see M. son v. Union Mills Paper Mfg. Co., 81 Md. 446, 48 Am. St. Rep. 524, 29 L. R. A. 273, 32 Atl. 311.

<sup>4</sup> Gustin v. Brattle, Kirby (Conn.) 299.

In Earle v. Dickson, 1 Dev. L. (N. Car.) 16, the expression "beyond the seas" was construed literally; the court holding that the legislature referred to British creditors.

Under some of the modern statutes, this expression has been modified so as to make it clear that it means out of the United States, on the one hand,<sup>5</sup> or out of the jurisdiction of the particular state, on the other.<sup>6</sup>

The exception of the absence of the plaintiff has been repealed in many of the modern statutes, and if such exception is repealed, the court can not insert it.<sup>7</sup>

**§ 3462. When disability must exist.** The disabilities of the plaintiff enumerated by statute must, in the absence of specific statutory provision, exist when the cause of action accrues. If when the cause of action accrues the plaintiff is competent to maintain the action, and subsequently, while the period of limitations is still running, he becomes subject to one of the disabilities enumerated in the statute, such disability does not prevent the Statute of Limitations from continuing to run against him.<sup>1</sup> If a cause of action accrues in favor of an adult, his death does not stop limitations from running even though the persons who succeed him in interest are minors.<sup>2</sup> This rule has been applied where the right to bring a proceeding in error accrued to an adult and before

<sup>5</sup> *McMillan v. Wood*, 29 Me. 217 (including Canada); *Whitney v. Goddard*, 37 Mass. (20 Pick.) 304, 32 Am. Dec. 216.

<sup>6</sup> *Sleight v. Kane*, 1 Johns. Cas. (N. Y.) 76. (In time of war, one who is within the territorial limits of the state, but also within the lines of the enemy, is to be regarded as without the state; in this case, applicable to the debtor.)

<sup>7</sup> *Royse v. Turnbaugh*, 117 Ind. 539, 20 N. E. 485.

<sup>1</sup> *United States. McDonald v. Hovey*, 110 U. S. 619, 28 L. ed. 269.

**Arkansas.** *Miller v. Chicago Mill & Lumber Co.*, 140 Ark. 639, 215 S. W. 900.

**California.** *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879.

**Illinois.** *Beattie v. Whipple*, 154 Ill. 273, 40 N. E. 340.

**Iowa.** *Black v. Ross*, 110 Ia. 112, 81 N. W. 229.

**Kentucky.** *Henderson v. Fielder*, 185 Ky. 482, 215 S. W. 187.

**Michigan.** *Daniells v. Daniells*, 92 Mich. 208, 52 N. W. 303.

**Minnesota.** *Kelley v. Gallup*, 67 Minn. 169, 69 N. W. 812.

**Missouri.** *Priddy v. Boice*, 201 Mo. 309, 119 Am. St. Rep. 762, 9 L. R. A. (N.S.) 718, 99 S. W. 1055; *Laster v. Cunningham Land & Improvement Co.*, — Mo. —, 213 S. W. 89.

**North Carolina.** *White v. Scott*, 178 N. Car. 637, 101 S. E. 369.

**West Virginia.** *Jones v. Lemon*, 26 W. Va. 629.

**Wisconsin.** *Swearingen v. Robertson*, 39 Wis. 462; *Hahn v. Keith*, 170 Wis. 524, 174 N. W. 551.

**Wyoming.** *Bliller v. Boswell*, 9 Wyo. 57, 59 Pac. 798, 61 Pac. 867.

<sup>2</sup> **Arkansas.** *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17, 17 S. W. 589.

**California.** *Leran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814, 14 Pac. 879;

the time limited had expired he died and his interests descended to minors.<sup>3</sup> If the creditor is sane when the cause of action accrues his subsequent insanity does not prevent limitations from running.<sup>4</sup>

**§ 3463. Tacking disabilities.** All the disabilities which can be used to prevent the running of the Statute of Limitations must exist when the cause of action accrues. Hence, if the plaintiff suffers under one disability, when the cause of action accrues, and before such disability ceases, he becomes subject to another disability, the Statute of Limitations begins to run from the date of the cessation of the first disability, and continues to run even though the plaintiff may during the whole time be under some form of disability. The attempt to prevent the Statute of Limitations from running by adding the successive disabilities is what is known as "tacking disabilities," and is forbidden.<sup>1</sup> If when a right of action in ejectment accrues, plaintiff is a minor, and she subsequently marries before coming of age, her coverture does not prevent limitations from beginning to run against her when she

**Castro v. Geil**, 110 Cal. 202, 52 Am. St. Rep. 84, 42 Pac. 804.

**Iowa.** Grether v. Clark, 75 Ia. 383, 9 Am. St. Rep. 491, 39 N. W. 655.

**Kentucky.** Henderson v. Fielder, 185 Ky. 482, 215 S. W. 187.

**Missouri.** Pim v. St. Louis, 122 Mo. 654, 27 S. W. 525.

**Nebraska.** Hardy v. Riddle, 24 Neb. 670, 39 N. W. 841.

**North Carolina.** White v. Scott, 178 N. Car. 637, 101 S. E. 369.

**Wisconsin.** Hahn v. Keith, 170 Wis. 524, 174 N. W. 551.

<sup>3</sup> **Hinde v. Whitney**, 31 O. S. 53.

<sup>4</sup> **Grady v. Wilson**, 115 N. Car. 344, 44 Am. St. Rep. 461, 20 S. E. 518. And see for similar facts **Oliver v. Pullam**, 24 Fed. 127.

<sup>1</sup> **United States.** McDonald v. Hovey, 110 U. S. 619, 28 L. ed. 289.

**Arkansas.** Miller v. Chicago Mill & Lumber Co., 140 Ark. 639, 215 S. W. 900.

**Florida.** Doyle v. Wade, 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516.

**Illinois.** Hibernian Banking Association v. Bank, 157 Ill. 524, 41 N. E. 919.

**Kentucky.** Clark v. Jones, 55 Ky. (16 B. Mon.) 121; Manion v. Titsworth, 57 Ky. (18 B. Mon.) 582.

**New York.** Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

**Tennessee.** Patton v. Dixon, 106 Tenn. 97, 58 S. W. 299.

**Texas.** White v. Latimer, 12 Tex. 61.

**Vermont.** McFarland v. Stone, 17 Vt. 165, 44 Am. Dec. 325. "Disabilities which bring a person within the exceptions of the statute can not be piled one upon another; but a party claiming the benefit of the proviso can only avail himself of the disability existing when the right of action first accrued." Syllabus in **Mercer v. Selden**, 42 U. S. (1 How.) 37; quoted in **Cozzens v. Farnan**, 30 O. S. 491, 497, 27 Am. Rep. 470, 11 L. ed. 491.

comes of age.<sup>2</sup> If a disability which existed when the cause of action arose, terminates, and a new disability arises thereafter, the period of the two disabilities can not be added together.<sup>3</sup> If one who was insane when the cause of action arose, regains his sanity, and becomes insane thereafter, the period of the second insanity can not be added to the first.<sup>4</sup> If a female minor executes a conveyance, and marries after she becomes of age, the period of her coverture can not be added to the period of her minority.<sup>5</sup> If a woman is a feme covert when the cause of action accrues, and subsequently her husband dies and she then remarries, limitations continues to run notwithstanding her second marriage.<sup>6</sup>

If a cause of action in favor of a person under a disability passes either by operation of law or by act of the parties to a person also under a disability, the periods covered by the two disabilities can not be added.<sup>7</sup> If the claimant in an ejectment suit, living when the right of action accrues, is a feme covert, and she subsequently dies and her interests descend to a minor heir, the periods covered by these two disabilities can not be added;<sup>8</sup>

<sup>2</sup> *Downing v. Ford*, 39 Ky. (9 Dana) 391; *Eager v. Commonwealth*, 4 Mass. 182; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Cozzens v. Farnan*, 30 O. S. 491, 27 Am. Rep. 470. For similar facts see *Sims v. Gay*, 109 Ind. 501.

<sup>3</sup> *England*. *Cotterell v. Dutton*, 4 Taunt. 826; *Murray v. East India Co.*, 5 Barn. & Ald. 204.

*Illinois*. *Keil v. Healey*, 84 Ill. 104, 25 Am. Rep. 434.

*Kentucky*. *Floyd v. Johnson*, 12 Ky. (2 Litt.) 109, 13 Am. Dec. 75.

*Missouri*. *Priddy v. Boice*, 201 Mo. 309, 119 Am. St. Rep. 762, 9 L. R. A. (N.S.) 718, 99 S. W. 1055; *Laster v. Cunningham Land & Improvement Co.*, — Mo. —, 213 S. W. 89.

*Rhode Island*. *Union Savings Bank v. Taber*, 13 R. I. 683.

*Vermont*. *McFarland v. Stone*, 17 Vt. 165, 44 Am. Dec. 325.

<sup>4</sup> *Verdery v. Savannah Florida & Western Ry.*, 82 Ga. 675, 9 S. E. 1133.

<sup>5</sup> *Priddy v. Boice*, 201 Mo. 309, 119 Am. St. Rep. 762, 9 L. R. A. (N.S.) 718, 99 S. W. 1055.

<sup>6</sup> *Mitchell v. Berry*, 58 Ky. (1 Met.) 602.

See also, *Laster v. Cunningham Land & Improvement Co.*, — Mo. —, 213 S. W. 89. For a similar result in case of divorce and remarriage see, *Miller v. Chicago Mill & Lumber Co.*, 140 Ark. 639, 215 S. W. 900.

<sup>7</sup> *United States*. *Davis v. Coblenz*, 174 U. S. 719, 43 L. ed. 1147.

*Florida*. *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516.

*Missouri*. *Pim v. St. Louis*, 122 Mo. 654, 27 S. W. 525.

*New York*. *Carpenter v. Schermerhorn*, 2 Barb. Ch. (N. Y.) 314.

*Ohio*. *Whitney v. Webb*, 10 Ohio 513.

*Pennsylvania*. *Bensell v. Chancellor*, 5 Whart. (Pa.) 371, 34 Am. Dec. 561.

*Tennessee*. *Jones v. Coal Creek Mining & Mfg. Co.*, 133 Tenn. 159, 180 S. W. 170.

*Contra*, *Bush v. Combs*, 187 Ky. 203, 218 S. W. 711.

<sup>8</sup> *Davis v. Coblenz*, 174 U. S. 719, 43 L. ed. 1147. And for similar facts see

and so if the ancestor was insane when the cause of action accrues and on his death his interest descends to minor heirs.<sup>9</sup> So if a party to the contract is under no disability when the cause of action accrues, his subsequent assignment of the contract to an assignee who is under disability does not prevent the statute from operating.<sup>10</sup> If, however, the plaintiff suffered under several disabilities at the time when his cause of action accrued, limitations does not begin to run against him until the last of the disabilities from which he was then suffering has ceased to operate.<sup>11</sup>

**§ 3464. Death of party.** The death of a party after a right of action has once accrued,<sup>1</sup> whether plaintiff<sup>2</sup> or defendant,<sup>3</sup> does not suspend the running of the Statute of Limitations, in the absence of express statutory provision. In case the plaintiff dies, it is the duty of those claiming under him to proceed at once to have an executor or administrator appointed to collect claims due to his estate, and accordingly it is their own fault if there is no party in existence capable of bringing suit.<sup>4</sup> If the defendant dies, persons having claims against his estate have it in their power in most states to have an administrator appointed against whom such claims can be presented, and their failure to cause such appointment to be made, is caused by their own negligence. Hence, fail-

Patton v. Dixon, 105 Tenn. 97, 58 S. W. 209.

Contra, Bush v. Combs, 187 Ky. 203, 218 S. W. 711.

<sup>9</sup>Thorp v. Raymond, 57 U. S. (16 How.) 247, 14 L. ed. 113.

<sup>10</sup>Meyer v. Christopher, 176 Mo. 580, 75 S. W. 750; Causey v. Snow, 122 N. C. 326, 29 S. E. 359.

<sup>11</sup>Sims v. Everhardt, 102 U. S. 300, 26 L. ed. 87; Sims v. Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Keeton v. Keeton, 20 Mo. 530; Jackson v. Johnson, 5 Cowen (N. Y.) 74, 15 Am. Dec. 433.

<sup>1</sup>California. Davis v. Hart, 123 Cal. 384, 55 Pac. 1060.

Montana. Davis v. Davis' Estate, 56 Mont. 500, 185 Pac. 559.

Nebraska. Hardy v. Riddle, 24 Neb. 670, 39 N. W. 841.

Ohio. Granger v. Granger, 6 Ohio 35.

West Virginia. Rowan v. Chenoweth,

49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544.

<sup>2</sup>Mereness v. Charles City First National Bank, 112 Ia. 11, 84 Am. St. Rep. 318, 83 N. W. 711; Henderson v. Fielder, 185 Ky. 482, 215 S. W. 187; Hill v. Townley, 45 Minn. 167, 47 N. W. 653; Campbell v. Dick, — Okla. —, 157 Pac. 1062.

<sup>3</sup>California. McMillan v. Hayward, 94 Cal. 357, 29 Pac. 774.

Maryland. Lang v. Wilmer, 131 Md. 215, 2 A. L. R. 1698, 101 Atl. 706.

Maine. Carpenter v. Hadley, 118 Me. 437, 108 Atl. 679.

Montana. Davis v. Davis' Estate, 56 Mont. 500, 185 Pac. 559.

New York. Sanford v. Sanford, 62 N. Y. 553.

West Virginia. Handy v. Smith, 30 W. Va. 195, 3 S. E. 604.

<sup>4</sup>Rowan v. Chenoweth, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544.

ure to appoint a personal representative does not extend the period of limitations in either case. The death of a party to a suit eighteen days before the time fixed for taking an appeal expired, does not extend the time for taking such appeal though an administrator was not appointed for six months thereafter.<sup>5</sup>

If a cause of action accrues in favor of a decedent's estate at or after his death, it has been held that limitations does not begin to run until an administrator has been appointed.<sup>6</sup> Insurance which should have been paid to the administrator of decedent was paid to another. Limitations was held not to run against the right to recover such money from such other person until an administrator was appointed.<sup>7</sup>

Even where leave of court is necessary to enable an action to be brought, omission to ask such leave does not prevent limitations from running from the time when such leave might have been asked, and if it had been obtained, suit might have been brought.<sup>8</sup> Even if leave of court to bring an action is necessary, limitations runs on a judgment from its rendition,<sup>9</sup> and on an administrator's bond from the date of the final decree of distribution.<sup>10</sup>

By statute in some jurisdictions the Statute of Limitations is suspended on the death of the debtor, either for a fixed period of time,<sup>11</sup> or till an administrator is appointed,<sup>12</sup> or until a certain period after the death of a party.<sup>13</sup> A statute which provides that an action must be brought by an executor of the creditor within a

<sup>5</sup> *Williams v. Long*, 130 Cal. 58, 80 Am. St. Rep. 68, 62 Pac. 264.

<sup>6</sup> *St. Paul Trust Co. v. Sargent*, 44 Minn. 449, 47 N. W. 51; *Hoiles v. Riddle*, 74 O. S. 173, 78 N. E. 219; *Riner v. Riner*, 166 Pa. St. 617, 45 Am. St. Rep. 693, 31 Atl. 347.

*Contra*, *Hibernia Savings & Loan Society v. Conlin*, 67 Cal. 178, 7 Pac. 477.

<sup>7</sup> *Riner v. Riner*, 166 Pa. St. 617, 45 Am. St. Rep. 693, 31 Atl. 347.

<sup>8</sup> *Gausser v. Gausser*, 83 Minn. 199, 85 Am. St. Rep. 461, 86 N. W. 18; *Osborne v. Lindstrom*, 9 N. D. 1, 81 Am. St. Rep. 516, 46 L. R. A. 715, 81 N. W. 72; *Spokane v. Prescott*, 19 Wash. 418, 67 Am. St. Rep. 733, 53 Pac. 661.

<sup>9</sup> *Osborne v. Lindstrom*, 9 N. D. 1,

81 Am. St. Rep. 516, 46 L. R. A. 715, 81 N. W. 72.

<sup>10</sup> *Gausser v. Gausser*, 83 Minn. 199, 85 Am. St. Rep. 461, 86 N. W. 18.

<sup>11</sup> *Casey v. Gibbons*, 136 Cal. 368, 68 Pac. 1032; *Willis v. Sutton*, 116 Ga. 283, 42 S. E. 526; *Groesbeck v. Crow*, 91 Tex. 74, 40 S. W. 1028; *Baumgartner v. McKinnon*, 137 Ga. 165, 38 L. R. A. (N.S.) 824, 73 S. E. 518.

<sup>12</sup> *Farris v. Haskins* (Ky.), 63 S. W. 577; *Whiteside v. Catching*, 19 Mont. 394, 48 Pac. 747.

The appointment of a temporary administrator does not start limitations to running under such a statute. *Baumgartner v. McKinnon*, 137 Ga. 165, 38 L. R. A. (N.S.) 824, 73 S. E. 518.

<sup>13</sup> *Steffey v. King*, 126 Va. 120, 101 S. E. 62.

certain time after the death of the decedent, does not suspend the running of the Statute of Limitations during the period thus specified.<sup>14</sup>

**§ 3465. Conduct of defendant—Absence from state or fraudulent concealment.** The conduct of the defendant, which is generally selected by statute as that which prevents limitations from running in his favor is his absence from the state. If he is absent from the state at the time when the cause of action accrues against him, the Statute of Limitations does not begin running in his favor until his return to the state.<sup>1</sup>

The statute which provides for the absence of the defendant from the state, usually provides that the time during which he is absent from the state shall not be counted in determining whether limitations has run or not. Under such statutes, if the defendant is within the state when the cause of action accrues, and subsequently removes from the state, the time during which he is absent from the state must be deducted from the entire period for the purpose of determining whether limitations has run or not.<sup>2</sup> Under some statutes the absence and return of the debtor makes a new point of time from which limitations is to run.<sup>3</sup>

<sup>14</sup> *Morse v. Hayes*, 150 Mich. 597, 13 L. R. A. (N.S.) 1200, 114 N. W. 397; *Curran v. Witter*, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705; *Palmer v. O'Rourke*, 130 Wis. 507, 110 N. W. 389.

<sup>1</sup> *California*. *Stone v. Hammel*, 83 Cal. 547, 17 Am. St. Rep. 272, 8 L. R. A. 425, 23 Pac. 703.

*Indiana*. *Wood v. Bissell*, 108 Ind. 229, 9 N. E. 425.

*Iowa*. *McNamara v. McAllister*, 150 Ia. 243, 34 L. R. A. (N.S.) 436, 130 N. W. 26.

*Kansas*. *Roth v. Holman*, 105 Kan. 175, 182 Pac. 416.

*Oklahoma*. *Hale v. St. Louis & San Francisco Ry. Co.*, 39 Okla. 192, L. R. A. 1915C, 544, 134 Pac. 949.

*Oregon*. *Jamieson v. Potts*, 55 Or. 292, 25 L. R. A. (N.S.) 24, 105 Pac. 93.

<sup>2</sup> *California*. *McKee v. Dodd*, 152 Cal. 637, 14 L. R. A. (N.S.) 780, 93 Pac. 854.

*Iowa*. *Bader v. Hiscox*, — Ia. —, 10 A. L. R. 316, 174 N. W. 565.

*Kansas*. *Baxter v. Krause*, 79 Kan. 851, 23 L. R. A. (N.S.) 547, 101 Pac. 467.

*Minnesota*. *McRae v. Feigh*, 143 Minn. 241, 173 N. W. 655.

*North Carolina*. *Williams v. Iron Belt Building & Loan Association*, 131 N. Car. 267, 42 S. E. 607.

*Ohio*. *Stanley v. Stanley*, 47 O. S. 225, 21 Am. St. Rep. 806, 8 L. R. A. 333, 24 N. E. 493.

*Oklahoma*. *Fidelity & Deposit Co. v. Sheahan*, 37 Okla. 702, 47 L. R. A. (N.S.) 309, 133 Pac. 228.

*Texas*. *Wilson v. Daggett*, 88 Tex. 375, 53 Am. St. Rep. 766, 31 S. W. 618.

*Washington*. *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519.

*West Virginia*. *Lamon v. Gold*, 72 W. Va. 618, 51 L. R. A. (N.S.) 883, 79 S. E. 728.

<sup>3</sup> *Cottrell v. Kenney*, 25 R. I. 99, 54 Atl. 1010.

Absence from the state includes cases where the defendant resides elsewhere when the cause of action accrues and moves into the state at a later time. Limitations runs in such cases from the time that he moves into the state.<sup>4</sup> If he has never been a resident of the state at the time that the cause of action against him accrues, limitations does not run in his favor until he moves into the state.<sup>5</sup> A note was given in New Hampshire. After it fell due, but before it was there barred by limitations, the maker moved to South Carolina. Suit was there brought against him after the statutory period fixed by the South Carolina statute counting from the maturity of the note, but within the period counting from the time that the maker came to South Carolina. It was held that under a section of the statute which prevents limitations from running against a maker who is out of the state when the cause of action accrues until his return, the action was brought in time.<sup>6</sup>

A claim against one of two or more joint debtors is barred by limitations if such joint debtor is a resident, though one of the

<sup>4</sup> Alabama. *Steen v. Swadley*, 126 Ala. 616, 28 So. 620.

California. *McKee v. Dodd*, 152 Cal. 637, 14 L. R. A. (N.S.) 780, 93 Pac. 854.

Idaho. *West v. Theis*, 15 Ida. 167, 17 L. R. A. (N.S.) 472, 96 Pac. 932.

Iowa. *Wetmore v. Marsh*, 81 Ia. 677, 47 N. W. 1021; *McNamara v. McAllister*, 150 Ia. 243, 34 L. R. A. (N.S.) 436, 130 N. W. 26.

Massachusetts. *Broadway National Bank v. Baker*, 176 Mass. 294 57 N. E. 603.

Oregon. *Jamieson v. Potts*, 55 Or. 292, 25 L. R. A. (N.S.) 24, 105 Pac. 93.

Washington. *Freundt v. Hahn*, 24 Wash. 8, 85 Am. St. Rep. 939, 63 Pac. 1107.

Wisconsin. *Adkins v. Loucks*, 107 Wis. 587, 83 N. W. 934.

<sup>5</sup> California. *McKee v. Dodd*, 152 Cal. 637, 14 L. R. A. (N.S.) 780, 93 Pac. 854.

Idaho. *West v. Theis*, 15 Ida. 167, 17 L. R. A. (N.S.) 472, 96 Pac. 932.

Under a statute which speaks of the debtor's "return to the State." *West*

*v. Theis*, 15 Ida. 167, 17 L. R. A. (N.S.) 472, 96 Pac. 932.

Iowa. *McNamara v. McAllister*, 150 Ia. 243, 34 L. R. A. (N.S.) 436, 130 N. W. 26.

Maryland. *Mason v. Union Mills Paper Mfg. Co.*, 81 Md. 446, 48 Am. St. Rep. 524, 29 L. R. A. 273, 32 Atl. 311.

Minnesota. *Jordan v. Secombe*, 33 Minn. 220, 22 N. W. 383.

New York. *Ruggles v. Keeler*, 3 Johns. (N. Y.) 263, 3 Am. Dec. 482.

Oregon. *Jamieson v. Potts*, 55 Or. 292, 25 L. R. A. (N.S.) 24, 105 Pac. 93.

South Carolina. *Burrows v. French*, 34 S. Car. 165, 27 Am. St. Rep. 811, 13 S. E. 355.

South Dakota. *McConnell v. Spicker*, 15 S. D. 98, 87 N. W. 574.

Tennessee. *Kempe v. Bader*, 86 Tenn. 189, 6 S. W. 126 [overruling *Barbour v. Erwin*, 82 Tenn. (14 Lea) 716].

<sup>6</sup> *Burrows v. French*, 34 S. Car. 165, 27 Am. St. Rep. 811, 13 S. E. 355.

See to the same effect, *McConnell v. Spicker*, 15 S. D. 98, 87 N. W. 574.

other joint debtors was absent from the state.<sup>7</sup> A claim against a partnership is not relieved from the operation of the statute by the absence of one partner, the other being a resident.<sup>8</sup> A claim against a surety, on which an action can be brought in the absence of the principal debtor, is barred by limitations if the surety is a resident though the principal debtor is without the state.<sup>9</sup> A claim against the principal debtor was barred by limitations. A surety of the principal debtor who had been absent from the state and in whose favor limitations had not run, gave his note on his return to a co-surety for his share of the total amount of the principal's debt paid by such co-surety. This was held not to give to such surety any cause of action against the principal debtor.<sup>10</sup>

The clause of the statute providing that time during which a party is absent from the state after a cause of action accrues against him, shall not be taken as any part of the time limited applies where the maker and payee, who were husband and wife, left the state together and resided in another state for a considerable period of time, and then returned to the state where the note in question was originally given.<sup>11</sup>

Under a statute which provides that limitations does not run in favor of a defendant who absconds and conceals himself, limitations does not run in favor of one who went to another state and then returned, using a different Christian name so that his identity was concealed from the plaintiff.<sup>12</sup>

**§ 3466. Domicile, residence and personal presence.** Some courts take a different view from that already expressed, and hold that the statute as to absence from the state does not apply to one once a citizen who removes from the state before the "accrual or birth of the cause of action."<sup>1</sup> In these states there is some conflict of authority as to whether one who is a resident of the state

<sup>7</sup> *Mozingo v. Ross*, 150 Ind. 688, 65 Am. St. Rep. 387, 41 L. R. A. 612, 50 N. E. 867; *Denny v. Smith*, 18 N. Y. 567 [overruling *Brown v. Delafield*, 1 Den. (N. Y.) 445]; *Cohen v. Jenkins*, 125 Va. 635, 100 S. E. 678.

<sup>8</sup> *Lovett's Administrator v. Perry*, 98 Va. 604, 37 S. E. 33; *Cohen v. Jenkins*, 125 Va. 635, 100 S. E. 678.

<sup>9</sup> *Mozingo v. Ross*, 150 Ind. 688, 65 Am. St. Rep. 387, 41 L. R. A. 612, 50 N. E. 867; *Davis v. Clark*, 58 Kan. 454, 49 Pac. 665.

<sup>10</sup> *Stone v. Hammel*, 83 Cal. 547, 17 Am. St. Rep. 272, 8 L. R. A. 425, 23 Pac. 703.

<sup>11</sup> *Blackburn v. Blackburn*, 124 Mich. 190, 83 Am. St. Rep. 325, 82 N. W. 835.

<sup>12</sup> *Cummings v. Keating*, 103 Neb. 453, 172 N. W. 358.

<sup>1</sup> *S. O. Walsh v. Schilling*, 33 W. Va. 108, 10 S. E. 54; *Fisher v. Hartley*, 48 W. Va. 339, 86 Am. St. Rep. 39, 54 L. R. A. 215, 37 S. E. 578.

at the time of the "birth" of the cause of action, but who removes before the maturity of the cause of action is within the exception of the statute.<sup>2</sup> The fact that the defendant makes "casual temporary visits" to the state,<sup>3</sup> or that he returns to the state as a traveling salesman, being in the state several months during each year, but not staying at any one place more than a day or so,<sup>4</sup> does not make limitations run in his favor.

Some of the statutes are so worded that they can apply only to resident debtors who are absent from the state of their residence.<sup>5</sup> If the statute is drawn in general terms, it is nevertheless held in some jurisdictions that it is to be construed as applying only to the residents of that state,<sup>6</sup> but the better view, which is supported by the weight of authority, is that this statute includes both residents and non-residents.<sup>7</sup>

Some statutes are so worded that the exception applies only in favor of creditors who are residents of that state.<sup>8</sup>

Under the statutes which deal with the absence of the debtor, a debtor who is present in the state personally is not within the statutory exception, even if he has a residence or domicile outside of the state;<sup>9</sup> and if the debtor has changed his residence after the cause of action accrues, the time which he is physically present in the state is to be counted upon the period of limitations, if he has not concealed himself.<sup>10</sup>

<sup>2</sup> That he is within the exception. *Hefflebower v. Detrick*, 27 W. Va. 16.

<sup>3</sup> *Connecticut Trust & Safe Deposit Co. v. Wead*, 172 N. Y. 497, 92 Am. St. Rep. 756, 65 N. E. 261.

<sup>4</sup> *Weille v. Levy*, 74 Miss. 34, 60 Am. St. Rep. 500, 20 So. 3.

<sup>5</sup> *Embrey v. Jemison*, 131 U. S. 336, 33 L. ed. 172 (Virginia law); *Hunter v. Bremer*, 256 Pa. St. 257, 100 Atl. 809; *Howard v. Blair*, 83 W. Va. 561, 98 S. E. 435.

<sup>6</sup> *Wheeler v. Wheeler*, 134 Ill. 522, 10 L. R. A. 613, 25 N. E. 588; *O'Dell v. Browning*, 182 Ia. 223, 165 N. W. 395; *Lindauer Mercantile Co. v. Boyd*, 11 N. M. 464, 70 Pac. 568; *In re Wemple*, — Okla. —, 179 Pac. 674.

<sup>7</sup> *England. Lafond v. Ruddock*, 13 C. B. 813.

*Connecticut. Waterman v. A. & W.*

*Sprague Mfg. Co.*, 55 Conn. 554, 12 Atl. 240.

*Massachusetts. McCann v. Randall*, 147 Mass. 81, Am. St. Rep. 666, 17 N. E. 75.

*New York. Olcott v. Troga Ry.*, 20 N. Y. 210, 75 Am. Dec. 393.

*North Carolina. Cuthbertson v. People's Bank*, 170 N. Car. 531, 87 S. E. 333.

*South Dakota. Reeves v. Block*, 31 S. D. 60, 139 N. W. 780.

*Wisconsin. In re Gilbert*, 167 Wis. 291, 167 N. W. 447.

<sup>8</sup> *Koepping v. Monteleone*, 143 La. 353, 78 So. 590.

<sup>9</sup> *Foster v. Butler*, 164 Cal. 623, 130 Pac. 6; *Baxter v. Krause*, 79 Kan. 851, 23 L. R. A. (N.S.) 547, 101 Pac. 467.

<sup>10</sup> *Baxter v. Krause*, 79 Kan. 851, 23 L. R. A. (N.S.) 547, 101 Pac. 467.

There is some authority for holding that the debtor must have a domicile outside of the state in order to come within the operation of this exception,<sup>11</sup> but the weight of authority holds that he may be within the exception, even if he has not acquired a domicile without the state.<sup>12</sup>

Under a statute which refers to a debtor who is "out of the state," it is held that his physical presence or absence is the test.<sup>13</sup> Whether the test of a debtor's absence is the ability to serve summons upon him by service at his place of residence, so that a personal judgment can be rendered against him, is a question upon which there is a conflict of authority. Some courts hold that the time of his absence can not be deducted if process could be served at his usual place of residence;<sup>14</sup> and other courts hold that his physical presence is the test, and that the time during which he is absent from the state is to be deducted, although summons could be served at his usual place of residence.<sup>15</sup>

Within the meaning of statutes which provide that if the defendant shall "depart from and reside outside of the state," limitations shall not run against him, a change of residence, at least, is necessary.<sup>16</sup> Accordingly, if a congressman living within

<sup>11</sup> *Slocum v. Riley*, 145 Mass. 370, 14 N. E. 174.

<sup>12</sup> *Hedges v. Jones*, 63 Ia. 573, 19 N. W. 675; *Johnson v. Smith*, 43 Mo. 499; *Fidelity & Deposit Co. v. Sheahan*, 37 Okla. 702, 47 L. R. A. (N.S.) 309, 133 Pac. 228.

<sup>13</sup> *Lane v. National Bank*, 6 Kan. 74; *Coale v. Campbell*, 58 Kan. 480, 49 Pac. 604; *Investment Securities Co. v. Berghold*, 60 Kan. 813, 58 Pac. 469; *Williams v. Metropolitan Street Ry. Co.*, 68 Kan. 17, 104 Am. St. Rep. 377, 64 L. R. A. 794, 74 Pac. 600; *Gibson v. Simmons*, 77 Kan. 461, 94 Pac. 1013; *Roth v. Holman*, 105 Kan. 175, 182 Pac. 416.

<sup>14</sup> *Connecticut. Dorus v. Lyon*, 92 Conn. 55, 101 Atl. 490.

*Iowa. Platt v. Carter*, 187 Ia. 777, 174 N. W. 786.

*Michigan. Sproat v. Hall*, 189 Mich. 28, 155 N. W. 361.

*Mississippi. Dent v. Jones*, 50 Miss. 265.

*Missouri. State v. Snyder*, 182 Mo. 462, 82 S. W. 12.

*Washington. Crowder v. Morphy*, 61 Wash. 626, 112 Pac. 742.

*West Virginia. Bent v. Read*, 82 W. Va. 680, 97 S. E. 286.

<sup>15</sup> *United States. Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316.

*Kansas. Roth v. Holman*, 105 Kan. 175, 182 Pac. 416.

*Oklahoma. Fidelity & Deposit Co. v. Sheahan*, 37 Okla. 702, 47 L. R. A. (N. S.) 309, 133 Pac. 228.

*Utah. Keith-O'Brien Co. v. Snyder*, 51 Utah 227, 169 Pac. 954.

*Wisconsin. Parker v. Kelly*, 61 Wis. 552, 21 N. W. 539.

<sup>16</sup> *United States. Barney v. Oelrichs*, 138 U. S. 529, 34 L. ed. 1037.

*Illinois. Pells v. Snell*, 130 Ill. 379, 23 N. E. 117; reversing 31 Ill. App. 158.

*Massachusetts. Slocum v. Riley*, 145 Mass. 370, 14 N. E. 174.

*Nebraska. Marx v. Kilpatrick*, 25 Neb. 107, 41 N. W. 111.

the state goes to Washington with his family, but leaves his house in charge of his servants, he is not residing outside of the state so as to interrupt the running of the Statute of Limitations in his favor.<sup>17</sup>

This exception is said not to be applicable to cases in which both plaintiff and defendant are non-residents and the contract was made and to be performed outside of the jurisdiction of the forum.<sup>18</sup>

A statute of this sort, does not apply to an action against the debtor in another state.<sup>18</sup>

**§ 3467. Foreign Corporations.** Whether a foreign corporation is absent from a state other than that of its creation is a question upon which there has been a conflict of authority. The original theory seems to have been that a corporation could not migrate from the state of its creation, and in some jurisdictions, in the absence of special statute, this theory has been applied to this exception to the statute of limitations; and it is held that a foreign corporation is necessarily outside of the state, without regard to the fact that it does business in the state, or that an action can be brought against it therein.<sup>1</sup> The fact that a corporation can actually do business in another state, is generally recognized both by judicial decision and by legislation. Legislation frequently provides for admitting a foreign corporation to do business upon its complying with certain requirements, among which is the appointment of an agent upon whom process can be served. The weight of modern authority holds that a foreign corporation which has complied with all of these requirements, is to be regarded as being within the state, for the purpose of the running of the Statute of Limitations in its favor.<sup>2</sup> If a foreign corporation attempts

**Wisconsin.** *Farr v. Durant*, 90 Wis. 341, 63 N. W. 274.

<sup>17</sup> *Kerwin v. Sabin*, 50 Minn. 320, 36 Am. St. Rep. 645, 17 L. R. A. 225, 52 N. W. 642.

*Contra*, *Lane v. National Bank*, 6 Kan. 74.

<sup>18</sup> *Fisher v. Burk*, 123 Miss 781, 86 So. 300.

<sup>19</sup> *Ramsden v. Knowles*, 151 Fed. 721, 10 L. R. A. (N.S.) 897, 81 C. C. A. 105.

<sup>1</sup> *Boardman v. Lake Shore & Michi-*

*gan Southern Ry.*, 84 N. Y. 157; *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 41 L. R. A. 557, 74 N. W. 372 [rehearing denied, 99 Wis. 377, 78 N. W. 407]; *State v. National Accident Association*, 103 Wis. 208, 79 N. W. 220.

<sup>2</sup> **California.** *Harrigan v. Home Life Ins. Co.*, 128 Cal. 531, 58 Pac. 180, 61 Pac. 99.

**Missouri.** *Sidway v. Missouri Land & Live Stock Co.*, 187 Mo. 649, 86 S. W. 150.

to do business in the state, and complies with some of the statutory requirements, but not all, we have again a conflict of authority as to the effect of such conduct upon the running of the Statute of Limitations. In some cases, it is held that the proper test is ability to serve the corporation with summons within such state; and that, if the corporation has so far complied with the statutory requirements, that summons can be served upon it, it is protected by the statute of limitations, and is not regarded as being outside of the state.<sup>3</sup> It has been held, however, that the protection of the statute is to be given only to such foreign corporations as have complied with all of the statutory requirements, including those which do not relate to the service of process.<sup>4</sup> A statute providing that limitations shall not begin to run if the defendant is "absent from the state when the cause accrues," applies to an action against a foreign corporation, although the cause of action arose in another state.<sup>5</sup>

**§ 3468. Absence—Effect of right to constructive service.** The statutory provision, that time during which a defendant is absent from the state shall not be counted in determining whether the period of limitations has elapsed, applies to cases where a non-resident has property within the state, which might be taken in some proceeding in rem, if a personal judgment could not be rendered against him.<sup>1</sup> Hence, in actions to foreclose a mortgage,<sup>2</sup>

**Nebraska.** *O'Connor v. Aetna Life Ins. Co.*, 67 Neb. 122, 93 N. W. 137, 99 N. W. 845.

**North Dakota.** *Colonial & United States Mortgage Co. v. Northwest Thresher Co.*, 14 N. D. 147, 116 Am. St. Rep. 642, 70 L. R. A. 814, 103 N. W. 915.

**Tennessee.** *Turcott v. Yazoo & Mississippi Valley Ry.*, 101 Tenn. 102, 70 Am. St. Rep. 661, 40 L. R. A. 768, 45 S. W. 1067.

<sup>3</sup> *King v. National Mining & Exploring Co.*, 4 Mont. 1, 1 Pac. 727; *O'Connor v. Aetna Life Ins. Co.*, 67 Neb. 122, 93 N. W. 137, 99 N. W. 845; *Turcott v. Yazoo & Mississippi Valley Ry.*, 101 Tenn. 102, 70 Am. St. Rep. 661, 40 L. R. A. 768, 45 S. W. 1067.

<sup>4</sup> *Hale v. St. Louis & San Francisco Ry. Co.*, 39 Okla. 192, L. R. A. 1915C, 544, 134 Pac. 949.

<sup>5</sup> *Mason v. Union Mills Paper Mfg. Co.*, 81 Md. 446, 48 Am. St. Rep. 524, 29 L. R. A. 273, 32 Atl. 311.

<sup>1</sup> *McCone v. Eccles*, 42 Nev. 451, 181 Pac. 134 (personalty); *Grist v. Williams*, 111 N. Car. 53, 32 Am. St. Rep. 782, 15 S. E. 889; *Lamon v. Gold*, 72 W. Va. 618, 51 L. R. A. (N.S.) 883, 79 S. E. 728.

*Contra*, *Zoll v. Carnahan*, 83 Mo. 35; *Anderson v. Baxter*, 4 Or. 105.

<sup>2</sup> *Hibernian Banking Association v. Commercial National Bank*, 157 Ill. 524, 41 N. E. 919; *Brown v. Rockhold*, 49 Ia. 282; *Kulp v. Kulp*, 51 Kan. 341, 21 L. R. A. 550, 32 Pac. 1118.

or other actions affecting real estate,<sup>3</sup> or in determining the duration of a judgment lien,<sup>4</sup> or in actions affecting personality,<sup>5</sup> limitations does not run during the absence of the defendant from the state, even though service by publication might be obtained. The creditor has a right to personal service and a personal judgment.

Furthermore, whatever it may have been wise for the legislature to enact, the courts have no power, under a statute which provides that limitations shall not run during the absence of defendant from the state, to create thereto the exception of cases where some relief might have been had on constructive service. An exception to this rule is generally recognized in cases where the right of action is exclusively in rem, and personal service upon the non-resident could have no effect upon the progress of the litigation. The absence of a mortgagor who has conveyed to a resident grantee is held not to stop limitations as to the mortgage.<sup>6</sup> The absence of a grantee of mortgaged realty who is not personally liable for the mortgage debt has been held not to stop limitations.<sup>7</sup> On the other hand, if the mortgagor is personally liable for the debt and has conveyed to a resident by an unrecorded deed of which the mortgagee has no notice, his absence stops limitations from running.<sup>8</sup>

In some states by express provision of the statute, limitations runs as to actions in rem, even if the defendant is absent.<sup>9</sup> The absence of an adverse possessor who leaves a tenant or agent in possession does not prevent limitations from running in his favor.<sup>10</sup> Under such statute, limitations runs against foreclosure even if the mortgagor is absent.<sup>11</sup> Under other statutes, limitations runs if defendant left in the state property subject to attachment sufficient to satisfy plaintiff's claims and plaintiff knew of such fact.<sup>12</sup>

<sup>3</sup> Applegate v. Applegate, 107 Ia. 312, 78 N. W. 34; Newlove v. Pennock, 123 Mich. 280, 82 N. W. 54.

<sup>4</sup> Lamon v. Gold, 72 W. Va. 618, 51 L. R. A. (N.S.) 883, 79 S. E. 728.

<sup>5</sup> McCone v. Eccles, 42 Nev. 451, 181 Pac. 134.

<sup>6</sup> Filippini v. Trobock, 134 Cal. 441, 66 Pac. 587 [reversing, 62 Pac. 1066].

<sup>7</sup> Hogaboom v. Flower, 67 Kan. 41, 72 Pac. 547.

<sup>8</sup> Denny v. Palmer, 26 Wash. 469, 90 Am. St. Rep. 766, 67 Pac. 268.

<sup>9</sup> St. Paul v. Chicago, Milwaukee & St. Paul Ry. Co., 45 Minn. 387, 48 N. W. 17.

<sup>10</sup> Omaha & Florence Land & Trust Co. v. Parker, 33 Neb. 775, 29 Am. St. Rep. 506, 51 N. W. 139.

<sup>11</sup> Hurley v. Cox, 9 Neb. 230, 2 N. W. 705.

<sup>12</sup> Little v. Blunt, 33 Mass. (16 Pick.) 359.

§ 3469. **Fraudulent concealment by defendant.** Cases not infrequently arise where the cause of action was created by the fraud of the defendant, and fraud consists of such concealment of the truth that the plaintiff did not at the time of the transaction know of his injury or of the fact that a cause of action existed in his favor. The question has been presented, whether as long as such fraud could not be discovered by due diligence on the part of the injured person, the Statute of Limitations should run against him. A like question has been presented where the original cause of action was not based upon the fraud of the defendant, but where the defendant has been guilty of some active concealment whereby the injured party has been prevented from discovering the existence of the cause of action in his favor. Where equity is not bound by the Statute of Limitations, but acts only in analogy thereto, the courts of equity hold that fraud or concealment of the kinds herein named, prevents the Statute of Limitations from running.<sup>1</sup> In courts of law the original rule was that in analogy to the rule concerning the personal disability of the plaintiff, they were unable to create by judicial legislation exceptions which had not been made by the legislature, and hence such facts could not prevent the Statute of Limitations from running.<sup>2</sup> In some courts

<sup>1</sup> **United States.** *Prevost v. Gratz*, 19 U. S. (6 Wheat.) 481, 5 L. ed. 311; *Veazie v. Williams*, 49 U. S. (8 How.) 134, 12 L. ed. 1018; *Bailey v. Glover*, 88 U. S. (21 Wall.) 342, 22 L. ed. 636; *Kirby v. Lake Shore & Michigan Southern Ry.*, 120 U. S. 130, 30 L. ed. 569; *Jones v. Van Doren*, 130 U. S. 684, 32 L. ed. 1077.

**California.** *Odell v. Moss*, 130 Cal. 352, 62 Pac. 555.

**Delaware.** *Lieberman v. First National Bank of Wilmington*, 2 Penne. (Del.) 416, 45 Atl. 901.

**Iowa.** *Wilder v. Secor*, 72 Ia. 161, 2 Am. St. Rep. 236, 33 N. W. 448.

**Ohio.** *Longworth v. Hunt*, 11 O. S. 194.

**Pennsylvania.** *Semple v. Callery*, 184 Pa. St. 95, 39 Atl. 6.

**Wisconsin.** *Maldaner v. Beurhaus*, 108 Wis. 25, 84 N. W. 25.

<sup>2</sup> **Kentucky.** *Ellis v. Kelso*, 57 Ky. (18 B. Mon.) 296.

**New Hampshire.** *Desmaris v. People's Gaslight Co.*, — N. H. —, 107 Atl. 491 (death by wrongful act).

**New York.** *Troup v. Smith*, 20 Johns. (N. Y.) 33.

**Ohio.** *Fee's Administrator v. Fee*, 10 Ohio 469, 36 Am. Dec. 103.

**South Carolina.** *Miles v. Berry*, 1 Hill (S. Car.) 296.

**Tennessee.** *York v. Bright*, 23 Tenn. (4 Humph.) 312.

**Virginia.** *Cook v. Darby*, 18 Va. (4 Munf.) 444.

**Washington.** *Cornell v. Edsen*, 78 Wash. 662, 51 L. R. A. (N.S.) 279, 139 Pac. 602.

**Wisconsin.** *Wisconsin Trust Co. v. Cousins*, — Wis. —, 179 N. W. 801.

If an attorney dismisses an action wrongfully, his liability is for breach of duty, and not for fraud; even though he acted fraudulently. Accordingly the statute of limitations runs from such wrongful act and not from the

of law, however, it has been held that limitations should not begin to run until the cause of action, which has been fraudulently concealed by the defendant, has been discovered.<sup>3</sup>

In many jurisdictions, however, the question is put at rest by statutes which to a greater or less extent adopt the equity rule as applicable to cases at law.<sup>4</sup> Under such statutes limitations runs at least when the cause of action is discovered and perfected.<sup>5</sup> If

discovery thereof; even though such attorney concealed such wrongful act from such client. *Cornell v. Edsen*, 78 Wash. 662, 51 L. R. A. (N.S.) 279, 139 Pac. 602.

<sup>3</sup>*District of Columbia*. *Sheehy Co. v. Eastern Importing & Manufacturing Co.*, 44 D. C. App. 107, L. R. A. 1916F, 810.

*California*. *Shearer v. Park Nursery Co.*, 103 Cal. 415, 42 Am. St. Rep. 125, 37 Pac. 412.

*Georgia*. *Beach v. Branch*, 57 Ga. 362.

*Maine*. *Penobscot Ry. Co. v. Mayo*, 67 Me. 470, 24 Am. Rep. 45.

*Massachusetts*. *Farnam v. Brooks*, 26 Mass. (9 Pick.) 212.

*Michigan*. *Felt v. Reynolds Rotary Fruit Evaporating Co.*, 52 Mich. 602, 18 N. W. 378.

*Pennsylvania*. *Lewey v. C. H. Fricke Coke Co.*, 166 Pa. St. 536, 45 Am. St. Rep. 684, 28 L. R. A. 283, 31 Atl. 261.

*Texas*. *Munson v. Hallowell*, 26 Tex. 475, 84 Am. Dec. 582.

See obiter in *Bree v. Holbech*, 2 Dougl. 654a, and *Bailey v. Glover*, 88 U. S. (21 Wall.) 342, 22 L. ed. 636, on which many of the cases taking this view have been based.

In some jurisdictions, limitation is held not to begin to run against a cause of action based on a continuing warranty, until the breach is discovered, or a reasonable opportunity for discovering it is given. This is, in part, on the theory that such breach is a continuing one; and that limitation does not necessarily run from the

first breach. *Sheehy Co. v. Eastern Importing & Manufacturing Co.*, 44 D. C. App. 107, L. R. A. 1916F, 810; *Ingalls v. Angell*, 76 Wash. 692, 137 Pac. 309.

<sup>4</sup>*Alabama*. *Bromberg v. Sands*, 127 Ala. 411, 30 So. 510.

*Connecticut*. *State v. Northrop*, 93 Conn. 558, 7 A. L. R. 1014, 106 Atl. 504.

*Delaware*. *Williams v. Beltz*, 30 Del. 360, 107 Atl. 298.

*Iowa*. *Faust v. Hosford*, 119 Ia. 97, 93 N. W. 58.

*Kansas*. *Horne v. Curtis*, 105 Kan. 371, 184 Pac. 719.

*Kentucky*. *Bement v. Ohio Valley Banking & Trust Co.*, 99 Ky. 109, 59 Am. St. Rep. 445, 35 S. W. 139.

*Louisiana*. *Woodward-Wight & Co. v. Engel Land & Lumber Co.*, 123 La. 1094, 49 So. 719.

*Nebraska*. *Bankers' Surety Co. v. Willow Springs Beverage Co.*, — Neb. —, 176 N. W. 82.

*North Carolina*. *Alpha Mills v. Watertown Steam Engine Co.*, 116 N. Car. 797, 21 S. E. 917; *Morrison v. Hartley*, 178 N. Car. 618, 101 S. E. 375.

*Oklahoma*. *Spaulding v. Enid Cemetery Association*, 76 Okla. 180, 184 Pac. 579.

*Utah*. *Larsen v. Utah Loan & Trust Co.*, 23 Utah 449, 65 Pac. 208.

*Washington*. *Stearns v. Hochbrunn*, 24 Wash. 206, 64 Pac. 165; *Daniel v. Daniel*, 106 Wash. 559, 181 Pac. 215.

<sup>5</sup>*Bromberg v. Sands*, 127 Ala. 411, 30 So. 510; *Davis v. Heynes*, 105 Kan. 75, 181 Pac. 566; *Horne v. Curtis*, 105 Kan. 371, 184 Pac. 719.

diligence is used limitations does not run until the cause of action is discovered.<sup>6</sup> This rule is, of course, modified in some states by specific statutory provisions fixing a time within which a cause of action is barred, whether the fraud is discovered or not.<sup>7</sup>

If due diligence is not used, limitations runs from the time when the cause of action could have been discovered had such diligence been used.<sup>8</sup> Constructive notice of the cause of action is sufficient to start limitations to running.<sup>9</sup> Stockholders have a right to rely on the fidelity of directors; and it is not necessary for the stockholders to use any degree of diligence in discovering such lack of fidelity.<sup>10</sup>

Concealment which will suspend the running of the statute must ordinarily be concealment by the defendant who is seeking to interpose the bar of the statute, or by some one authorized by him, or he must know of the deceit practiced upon the plaintiff. If the plaintiff is deceived by the fraud of a third person, limitations is not suspended as in favor of the defendant unless he authorized such wrongful conduct.<sup>11</sup> However, fraudulent concealment by a principal debtor which prevents the cause of action from running against him, prevents it from running against his

<sup>6</sup> Delaware. *Williams v. Beltz*, 30 Del. 360, 107 Atl. 298.

Iowa. *Cole v. Charles City National Bank*, 114 Ia. 632, 87 N. W. 671; *Faust v. Hosford*, 119 Ia. 97, 93 N. W. 58.

Nebraska. *Forsyth v. Easterday*, 63 Neb. 887, 89 N. W. 407; *Bankers' Surety Co. v. Willow Springs Beverage Co.*, — Neb. —, 176 N. W. 82.

Utah. *Larsen v. Utah Loan & Trust Co.*, 23 Utah 449, 65 Pac. 208.

Washington. *Stearns v. Hochbrunn*, 24 Wash. 206, 64 Pac. 165.

<sup>7</sup> *Row v. Row*, 185 Ky. 763, 215 S. W. 814.

<sup>8</sup> United States. *Wood v. Carpenter*, 101 U. S. 135, 25 L. ed. 807.

California. *Nicholson v. Tarpey*, 124 Cal. 442, 57 Pac. 457; *Nichols v. Moore*, 181 Cal. 131, 183 Pac. 531.

Delaware. *Williams v. Beltz*, 30 Del. 360, 107 Atl. 298.

Georgia. *Maxwell v. Walsh*, 117 Ga. 467, 43 S. E. 704.

Iowa. *Mather v. Rogers*, 99 Ia. 292, 68 N. W. 700.

Kentucky. *Clarke v. Seay* (Ky.), 51 S. W. 589.

Missouri. *Hays v. Smith*, — Mo. —, 213 S. W. 451.

Nebraska. *Bankers' Surety Co. v. Willow Springs Beverage Co.*, — Neb. —, 176 N. W. 82.

Tennessee. *Whaley v. Catlett*, 103 Tenn. 347, 53 S. W. 131.

Wisconsin. *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571.

<sup>9</sup> *Davis v. Heynes*, 105 Kan. 75, 181 Pac. 566.

<sup>10</sup> *Farwell v. Pyle-National Electric Headlight Co.*, 289 Ill. 157, 10 A. L. R. 363, 124 N. E. 449.

<sup>11</sup> *Bates v. Preble*, 151 U. S. 149, 38 L. ed. 106; *Gibson v. Henley*, 131 Cal. 6, 63 Pac. 61; *Campbell v. Campbell*, 133 Cal. 33, 65 Pac. 134; *Wood v. Williams*, 142 Ill. 269, 34 Am. St. Rep. 79, 31 N. E. 681.

surety.<sup>12</sup> Concealment implies affirmative conduct on the part of the defendant, and silence alone does not amount to concealment.<sup>13</sup>

**§ 3470. Mistake.** Under some statutes, limitations does not begin to run against a right of action which is based on mistake,<sup>1</sup> such as a right to recover money paid by mistake,<sup>2</sup> until such mistake has been discovered or would have been discovered by the use of reasonable diligence.<sup>3</sup>

**§ 3471. Disabilities limited to party specified.** If the above disabilities are by statute made exceptions to the Statute of Limitations in cases where they are suffered by the plaintiff, the courts can not by construction extend them to apply to cases where they are suffered by the defendant and not by the plaintiff.<sup>1</sup> Thus infancy,<sup>2</sup> insanity,<sup>3</sup> or coverture,<sup>4</sup> of the defendant can not affect the running of the Statute of Limitations if not provided for by statute.

**§ 3472. Dismissal of action not on merits.** Statutes specially provide in effect in most jurisdictions that if an action is brought before limitations has expired, and is dismissed without a hearing on the merits and without the plaintiff's voluntary act, a new action may be brought within a specified time thereafter even if

<sup>12</sup> *Eising v. Andrews*, 66 Conn. 58, 50 Am. St. Rep. 75, 33 Atl. 585; *McMullen v. Winfield Building & Loan Association*, 64 Kan. 298, 91 Am. St. Rep. 236, 56 L. R. A. 924, 67 Pac. 892.

<sup>13</sup> *United States. Bates v. Preble*, 151 U. S. 149, 38 L. ed. 106.

*Illinois. Wood v. Williams*, 142 Ill. 269, 34 Am. St. Rep. 79, 31 N. E. 681; *Fortune v. English*, 226 Ill. 262, 117 Am. St. Rep. 253, 12 L. R. A. (N.S.) 1005, 80 N. E. 781; *Culpeper National Bank v. Tidewater Improvement Co.*, 119 Va. 73, 89 S. E. 118.

*Indiana. Fidelity & Casualty Co. v. Jasper Veneer Mills*, 186 Ind. 566, 117 N. E. 258.

*Massachusetts. O'Brien v. McSherry*, 222 Mass. 147, 109 N. E. 904.

*Missouri. State v. Yates*, 231 Mo. 276, 132 S. W. 672.

<sup>1</sup> *West v. Fry*, 134 Ia. 675, 11 L. R. A. (N.S.) 1191, 112 N. W. 184; *Henofer v. Realty Loan & Guaranty Co.*, 178 N. Car. 584, 101 S. E. 265.

<sup>2</sup> *West v. Fry*, 134 Ia. 675, 11 L. R. A. (N.S.) 1191, 112 N. W. 184.

<sup>3</sup> This result has been reached even under a statute which provides that the action shall not be deemed to accrue until the mistake is discovered. *West v. Fry*, 134 Ia. 675, 11 L. R. A. (N.S.) 1191, 112 N. W. 184.

<sup>1</sup> *Petetin v. His Creditors*, 51 La. Ann. 1660, 26 So. 471.

<sup>2</sup> *Petetin v. His Creditors*, 51 La. Ann. 1660, 26 So. 471.

<sup>3</sup> *Grady v. Wilson*, 115 N. Car. 344, 44 Am. St. Rep. 461, 20 S. E. 518.

<sup>4</sup> *Hodges v. Darden*, 51 Miss. 199.

such time exceeds the period of limitations.<sup>1</sup> This rule applies where the complaint in the first suit does not state a cause of action,<sup>2</sup> or omits to state a jurisdictional fact which really exists,<sup>3</sup> or the first action is brought in the federal courts and is dismissed for want of jurisdiction,<sup>4</sup> or the original action was brought prematurely,<sup>5</sup> or the action is otherwise dismissed without the voluntary act of the plaintiff and without a hearing on the merits.<sup>6</sup>

The statute does not apply where the first action was dismissed voluntarily by the plaintiff,<sup>7</sup> or by the court for want of prosecution,<sup>8</sup> or on account of the negligence of the plaintiff.<sup>9</sup> The statute does not prevent limitations from running if the cause of action,<sup>10</sup> or the parties,<sup>11</sup> are different in the second cause from those in the first.

A statute which gives a length of time in which to bring a new action after reversal, does not apply to an action against a defendant in whose favor judgment was rendered by the trial court, although a judgment has been rendered against other joint defendants which has been reversed on appeal.<sup>12</sup> A statute which

<sup>1</sup>Arkansas. *Felker v. Boatman's Bank*, — Ark. —, 225 S. W. 306.

Montana. *Tietjep v. Heberlein*, 54 Mont. 486, 171 Pac. 928.

New York. *Deyo v. Hudson*, 226 N. Y. 685, 123 N. E. 851.

North Carolina. *Grimes v. Andrews*, 170 N. Car. 515, 87 S. E. 341.

Utah. *Larsen v. Utah Loan & Trust Oklahoma*. *Myers v. First Presbyterian Church*, 11 Okla. 544, 69 Pac. 874; *English v. T. H. Rogers Lumber Co.*, — Okla. —, 173 Pac. 1046.

West Virginia. *Browning v. Brown*, 85 W. Va. 46, 100 S. E. 860.

Wisconsin. *St. Croix Consolidated Copper Co. v. Guaranteed Investment Co.*, 166 Wis. 459, 166 N. W. 28.

See also, *Anderson v. Cercone*, 54 Utah 345, 180 Pac. 586.

<sup>2</sup>*Woodcock v. Bostic*, 128 N. Car. 243, 38 S. E. 881.

<sup>3</sup>*Smith v. McNeal*, 109 U. S. 426, 27 L. ed. 986.

<sup>4</sup>*Tompkins v. Pacific Mutual Life Ins. Co.*, 53 W. Va. 479, 97 Am. St. Rep. 1006, 44 S. E. 439.

<sup>5</sup>*Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22.

<sup>6</sup>*Spear v. Curtis*, 40 Vt. 59.

<sup>7</sup>*Richards v. Maryland Ins. Co.*, 12 U. S. (8 Cr.) 84, 3 L. ed. 496; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516; *English v. T. H. Rogers Lumber Co.*, — Okla. —, 173 Pac. 1046 (obiter).

See as to non-suit, *Felker v. Boatman's Bank*, — Ark. —, 225 S. W. 306.

<sup>8</sup>*Jones v. Swanson*, 40 Tenn. (3 Head.) 161.

<sup>9</sup>*Wilhemi v. Des Moines Ins. Co.*, 103 Ia. 532, 72 N. W. 685.

<sup>10</sup>*McDonald v. Jackson*, 55 Ia. 37, 7 N. W. 408; *Hughes v. Brown*, 88 Tenn. 578, 8 L. R. A. 480, 13 S. W. 286.

<sup>11</sup>*Henderson v. Griffin*, 30 U. S. (5 Pet.) 151, 8 L. ed. 79; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334, 1 So. 516; *Hughes v. Brown*, 88 Tenn. 578, 8 L. R. A. 480, 13 S. W. 286.

<sup>12</sup>*Colby v. Portland*, 89 Or. 566, 3 A. L. R. 819, 174 Pac. 1159.

gives a right of action after dismissal, is intended to extend the period of limitations, and not to shorten it.<sup>13</sup> If limitations has not run against the original cause of action, failure to bring the action within the time fixed by statute for bringing an action after dismissal of a former action, does not operate as a bar.<sup>14</sup> A statute of this sort does not apply to a contractual provision limiting the time within which an action may be brought upon such contract.<sup>15</sup>

If a specific method of avoiding limitations is provided by statute, as by leave to amend, such protection does not extend to cases in which the plaintiff institutes a new action.<sup>16</sup>

## IV

## COMMENCEMENT OF ACTION

**§ 3473. Commencement of action—Effect on limitations.** Under the statutes of limitation as ordinarily worded, actions can be brought only within certain specified periods. From this phraseology, it follows that the Statute of Limitations ceases to run against a given cause of action when an action is brought thereon,<sup>1</sup> even if final judgment is not rendered for a considerable period of time thereafter.<sup>2</sup>

<sup>13</sup> *Browning v. Browning*, 85 W. Va. 46, 100 S. E. 860.

<sup>14</sup> *Browning v. Browning*, 85 W. Va. 46, 100 S. E. 860.

<sup>15</sup> *Dahrooge v. Rochester German Insurance Co.*, 177 Mich. 442, 48 L. R. A. (N.S.) 906, 143 N. W. 608.

<sup>16</sup> *Limpert v. Stitt*, — N. J. —, 110 Atl. 832.

<sup>1</sup> *England. Alsop v. Bell*, 24 Beav. 451.

*United States. St. Romes v. Lever Steam Cotton-Press Co.*, 127 U. S. 614, 32 L. ed. 289.

*Alabama. Chambers v. Talladega Real Estate & Loan Association*, 126 Ala. 296, 28 So. 636; *Wilbourne v. Mann*, 203 Ala. 26, 81 So. 816.

*Illinois. Hacken v. Isenberg*, 288 Ill. 589, 124 N. E. 306; *Shaw v. Dorris*, 290 Ill. 196, 124 N. E. 796.

*Iowa. Lammers v. Chicago Great*

*Western Ry.*, 187 Ia. 1277, 175 N. W. 311.

*Kansas. Service v. Farmington Savings Bank*, 62 Kan. 857, 62 Pac. 670.

*Louisiana. South Arkansas Lumber Co. v. Tremont Lumber Co.*, 146 La. 62, 83 So. 378.

*Missouri. Knisely v. Leathe*, 256 Mo. 341, 166 S. W. 257.

*Nebraska. Bank v. Alter*, 61 Neb. 359, 85 N. W. 300.

*New Jersey. Forman v. Brewer*, 62 N. J. Eq. 748, 90 Am. St. Rep. 475, 48 Atl. 1012.

*Ohio. U. S. Promotion Co. v. Anderson*, 100 O. S. 58, 125 N. E. 106.

*Washington. Hayton v. Beason*, 31 Wash. 317, 71 Pac. 1018.

<sup>2</sup> *St. Romes v. Lever Steam Cotton-Press Co.*, 127 U. S. 614, 32 L. ed. 289; *Forman v. Brewer*, 62 N. J. Eq. 748, 90 Am. St. Rep. 475, 48 Atl. 1012.

Commencing a suit in equity suspends the running of the Statute of Limitations upon the same cause of action at law.<sup>3</sup> Bringing an action at law suspends the running of the Statute of Limitations as to a suit in equity,<sup>4</sup> at least if, under the local practice, such proceeding can be transferred from the law side of the court to the equity side.<sup>5</sup>

If error or appeal is prosecuted from the judgment of the trial court, limitations does not run during the pendency of such proceedings in error or appeal if the plaintiff is unable during such time to enforce the judgment rendered by the trial court.<sup>6</sup> If, however, he can proceed unless a supersedeas bond is given, limitations runs during an appeal if such bond is not given.<sup>7</sup>

The general rule that pendency of an action prevents limitations from running may, of course, be modified by statute. Under a statute providing that if execution is not issued for one year on a judgment secured by the obligee on such bond, such judgment debtors as were sureties shall be released, bringing a suit "for discovery to enforce" such bond, is not a substitute for issuing execution and does not prevent limitations from running.<sup>8</sup>

**§ 3474. What constitutes commencement of action.** In applying the general principle that bringing an action stops the running of the Statute of Limitations, the question generally presented, and under a variety of forms, is at what time a suit can be properly said, within the meaning of this rule, to be commenced. This is, of course, primarily a question of procedure and as such is not for discussion here. Some illustrative examples may, however, be given. Filing a bill,<sup>1</sup> or causing summons to issue thereon,<sup>2</sup> may be sufficient without actual service, though it is usually provided that there must be a bona fide and diligent attempt to serve such summons. If the summons is irregular but is not a nullity, limitations stops when it issues,<sup>3</sup> even though it is set aside on direct

<sup>3</sup>Woodcock v. Bostic, 128 N. Car. 243, 38 S. E. 881.

<sup>4</sup>Wilbourne v. Mann, 203 Ala. 26, 81 So. 816.

<sup>5</sup>Wilbourne v. Mann, 203 Ala. 26, 81 So. 816.

<sup>6</sup>Nevitt v. Woodburn, 160 Ill. 203, 52 Am. St. Rep. 315, 43 N. E. 385.

<sup>7</sup>Bank v. Weins, 12 Okla. 502, 71 Pac. 1073.

<sup>8</sup>Louis Sniders' Sons v. Armendt, 105 Ky. 317, 88 Am. St. Rep. 306, 49 S. W. 10.

<sup>1</sup>In equity. Cowan v. Donaldson, 95 Tenn. 322, 32 S. W. 457.

<sup>2</sup>Fairbanks v. Farwell, 141 Ill. 354, 30 N. E. 1056.

<sup>3</sup>German Insurance Co. v. Frederick, 58 Fed. 144.

attack. Issuing a summons signed in blank, is not a commencement of an action where such process is a nullity.<sup>4</sup> Delivering a writ to a sheriff, knowing that service can not be made, since the defendants are non-residents, knowing that they will have no knowledge of such writ, does not end the running of the Statute of Limitations.<sup>5</sup> If no summons issues, but defendant voluntarily enters his appearance,<sup>6</sup> as by filing a demurrer,<sup>7</sup> limitations stops when such appearance is entered. In a suit by the holder of the mortgage, against the holder of the legal title, intervention by the maker of the note to have the amount due thereon determined stops the running of the statute.<sup>8</sup> If a defendant may have a party brought in to warrant his claim, such citation to warrant suspends the running of the period of limitations.<sup>9</sup> A writ of citation is not an "action" within this provision.<sup>10</sup>

To suspend the running of the statute it is not necessary that the creditor should be the plaintiff in the action. If he is made a party to the action, and sets up his claim therein in a proper manner, whether by formal pleading or not, the statute stops running. Thus filing a complaint against an insolvent corporation and showing claims,<sup>11</sup> or presenting claims and commencing an action to sequester the property of the corporation,<sup>12</sup> or presenting a judgment to the probate court for classification,<sup>13</sup> or filing a foreclosure suit in which a deficiency judgment is asked against defendants who are personally liable on the mortgage notes,<sup>14</sup> each stop the running of the statute.

Where suit can not be brought against a state, or can be brought only in a specified manner, and the state has provided for a method of presenting claims, such presentation stops limitations.<sup>15</sup> A claim against the United States, presented to the treasury before

<sup>4</sup>Johnson v. Turnell, 113 Wis. 468, 89 N. W. 515.

<sup>5</sup>Cushing v. Brooklyn Trust Co., — Mass. —, 126 N. W. 429.

<sup>6</sup>Hotchkiss v. Aukermann 65 Neb. 177, 90 N. W. 949; Reliance Trust Co. v. Atherton, 67 Neb. 305, 93 N. W. 150.

<sup>7</sup>Hawkins v. Donnerberg, 40 Or. 97, 66 Pac. 691, 66 Pac. 908.

<sup>8</sup>Bank v. Alter, 61 Neb. 359, 85 N. W. 300.

<sup>9</sup>South Arkansas Lumber Co. v. Tremont Lumber Co., 146 La. 62, 83 So. 378.

<sup>10</sup>McClelland v. State, — Ohio —, 127 N. E. 409.

<sup>11</sup>London & North West American, Mortgage Co. v. St. Paul Park Improvement Co., 84 Minn. 144, 86 N. W. 872.

<sup>12</sup>Potts v. Park Association, 84 Minn. 217, 87 N. W. 604.

<sup>13</sup>McFaul v. Haley, 166 Mo. 56, 65 S. W. 995.

<sup>14</sup>Patrick v. National Bank of Commerce, 63 Neb. 200, 88 N. W. 183.

<sup>15</sup>Coxe v. State, 144 N. Y. 396, 39 N. E. 400.

the end of the period of limitations, and transmitted to the court of claims after such period, is not barred by limitations.<sup>16</sup>

**§ 3475. Creditors' bills.** Whether filing a creditor's bill suspends the running of the Statute of Limitations as to creditors who are not made parties to the suit, depends on whether the suit is brought for the benefit of such other creditors or not, and whether or not they become parties thereto. If the creditor who is not made a party is permitted to bring a separate suit on his own account, and he does not come into the original suit but elects to bring such separate suit, the bringing of the first suit by the other creditor does not suspend the running of the Statute of Limitations.<sup>1</sup> If the suit is brought for the benefit of one creditor, and if the other creditors are free to bring separate suits, bringing such suit does not suspend the statute as to the other creditors.<sup>2</sup> If the suit is brought for the benefit of one creditor, and is subsequently enlarged by decree, so as to permit other creditors to come in, and certain other creditors come in thereafter, limitations is suspended at the date of the decree which thus enlarged the purpose of the suit.<sup>3</sup> If the suit is brought for the benefit of all of the creditors, limitations is suspended at the time that such suit is brought,<sup>4</sup> especially if the other creditors are not permitted to bring separate suits.

**§ 3476. Commencement of action—Effect on counterclaim and set-off.** Limitations is generally held to stop running against a counterclaim when the suit is commenced in which such counterclaim is pleaded,<sup>1</sup> though some courts limit this rule to the use of

<sup>16</sup> *United States v. New York*, 160 U. S. 598, 40 L. ed. 551.

<sup>1</sup> *Callaway's Administrator v. Saunders*, 99 Va. 350, 38 S. E. 182.

<sup>2</sup> *Patterson v. Peaslee-Gaulbert Co.*, 174 Ky. 47, L. R. A. 1917D, 882, 191 S. W. 670.

<sup>3</sup> *Repass v. Moore*, 96 Va. 147, 30 S. E. 458; *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561.

<sup>4</sup> *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864; *Barrick v. Gifford*, 47 O. S. 180, 21 Am. St. Rep. 798, 24 N. E. 259; *Dunne v. Portland Street Ry.*, 40 Or. 295, 65 Pac. 1052.

<sup>1</sup> *California. McDougald v. Hulet*, 132 Cal. 154, 64 Pac. 278.

*Louisiana. Lewy v. Wilkinson*, 135 La. 105, 64 So. 1003.

*North Carolina. Norfolk & Southern Ry. v. Dill*, 171 N. Car. 176, 88 S. E. 144.

*Ohio. McEwing v. James*, 36 O. S. 152.

*South Carolina. Lenhardt v. French*, 57 S. Car. 493, 35 S. E. 761.

*Tennessee. Lewis v. Turnley*, 97 Tenn. 197, 36 S. W. 872.

For the effect of the statute of limitations on counterclaim and set-off, see § 3426.

such set-off as a defense solely.<sup>2</sup> Some apply the rule even where the set-off is used as a basis for affirmative relief,<sup>3</sup> and some hold that limitations runs against a set-off until it is set up in a cross-petition.<sup>4</sup>

**§ 3477. Amendment—General principles.** If the plaintiff's bill or complaint is filed before the period of limitations has expired, and an amendment thereto is filed after the period of limitations has expired, the question arises whether the amendment dates back to the original pleading for the purpose of the Statute of Limitations. This depends on whether the amendment sets up the same facts and makes out the same cause of action as the original pleading or not. If it does, it dates back to the original pleading,<sup>1</sup> even if it gives a more accurate description of the written instrument on which the action is based,<sup>2</sup> or seeks different relief.<sup>3</sup> If a mortgagee brings an action at law against a grantee who has assumed a mortgage debt and fails because in that jurisdiction, such relief is held to be equitable, he may amend even after limitations has run and seek subrogation,<sup>4</sup> such liberty of amendment being otherwise proper. A suit to foreclose a mortgage has been held to stop limitations on a note secured thereby,<sup>5</sup> and if a complaint is filed before limitations has run, based on a note, an amendment filed after limitations has run which sets up a mortgage securing such note, dates back to the original complaint.<sup>6</sup> An amendment to a suit on a note whereby the holder is substituted for the payee has been held not to be a new cause of action within the application of the Statute of Limitations.<sup>7</sup> An amendment changing the theory of defendant's liability from individual

<sup>2</sup> Ware v. Howly, 68 Ia. 633, 27 N. W. 789.

<sup>3</sup> Steere v. Brownell, 124 Ill. 27, 15 N. E. 28.

<sup>4</sup> Holton v. Jackson, 184 Ky. 559, 212 S. W. 587; Rowan v. Chenoweth, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544; Boyd v. Beebe, 64 W. Va. 216, 17 L. R. A. (N.S.) 660, 61 S. E. 304.

<sup>1</sup> Brazil v. Silva, 181 Cal. 470, 185 Pac. 174; Shaw v. Dorris, 290 Ill. 196, 124 N. E. 796; Lammers v. Chicago Great Western Ry., 187 Ia. 1277, 175

N. W. 311; Easter v. Riley, 79 Miss. 625, 31 So. 210.

<sup>2</sup> Chambers v. Talladega Real Estate & Loan Association, 126 Ala. 296, 28 So. 636.

<sup>3</sup> Kent v. Savings Union, 130 Cal. 401, 62 Pac. 620.

<sup>4</sup> Woodcock v. Bostic, 128 N. Car. 243, 38 S. E. 881.

<sup>5</sup> Harris v. Schneider Co. (Neb.), 91 N. W. 250.

<sup>6</sup> Frost v. Witter, 132 Cal. 421, 84 Am. St. Rep. 53, 64 Pac. 705.

<sup>7</sup> Service v. Savings Bank, 62 Kan. 857, 62 Pac. 670.

liability to liability as an individual doing business under a partnership name does not set up a new cause of action.<sup>8</sup>

An amendment which sets up a new cause of action does not date back to the time of filing the original pleading for the purposes of limitations.<sup>9</sup> If the original complaint sets up facts which constitute an action for money had and received, an amendment which alleges goods sold and delivered does not relate back to the filing of the original complaint.<sup>10</sup> If the complaint sets up a contract and the performance thereof, an amendment which sets up a claim for materials and labor does not relate back.<sup>11</sup> If the original pleading filed before limitations has run sets up a cause of action based on an express contract to furnish water sufficient to protect property from fire, an amendment filed after limitations has run which abandons the express contract and sets up facts to show a legal duty to furnish such water is filed too late.<sup>12</sup> In an action brought upon a contract after the court held that the contract was within the Statute of Frauds, an amendment was filed to enable the plaintiff to recover in *assumpsit*. Such amendment was held not to relate back to the first pleading.<sup>13</sup> If the original pleading alleges a loan to defendant, an amendment which abandons the theory of a loan and alleges that money was obtained by defendant's agent through forgery, and that such money came to defendant's hands, does not date back to the time of filing the original pleading.<sup>14</sup> In an action which was brought on a note as an unconditional promise, an amendment which sets up such note, together with the contract under which it was given, does not relate back.<sup>15</sup> If the new promise made after limitations has run

<sup>8</sup> *Padden v. Clark*, 124 Ia. 94, 99 N. W. 152.

<sup>9</sup> *Alabama*. *Nelson v. First National Bank*, 139 Ala. 578, 101 Am. St. Rep. 52, 36 So. 707.

*California*. *Campbell v. Campbell*, 133 Cal. 33, 65 Pac. 134.

*Missouri*. *St. Charles Savings Bank v. Thompson*, — Mo. —, 223 S. W. 734.

*Texas*. *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483; *Phoenix Lumber Co. v. Houston Water Co.*, 94 Tex. 456, 61 S. W. 707.

*Wisconsin*. *Boyd v. Fire Association*, 116 Wis. 155, 96 Am. St. Rep. 948, 61 L. R. A. 918, 90 N. W. 1086, 94 N. W.

171; *Meinshausen v. Gettelman, Brewing Co.*, 133 Wis. 95, 13 L. R. A. (N.S.) 250, 113 N. W. 408.

<sup>10</sup> *Nelson v. First National Bank*, 139 Ala. 578, 101 Am. St. Rep. 52, 36 So. 707.

<sup>11</sup> *Meinshausen v. Gettelman Brewing Co.*, 133 Wis. 95, 13 L. R. A. (N.S.) 250, 113 N. W. 408.

<sup>12</sup> *Phoenix Lumber Co. v. Houston Water Co.*, 94 Tex. 456, 61 S. W. 707.

<sup>13</sup> *Hamilton v. Thurston*, 94 Md. 253, 51 Atl. 42.

<sup>14</sup> *Campbell v. Campbell*, 133 Cal. 33, 65 Pac. 134.

<sup>15</sup> *St. Charles Savings Bank v. Thompson*, — Mo. —, 223 S. W. 734.

is looked on as the cause of action, a pleading declaring on the original cause of action does not stop limitations from running against the new promise, and an amendment filed after limitations has run is filed too late.<sup>16</sup> If the statute permits an amendment as a means of preserving the rights of the defendant, against the Statute of Limitations, he can not protect such rights by dismissing such action and instituting a new one.<sup>17</sup>

**§ 3478. Amendment—New parties.** If an amendment is made so as to bring a new party into the proceeding, limitations runs against such party from the date of such amendment,<sup>1</sup> and not from the date at which the answer is filed.<sup>2</sup> If the complaint is amended so as to bring in a new plaintiff, the amendment has no effect upon the right of the original plaintiff; and as to him, limitations stops with the commencement of the action.<sup>3</sup> As to the new plaintiff, who has been brought in, it would seem that limitations ought to run, as to him, until he is made a party to the proceeding, at least if he does not claim under the original plaintiff, or is not merely a formal party. This view has been taken by some courts.<sup>4</sup> In a number of cases, however, it has been held that the commencement of the original action stops the running of limitations as against all plaintiffs who may be brought in thereafter.<sup>5</sup> This result may be justified if the rights of the parties are joint;<sup>6</sup> and if the jurisdiction is one in which no parties who have joint interests are barred, until all are barred.<sup>7</sup> In other

<sup>16</sup> Howard v. Windom, 86 Tex. 560, 26 S. W. 483.

<sup>17</sup> Limpert v. Stitt, — N. J. —, 110 Atl. 832.

<sup>1</sup> United States. Miller v. McIntyre, 31 U. S. (6 Pet.) 61, 8 L. ed. 320.

Illinois. Hacken v. Isenberg, 288 Ill. 589, 124 N. E. 306.

Kansas. Garrity v. State Board of Administration, 99 Kan. 696, 162 Pac. 1167.

Oklahoma. Hutchison v. Brown, — Okla. —, 167 Pac. 624.

Tennessee. Niehaus v. C. B. Barker Construction Co., 135 Tenn. 382, 186 S. W. 461.

Wisconsin. Webster v. Pierce, 108 Wis. 407, 83 N. W. 938.

<sup>2</sup> Hacken v. Isenberg, 288 Ill. 589, 124 N. E. 306.

<sup>3</sup> East Line & Red River Ry. v. Culberson, 72 Tex. 375, 13 Am. St. Rep. 805, 3 L. R. A. 567, 10 S. W. 706.

<sup>4</sup> Todd v. Louisville & Nashville Ry., 68 Fla. 205, 67 So. 84; East Line & Red River Ry. v. Culberson, 72 Tex. 375, 13 Am. St. Rep. 805, 3 L. R. A. 567, 10 S. W. 706.

<sup>5</sup> Brown v. Fullerton, 13 M. & W. 556; Archer v. Bowling, 166 Ky. 139, 179 S. W. 15; Orchard v. Wright-Dalton-Bell-Anchor-Store Co., — Mo.—, 107 S. W. 42; Bradford v. Andrews, 20 O. S. 208, 5 Am. Rep. 645.

<sup>6</sup> Bradford v. Andrews, 20 O. S. 208, 5 Am. Rep. 645.

<sup>7</sup> See § 3426.

cases, no reason appears for prolonging the period of limitations, in favor of a plaintiff who is not a party to the original action.

## V

## NEW PROMISE

**§ 3479. New promise.** The statute of limitations does not operate as a discharge of the debt, but as a bar to any action thereon. The original debt, while not enforceable in a direct action, has still some effect in law. It is a consideration sufficient to support a promise based thereon, either to pay such debt,<sup>1</sup> or to do some other thing in discharge of such liability. Accordingly, a promise made after the period of limitations has elapsed, will create a legal and enforceable liability on the part of the promisor.<sup>2</sup>

The original statutes made no reference to the effect of a promise to pay a debt which had once been barred by statute. The doctrine upon this point was therefore one evolved by the courts, and is an example of judicial legislation. Such statutes as have been passed upon the subject are generally statutes designed to restrict or modify the common-law rule which the courts had been applying to such cases.

**§ 3480. Causes of action affected by new promise.** The doctrine of the effect of a new promise as a revival of the original cause of action, has no application to actions *ex delicto*.<sup>1</sup> Whether a judgment can be revived by a new promise depends, in part, on the theory as to the nature of the judgment which is in force in that jurisdiction. For some purposes, a judgment is said to be a contract of record;<sup>2</sup> but it is not founded upon agreement,<sup>3</sup> and

<sup>1</sup> *Perkins v. Cheney*, 114 Mich. 567, 68 Am. St. Rep. 495, 72 N. W. 595; *Koons v. Vauconsant*, 129 Mich. 260, 95 Am. St. Rep. 438, 88 N. W. 630; *Lang v. Gage*, 66 N. H. 624, 32 Atl. 155; *Richard's Estate*, 185 Pa. St. 155, 39 Atl. 1117; *Suber v. Richards*, 61 S. Car. 393, 39 S. E. 540.

<sup>2</sup> *Senninger v. Rowley*, 138 Ia. 617, 18 L. R. A. (N.S.) 223, 116 N. W. 695; *Doran v. Doran*, 145 Ia. 122, 25 L. R. A. (N.S.) 805, 123 N. W. 996; *Maize v. Bradley* (Ky.), 64 S. W. 655; *Big Dia-*

*mond Milling Co. v. Chicago, Milwaukee & St. Paul Ry.*, 142 Minn. 181, 8 A. L. R. 1254, 171 N. W. 799; *Hollandsworth v. Squires* (Tenn. Ch. App.), 56 S. W. 1044.

<sup>1</sup> *Short v. McCarthy*, 3 Barn & Ald. 626; *Nelson v. Petterson*, 229 Ill. 240, 13 L. R. A. (N.S.) 912, 82 N. E. 229; *Vickers v. Stoneman*, 73 Mich. 419, 41 N. W. 495; *Belcher v. Tacoma Eastern Ry.*, 90 Wash. 34, 168 Pac. 782.

<sup>2</sup> See § 1134.

<sup>3</sup> See § 1135.

for many purposes it is said that a judgment is not to be classed with the contract.<sup>4</sup> By the weight of authority, a judgment is not a contract, within the meaning of the rule, that a new promise may remove the bar of the statute;<sup>5</sup> but in some jurisdictions a judgment is classed as a contract for this purpose.<sup>6</sup>

A promise to pay a debt barred by limitations revives a mortgage given to secure it,<sup>7</sup> even as against intervening lien creditors.<sup>8</sup>

**§ 3481. Nature of new promise—General principles.** Like other promises, a promise which revives a debt barred by limitations may be express or implied. The doctrine of implied contract, whereby a barred debt is revived, is complicated with another question, which is a survival of the original dispute with reference to the force and effect of the Statute of Limitations. The Statute of Limitations was at one time looked upon as a statute of presumption. When such view obtained any acknowledgment which would rebut the presumption of payment would revive a debt which would otherwise be barred by the Statute of Limitations. As we have seen, however, the present theory of the Statute of Limitations is that it is a statute of repose, and not a statute of presumption. The reason, therefore, which underlies many of the earlier decisions that certain forms of acknowledgment were sufficient, has entirely disappeared. The difficulty found in modern cases on this point arises out of the willingness of some courts to follow the earlier precedents, although the reason for such holdings has ceased, while other courts decline to follow such precedents. It is not necessary that the promise to pay should be made in express terms. Any language which shows such intent is sufficient,<sup>1</sup> such as a promise, "I will see that you get paid—as much as you were offered."<sup>2</sup>

<sup>4</sup> See §§ 1147 et seq.

<sup>5</sup> Niblack v. Goodman, 67 Ind. 174; Olson v. Dahl, 99 Minn. 433, 8 L. R. A. (N.S.) 444, 109 N. W. 1001; Berkson v. Cox, 73 Miss. 339, 55 Am. St. Rep. 539, 18 So. 934.

<sup>6</sup> Spilde v. Johnson, 132 Ia. 484, 8 L. R. A. (N.S.) 439, 109 N. W. 1023; Olcott v. Scales, 3 Vt. 173, 21 Am. Dec. 585.

<sup>7</sup> Robinson v. Basso's Administrator, 100 Va. 190, 40 S. E. 660.

<sup>8</sup> Robinson v. Basso's Administrator, 100 Va. 190, 40 S. E. 660.

<sup>1</sup> Abdill v. Abdill, 292 Ill. 231, 126 N. E. 543; Keener v. Crull, 19 Ill. 189; Horner v. Starkey, 27 Ill. 13; Sennott v. Horner, 30 Ill. 429; Wooters v. King, 54 Ill. 343; O'Hara v. Murphy, 196 Ill. 599, 63 N. E. 1081.

See § 3483.

<sup>2</sup> Abdill v. Abdill, 292 Ill. 231, 126 N. E. 543.

**§ 3482. Identification of debt.** In order to revive a barred debt, the new promise must refer to it in such a way as to identify it.<sup>1</sup> Such reference must be plain and unmistakable.<sup>2</sup> A statement "you need not worry about it, I will see to it and make it all right," if the letter to which this is an answer is not shown,<sup>3</sup> or a promise to pay the amount shown by a certain statement, which the debtor has in his possession, but which the witnesses do not see,<sup>4</sup> have been held to be insufficient.

If there are several different claims existing between the creditor and the debtor, a new promise to be enforceable, must indicate with reasonable certainty to what claim the debtor refers.<sup>5</sup> A promise to pay as soon as possible, and the like, which may refer to one of a number of drafts,<sup>6</sup> or to any one of several claims, one of which is a note barred by limitations,<sup>7</sup> is insufficient. A promise which may refer, either to an account already barred or to one

<sup>1</sup> **Colorado.** *Sears v. Hicklin*, 3 Colo. App. 331, 33 Pac. 137.

**Florida.** *Woodham v. Hill*, 78 Fla. 517, 83 So. 717.

**Iowa.** *Stout v. Marshall*, 75 Ia. 498, 39 N. W. 808.

**Minnesota.** *Russell v. Davis*, 51 Minn. 482, 53 N. W. 766; *Anderson v. Nystrom*, 103 Minn. 168, 123 Am. St. Rep. 320, 13 L. R. A. (N.S.) 1141, 114 N. W. 742; *Big Diamond Milling Co. v. Chicago, Milwaukee & St. Paul Ry.*, 142 Minn. 181, 8 A. L. R. 1254, 171 N. W. 790.

**Nebraska.** *Ashby v. Washburn*, 23 Neb. 571, 37 N. W. 267.

**Pennsylvania.** *Hancock v. Melloy*, 189 Pa. St. 569, 42 Atl. 292; *Markee v. Reyburn*, 258 Pa. St. 277, 101 Atl. 993.

**Texas.** *Cotulla v. Urbahn*, 104 Tex. 208, 34 L. R. A. (N.S.) 345, 135 S. W. 1159.

**Virginia.** *Cole's Executor v. Martin*, 99 Va. 223, 37 S. E. 907.

<sup>2</sup> **Florida.** *Woodham v. Hill*, 78 Fla. 517, 83 So. 717.

**Georgia.** *Paille v. Plant*, 109 Ga. 247, 34 S. E. 274.

**Minnesota.** *Russell v. Davis*, 51 Minn. 482, 53 N. W. 766; *Anderson v.*

*Nystrom*, 103 Minn. 168, 123 Am. St. Rep. 320, 13 L. R. A. (N.S.) 1141, 114 N. W. 742.

**Pennsylvania.** *Markee v. Reyburn*, 258 Pa. St. 277, 101 Atl. 993.

**Texas.** *Cotulla v. Urbahn*, 104 Tex. 208, 34 L. R. A. (N.S.) 345, 135 S. W. 1159.

<sup>3</sup> *Bakey v. Moeller*, 185 Ia. 946, 171 N. W. 289.

<sup>4</sup> *Markee v. Reyburn*, 258 Pa. St. 277, 101 Atl. 993.

<sup>5</sup> **Arkansas.** *Opp v. Wack*, 52 Ark. 288, 5 L. R. A. 743, 12 S. W. 565.

**Colorado.** *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093.

**Connecticut.** *Buckingham v. Smith*, 23 Conn. 453.

**Minnesota.** *Smith v. Moulton*, 12 Minn. 352.

**Texas.** *Cotulla v. Urbahn*, 104 Tex. 208, 34 L. R. A. (N.S.) 345, 135 S. W. 1159.

**Virginia.** *Cole's Executor v. Martin*, 99 Va. 223, 37 S. E. 907.

<sup>6</sup> *Opp v. Wack*, 52 Ark. 288, 5 L. R. A. 743, 12 S. W. 565.

<sup>7</sup> *Cotulla v. Urbahn*, 104 Tex. 208, 34 L. R. A. (N.S.) 345, 135 S. W. 1159.

not yet barred, is not sufficient to remove the bar as to the former account.<sup>8</sup>

According to some authorities, a promise which in fact is merely a promise to pay what may prove to be due, if anything, is not a promise sufficient to revive a debt.<sup>9</sup> A statement, "Whatever is due is ready, as it has been for seven years, whenever I can safely pay either you or" another party named, shows such doubt as to the amount due, and to whom it is due, that it does not stop the running of the statute.<sup>10</sup> A promise, "I'll pay you all I owe you," is not a sufficient acknowledgment.<sup>11</sup> A was liable to B on six different bills of exchange. A promise in writing "to work it off as soon as possible," without identifying the debt further, is not sufficient.<sup>12</sup> If a written promise to pay a debt refers to some specific liability, without stating the amount due, parol evidence is admissible to identify the debt in question, and to show how much is due thereon.<sup>13</sup> It is a question of fact whether a new promise refers to a debt barred by limitations or not.<sup>14</sup>

If only one debt exists between the parties, a promise by the debtor to pay all that he owes, has been held sufficient without further identification of the debt.<sup>15</sup> If a debtor promises to pay all the notes and bills held by the creditor against him at the date of such promise "as shown by the same and in the manner shown by the same," and the debtor admits that such bills are just and unpaid, the amount thereof and the items thereof may be shown by extrinsic evidence.<sup>16</sup>

In some cases the courts are more willing to recognize and enforce a promise which does not describe the debt with as accu-

<sup>8</sup> *Cole's Executor v. Martin*, 99 Va. 223, 37 S. E. 907.

See to the same effect, *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093.

<sup>9</sup> *Ward v. Jack*, 172 Pa. St. 416, 51 Am. St. Rep. 744, 33 Atl. 577; *Liskey v. Paul*, 100 Va. 764, 42 S. E. 875.

<sup>10</sup> *Braithwaite v. Harvey*, 14 Mont. 208, 43 Am. St. Rep. 625, 27 L. R. A. 101, 36 Pac. 38.

<sup>11</sup> *Miller v. Baschore*, 83 Pa. St. 356, 24 Am. Rep. 187.

<sup>12</sup> *Opp v. Wack*, 52 Ark. 288, 5 L. R. A. 743, 12 S. W. 565.

<sup>13</sup> *Miller v. Beardsley*, 81 Ia. 720, 45 N. W. 756; *First National Bank v. Woodman*, 93 Ia. 668, 57 Am. St. Rep.

287, 62 N. W. 28; *McConaughy v. Wilsey*, 115 Ia. 589, 88 N. W. 1101; *Senninger v. Rowley*, 138 Ia. 617, 18 L. R. A. (N.S.) 223, 116 N. W. 696; *Fitzgerald v. Flanagan*, 155 Ia. 217, 135 N. W. 738; *Bakey v. Moeller*, 185 Ia. 946, 171 N. W. 289; *Patterson v. Neuer*, 165 Pa. St. 66, 30 Atl. 748.

<sup>14</sup> *Beale v. Nind*, 4 B. & Ald. 568; *Whitney v. Bigelow*, 21 Mass. (4 Pick.) 110; *Shaw v. Newell*, 2 R. I. 264; *Wilcox v. Clarke*, 18 R. I. 324, 27 Atl. 219.

<sup>15</sup> *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081.

<sup>16</sup> *Pollak v. Billing*, 131 Ala. 519, 32 So. 639.

rate detail as it might. It has been said that a description which would be sufficient for a bond is sufficient for a promise of this sort.<sup>17</sup> Such promise has been given effect, although the amount of the debt is not stated.<sup>18</sup> A promise to pay "every cent I owe,"<sup>19</sup> or a promise to the public to refund the difference between the legal rate and the amount actually charged for freight, while litigation to determine the validity of the statutory rate was pending,<sup>20</sup> has been held to be sufficient.

**§ 3483. Promise must show intention to pay debt.** The language used by the debtor must be such as to show his intention to pay the debt referred to.<sup>1</sup> If the debtor says that he is unable or unwilling to pay a debt, the fact that he does not deny the validity of the debt does not, according to the weight of authority, constitute an implied promise to pay it.<sup>2</sup> The statement, "I have done my best to raise some money, but I can not do it now. \* \* \* But some money we will send you but not all because we must live first," has been held not to waive the bar of the statute.<sup>3</sup> A statement by the debtor that he would pay the debt if he were able, is not sufficient.<sup>4</sup> A statement by a debtor that he is trying

<sup>17</sup> *Big Diamond Milling Co. v. Chicago, Milwaukee & St. Paul Ry.*, 142 Minn. 181, 8 A. L. R. 1254, 171 N. W. 799.

<sup>18</sup> *Arkansas. Conway v. Reyburn*, 22 Ark. 200.

*Illinois. O'Hara v. Murphy*, 196 Ill. 509, 63 N. E. 1081.

*Iowa. First National Bank v. Woodman*, 93 Ia. 668, 57 Am. St. Rep. 287, 62 N. W. 28.

*Minnesota. Big Diamond Milling Co. v. Chicago, Milwaukee & St. Paul Ry.*, 142 Minn. 181, 8 A. L. R. 1254, 171 N. W. 799.

*New York. Kincaid v. Archibald*, 73 N. Y. 180.

*West Virginia. Abrahams v. Swann*, 18 W. Va. 274, 41 Am. Rep. 692.

<sup>19</sup> *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081.

<sup>20</sup> *Big Diamond Milling Co. v. Chicago, Milwaukee & St. Paul Ry.*, 142 Minn. 181, 8 A. L. R. 1254, 171 N. W. 799.

<sup>1</sup> *Florida. Woodham v. Hill*, 78 Fla. 517, 83 So. 717.

*Illinois. Ennis v. Car Co.*, 165 Ill. 161, 46 N. E. 439.

*Maine. Johnston v. Hussey*, 92 Me. 92, 42 Atl. 312; *Gray v. Day*, 100 Me. 492, 43 L. R. A. (N.S.) 535, 84 Atl. 1073.

*Michigan. Throop v. Russell*, 145 Mich. 482, 116 Am. St. Rep. 314, 108 N. W. 1013.

*North Carolina. Brown v. Atlantic Coast Line Ry.*, 147 N. Car. 217, 16 L. R. A. (N.S.) 645, 60 S. E. 985.

*Ohio. Goodrich v. Case*, 68 O. S. 187, 67 N. E. 295.

<sup>2</sup> *Wald v. Arnold*, 168 Mass. 134, 46 N. E. 419; *Manning v. Wheeler*, 13 N. H. 486; *Pierce v. Seymour*, 52 Wis. 272, 38 Am. Rep. 737, 9 N. W. 71.

<sup>3</sup> *Krueger v. Kreuger*, 76 Tex. 178, 7 L. R. A. 72, 12 S. W. 1004.

<sup>4</sup> *Manning v. Wheeler*, 13 N. H. 486.

to collect a claim due to himself and that he can do no more than pay his creditor when he collects such debt is not sufficient.<sup>5</sup> Statements "I know we are owing you and I am anxious it should be settled," and "It is not our wish to keep from you whatever may be your just due," are insufficient as a new promise if coupled with a statement of financial inability to pay.<sup>6</sup> In opposition to this view it has been held that a debtor's statement, "I can not pay it now as I have two members of my family now to support," is an implied promise to pay the debt some time in the future.<sup>7</sup>

An unqualified admission of the existence of the debt as a valid and subsisting liability is generally held to imply a promise to pay it.<sup>8</sup> The debtor's request that the creditor should not bring an action, is said not to prevent limitations from operating as a bar, if there is no promise to pay the debt, or contract not to make use of the statute.<sup>9</sup> A statement by the debtor that he had not intended to pay anything at present and had used his money for other purposes is said to be sufficient to prevent the Statute of Limitations from running.<sup>10</sup>

**§ 3484. Conditional promises.** A conditional promise to pay excludes the idea of the intention to assume a further liability if such condition is not performed; and accordingly such offer does not suspend the operation of the Statute of Limitations if it is not accepted by the creditor and if such condition is not performed.<sup>1</sup> A statement by the debtor that he will not take advantage of the statute on condition that the creditor surrender the

<sup>5</sup> *Cook v. Farley*, 1 Neb. (Unofficial) 540, 95 N. W. 683.

<sup>6</sup> *Bell v. Morrison*, 26 U. S. (1 Pet.) 351, 7 L. ed. 174.

<sup>7</sup> *Beeler v. Clarke*, 90 Md. 221, 78 Am. St. Rep. 439, 44 Atl. 1038.

<sup>8</sup> *United States. Bell v. Morrison*, 26 U. S. (1 Pet.) 351, 7 L. ed. 174.

*Delaware. Palmer v. Lodge*, 30 Del. 537, 109 Atl. 125.

*Illinois. Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595.

*Iowa. Senninger v. Rowley*, 138 Ia. 617, 18 L. R. A. (N.S.) 223, 116 N. W. 695; *Bakey v. Moeller*, 185 Ia. 946, 171 N. W. 289.

*Maine. Shaw v. Oliver*, 112 Me. 512, 92 Atl. 652.

*Maryland. Hemsley v. McKim*, 119 Md. 431, 87 Atl. 506.

*Massachusetts. Custy v. Donlan*, 159 Mass. 245, 38 Am. St. Rep. 419, 34 N. E. 360.

<sup>9</sup> *Brown v. Atlantic Coast Line Ry.*, 147 N. Car. 217, 16 L. R. A. (N.S.) 645, 60 S. E. 985.

<sup>10</sup> *Senninger v. Rowley*, 138 Ia. 617, 18 L. R. A. (N.S.) 223, 116 N. W. 695.

<sup>1</sup> *Kentucky. Marcum v. Terry*, 146 Ky. 145, 37 L. R. A. (N.S.) 885, 142 S. W. 209; *Farrell v. Records*, 187 Ky. 468, 12 A. L. R. 541, 219 S. W. 792.

*Maine. Gray v. Day*, 109 Me. 402, 43 L. R. A. (N.S.) 535, 84 Atl. 1073.

*Massachusetts. Gill v. Gibson*, 225 Mass. 226, 114 N. E. 198.

debtor's note,<sup>2</sup> or that the creditor accept a new note,<sup>3</sup> does not prevent the bar of the statute if such condition is not performed. An offer to pay in something other than money, does not affect the operation of the statute, if such offer is not accepted.<sup>4</sup> A conditional promise may be enforced on performance of the condition.<sup>5</sup>

**§ 3485. Promise to pay when able.** According to the weight of authority, the promise to pay when he can, is not a sufficient promise to revive a barred debt.<sup>1</sup> Where a debtor wrote, "It will be impossible to pay you anything until after the first of June. I will send you a check for something then. Hope to be able to clear your account quick," such statement was not sufficient to revive the debt.<sup>2</sup> A promise to pay whatever the debtor is able to pay is insufficient.<sup>3</sup> A promise to "pay him something on account in a few days,"<sup>4</sup> has been held sufficient.

A promise to pay when able may, however, be enforceable as a new contract on which the debtor is liable when he becomes able.<sup>5</sup> An action can not be maintained against him until he is in fact able to pay.<sup>6</sup> The statute runs against such new promise from the

**Michigan.** Throop v. Russell, 145 Mich. 482, 116 Am. St. Rep. 314, 108 N. W. 1013.

**Oregon.** Koop v. Cook, 67 Or. 93, 135 Pac. 317.

**Pennsylvania.** Maniatakis' Estate, 258 Pa. St. 11, L. R. A. 1918A, 900, 101 Atl. 920.

<sup>2</sup> Throop v. Russell, 145 Mich. 482, 116 Am. St. Rep. 314, 108 N. W. 1013.

<sup>3</sup> Gray v. Day, 109 Me. 492, 43 L. R. A. (N. S.) 535, 84 Atl. 1073.

<sup>4</sup> Marcum v. Terry, 146 Ky. 145, 37 L. R. A. (N. S.) 885, 142 S. W. 209 (payment in tax receipt).

<sup>5</sup> Big Diamond Milling Co. v. Chicago, Milwaukee & St. Paul Ry., 142 Minn. 181, 8 A. L. R. 1254, 171 N. W. 799.

<sup>1</sup> Colorado. Richardson v. Bricker, 7 Colo. 58, 49 Am. Rep. 344, 1 Pac. 433.

**Michigan.** Halladay v. Weeks, 127 Mich. 363, 89 Am. St. Rep. 478, 86 N. W. 799.

**Nevada.** Wilcox v. Williams, 5 Nev. 206.

**New Jersey.** Parker v. Butterworth, 46 N. J. L. 244, 50 Am. Rep. 407.

**North Carolina.** Cooper v. Jones, 128 N. Car. 40, 38 S. E. 28.

**Pennsylvania.** Maniatakis' Estate, 258 Pa. St. 11, L. R. A. 1918A, 900, 101 Atl. 920.

<sup>2</sup> Lambert v. Doyle, 117 Ga. 81, 43 S. E. 416.

<sup>3</sup> Nelson v. Hanson, 92 Ia. 356, 54 Am. St. Rep. 568, 60 N. W. 655; Boynton v. Moulton, 159 Mass. 248, 34 N. E. 361.

<sup>4</sup> Wilcox v. Clarke, 18 R. I. 324, 27 Atl. 219.

<sup>5</sup> St. Louis, Belleville & Southern Ry. v. Rice, 170 Ill. 354, 48 N. E. 974; affirming, 69 Ill. App. 244; Jenckes v. Rice, 119 Ia. 451, 93 N. W. 384; Mumford v. Freeman, 49 Mass. (8 Met.) 432, 41 Am. Dec. 532; Scott v. Thornton, 104 Tenn. 547, 58 S. W. 236; Gardenhire v. Rogers (Tenn. Ch. App.), 60 S. W. 616.

<sup>6</sup> Rodgers v. Byers, 127 Cal. 528, 60 Pac. 42.

time when the debtor becomes able to pay and not from the time that he makes a new promise.<sup>1</sup> A statement by a debtor that he has no money at that time, and will not have any until he sells a specified piece of property, and that then it will be all right between them, does not create any liability enforceable by the creditor until such property is sold.<sup>2</sup>

**§ 3486. Promise to pay part of amount due.** A promise by the debtor to pay a specified sum, which is less than the entire debt, revives his liability as to the sum thus indicated,<sup>1</sup> but does not revive his liability as to the entire amount of the original debt.<sup>2</sup> The statement that the debtor thought that his former partner had "paid that debt but as he did not settle it I'll see into it some time," did not amount to a new promise to pay the debt, as it might mean that he would try to make his partner pay it.<sup>3</sup>

**§ 3487. Voluntary character of promise.** Only voluntary acts of the debtor can amount to a new promise. The entry of a judgment on notes is not such a new promise as to extend limitations on the mortgage securing the debt.<sup>1</sup> If, however, the debtor expresses in unequivocal language his intention of paying the debt, the fact that with the consent of his creditor he fixes the time of payment in the future, as at the death of the debtor,<sup>2</sup> or that he agrees to satisfy the debt by a legacy in his will,<sup>3</sup> does not prevent such promise from operating as a waiver of the bar.

**§ 3488. Giving new note or new collateral.** If a creditor furnishes new collateral,<sup>1</sup> or gives a mortgage,<sup>2</sup> to secure a barred

<sup>1</sup> Van Buskirk v. Kuhns, 164 Cal. 472, 44 L. R. A. (N.S.) 710, 129 Pac. 587; Scott v. Thornton, 104 Tenn. 547, 58 S. W. 236.

<sup>2</sup> Keenan v. Keenan, 20 R. I. 105, 37 Atl. 632.

<sup>3</sup> McKisson v. Davenport, 83 Mich. 211, 10 L. R. A. 507, 47 N. W. 100; Mooar v. Mooar, 69 N. H. 643, 46 Atl. 1052.

<sup>2</sup> Mooar v. Mooar, 69 N. H. 643, 46 Atl. 1052.

<sup>3</sup> Liberman v. Gurensky, 27 Wash. 410, 67 Pac. 998. (Especially as the context showed that he was not in financial condition to pay them, though he might be at a future time.)

<sup>1</sup> Hanna v. Kasson, 26 Wash. 568, 67 Pac. 271.

<sup>2</sup> Neish v. Gannon, 198 Ill. 219, 64 N. E. 1000.

<sup>3</sup> Gill v. Donovan, 96 Md. 518, 54 Atl. 117.

<sup>1</sup> Hampton v. France (Ky.), 32 S. W. 950; First National Bank v. Bell, 141 La. 53, 74 So. 628; Wolford v. Cook, 71 Minn. 77, 70 Am. St. Rep. 315, 73 N. W. 706; Taylor v. Hunt, 118 N. C. 168, 24 S. E. 359.

Contra, Shepherd v. Thompson, 122 U. S. 231, 30 L. ed. 1156.

<sup>2</sup> Maddox v. Walker's Executrix (Ky.), 74 S. W. 741.

debt, or gives an order on a third person to secure such debt,<sup>3</sup> or a check,<sup>4</sup> even if such check is returned to the debtor,<sup>5</sup> the barred debt is thereby revived, or limitations is started to running again. The new period of limitations runs from the date of the collection of such order if the creditor uses good faith in making the collection, and not the date of the acceptance of the order.<sup>6</sup> If the debtor executes a new note, evidencing a debt barred by limitations, such debt is thereby revived.<sup>7</sup> The same effect has been held to follow a promise to execute a new note, even though such new note has not been executed.<sup>8</sup> If, however, the debtor executes a note as mere duplicate evidence of the original debt, such duplicate does not operate to revive a barred debt, or prevent limitations from running.<sup>9</sup> If the debtor offers to give a new note he waives the bar of the statute, even if he concludes, "If you think a note worthless, what will you take in cash and balance all I owe you."<sup>10</sup>

**§ 3489. To whom promise may be made.** In order to operate as a waiver of the bar of the Statute of Limitations, the new promise may be made to the creditor himself, or to his agent.<sup>1</sup> A promise made to a stranger to the contract has no legal effect as a waiver of the bar of the statute.<sup>2</sup> However, a stranger through whom the debtor intended to communicate such promise to the creditor is for this purpose agent of one of the parties; and when the promise is communicated to the creditor it binds the debtor.<sup>3</sup> A

<sup>3</sup> *Buffington v. Chase*, 152 Mass. 534, 10 L. R. A. 123, 25 N. E. 977; *Manchester v. Braedner*, 107 N. Y. 346, 1 Am. St. Rep. 829, 14 N. E. 405.

<sup>4</sup> *Senninger v. Rowley*, 138 Ia. 617, 18 L. R. A. (N.S.) 223, 116 N. W. 695 (period of limitations not then elapsed).

<sup>5</sup> *Senninger v. Rowley*, 138 Ia. 617, 18 L. R. A. (N.S.) 223, 116 N. W. 695.

<sup>6</sup> *Buffington v. Chase*, 152 Mass. 534, 10 L. R. A. 123, 25 N. E. 977.

<sup>7</sup> *Wilcox v. Gregory*, 135 Cal. 217, 67 Pac. 139.

<sup>8</sup> *Bowman v. Rector* (Tenn. Ch. App.), 59 S. W. 389.

Contra, *Ritter's Estate*, 161 Pa. St. 79, 28 Atl. 1011.

<sup>9</sup> *School District v. Cromer*, 52 Ark. 454, 6 L. R. A. 510, 12 S. W. 878;

*Goodrich v. Case*, 68 O. S. 187, 67 N. E. 295.

<sup>10</sup> *Rumsey v. Settle*, 120 Mich. 372, 79 N. W. 579.

<sup>1</sup> *Kirby v. Mills*, 78 N. Car. 124, 24 Am. Rep. 460.

<sup>2</sup> *Ft. Scott v. Hickman*, 112 U. S. 150, 28 L. ed. 636; *Niblack v. Goodman*, 67 Ind. 174; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Wesner v. Stein*, 97 Pa. St. 322; *Spangler v. Spangler*, 122 Pa. St. 358, 9 Am. St. Rep. 114, 15 Atl. 436; *Bahny v. Levy*, 236 Pa. St. 348, 84 Atl. 835.

Contra, *Peavey v. Brown*, 22 Me. 100; *Stewart v. Garrett*, 65 Md. 392, 57 Am. Rep. 333, 5 Atl. 324.

<sup>3</sup> *Strong v. Andros*, 34 D. C. App. 278; *Miller v. Teeter*, 53 N. J. Eq. 262,

promise made for the benefit of a creditor who is a stranger to the contract,<sup>4</sup> such as a promise by a purchaser of land to assume and pay a debt which is a lien thereon,<sup>5</sup> may inure to the benefit of the creditor, at least if he duly elects to take advantage thereof.<sup>6</sup> If the claim which is barred by the Statute of Limitations has been assigned, a promise made to the assignor before such assignment operates as a waiver of the bar.<sup>7</sup> A promise made to the assignor after the assignment, and while the debtor is in ignorance thereof, does not amount to a waiver of the bar.<sup>8</sup> The acknowledgment of a mortgage debt made by the grantee of realty subject to such mortgage to the former owner of the mortgage debt, after he has assigned it, does not waive the bar of the statute.<sup>9</sup> A promise to the general public,<sup>10</sup> such as a promise by a railroad to refund the difference between the statutory rate and the rate which is actually collected while litigation is pending, to determine the validity of the statutory rate,<sup>11</sup> may be taken advantage of by each member of the public who answers to such description.

**§ 3490. By whom promise may be made.** The new promise may be made by the debtor himself, or by his agent thereunto duly authorized.<sup>1</sup> One whom the debtor has requested to transmit his promise to the creditor is the agent of the debtor, within the meaning of this rule.<sup>2</sup> Where the debtor sent for the creditor's sister, and asked her to tell the creditor that the debtor would pay every cent that he owed him, the creditor's sister was the defendant's agent for that purpose.<sup>3</sup> An express promise by the grantee of mortgaged premises suspends the running of the Statute

31 Atl. 394; *Roller v. Bachman*, 73 Tenn. (5 Lea.) 153.

<sup>4</sup> *Conley v. Archillion*, — Ark. —, 225 S. W. 5.

<sup>5</sup> *Conley v. Archillion*, — Ark. —, 225 S. W. 5.

<sup>6</sup> See §§ 1392 et seq.

<sup>7</sup> *Bird v. Adams*, 7 Ga. 505; *Soulden v. Van Rensselaer*, 9 Wend. (N. Y.) 293.

<sup>8</sup> *Investment Securities Co. v. Berghold*, 60 Kan. 813, 58 Pac. 469.

<sup>9</sup> *Investment Securities Co. v. Berghold*, 60 Kan. 813, 58 Pac. 469.

<sup>10</sup> *Big Diamond Milling Co. v. Chicago, Milwaukee & St. Paul Ry.*, 142

Minn. 181, 8 A. L. R. 1254, 171 N. W. 799.

<sup>11</sup> *Big Diamond Milling Co. v. Chicago, Milwaukee & St. Paul Ry.*, 142 Minn. 181, 8 A. L. R. 1254, 171 N. W. 799.

<sup>1</sup> *Union Oil Co. v. Purissima Hills Oil Co.*, 181 Cal. 479, 185 Pac. 381; *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081; *Liphart v. Myers*, 97 Kan. 686, 156 Pac. 693.

<sup>2</sup> *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081.

<sup>3</sup> *O'Hara v. Murphy*, 196 Ill. 599, 63 N. E. 1081.

of Limitations against the foreclosure of the mortgage lien.<sup>4</sup> On the other hand, a promise by the maker of a note which is secured by mortgage, is not operative against a purchaser of the mortgaged land.<sup>5</sup>

Whether a new promise by one of two or more joint debtors waives the operation of the Statute of Limitations as to the other joint debtors, is a question upon which there is a conflict of authority. The weight of modern authority holds that such promise is not a waiver as to the remaining joint debtors,<sup>6</sup> but a few courts hold that such promise is operative as against the other joint debtors.<sup>7</sup>

Whether an executor or an administrator can bind the estate by a new promise, is a question upon which there is also a conflict of authority. In many jurisdictions such promise is not binding upon the estate;<sup>8</sup> and even if such promise was relied upon by the creditor and induced him to delay until limitations had run, and if the executors are thereby estopped to plead limitations, other creditors may plead limitations.<sup>9</sup> Under statutes which require a written promise and the signature of the party to be charged, it is said that the executor is not the party to be charged.<sup>10</sup>

In other jurisdictions such promise is operative as against the estate.<sup>11</sup> In some jurisdictions it is said that such promise is

<sup>4</sup> *Neosho Valley Investment Co. v. Huston*, 61 Kan. 859, 59 Pac. 643.

<sup>5</sup> *Kelsay v. Kelsay Land Co.*, — Okla. —, 106 Pac. 173.

<sup>6</sup> *England. Fordham v. Wallis*, 10 Hare 217.

*California. State Loan & Trust Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466, 600.

*Illinois. Boynton v. Spafford*, 162 Ill. 113, 53 Am. St. Rep. 274, 44 N. E. 379 [affirming, 61 Ill. App. 384].

*Iowa. Drake v. Stuart*, 87 Ia. 341, 54 N. W. 223.

*Michigan. Koons v. Vauconsant*, 129 Mich. 260, 95 Am. St. Rep. 438, 88 N. W. 630; *Myers v. Erwin*, 180 Mich. 469, 147 N. W. 458.

*Tennessee. Muse v. Donelson* (2 Humph.), 21 Tenn. 166, 36 Am. Dec. 309.

*Washington. Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271.

*Wisconsin. State Bank v. Pease*, 153 Wis. 9, 139 N. W. 767.

<sup>7</sup> *Whitcomb v. Whiting*, Dougl. 652; *Bound v. Lathrop*, 4 Conn. 336, 10 Am. Dec. 147; *Casebolt v. Ackerman*, 46 N. J. L. 169; *Hollister v. York*, 59 Vt. 1, 9 Atl. 2.

<sup>8</sup> *Arkansas. Abbott v. Johnston*, 130 Ark. 1, 195 S. W. 676.

*Idaho. Dern v. Olsen*, 18 Ida. 358, L. R. A. 1915B, 1016, 110 Pac. 164.

*Michigan. Hollister v. Kinyon*, 195 Mich. 261, 161 N. W. 962.

*Missouri. Cape Girardeau County v. Harbison*, 58 Mo. 90.

*Pennsylvania. Fritz v. Thomas*, 1 Whart. (Pa.) 66, 29 Am. Dec. 39; *In re Claghorn's Estate*, 181 Pa. St. 600, 59 Am. St. Rep. 680, 37 Atl. 918.

*Texas. Moore v. Hillebrant*, 14 Tex. 312, 65 Am. Dec. 118.

<sup>9</sup> *Kittera's Estate*, 17 Pa. St. 416; *In re Claghorn's Estate*, 181 Pa. St. 608, 37 Atl. 921.

<sup>10</sup> *Dern v. Olsen*, 18 Ida. 358, L. R. A. 1915B, 1016, 110 Pac. 164.

<sup>11</sup> *England. Browning v. Paris*, 5 M.

operative as against the personal property,<sup>12</sup> but not against realty.<sup>13</sup>

A promise made by a married woman during coverture will not revive a lien which she has created on her land for her husband's debt, if she did not have the capacity of incurring a personal obligation for that purpose.<sup>14</sup>

**§ 3491. Effect of new promise.** There is a divergence of authority as to whether such liability is a revivor of the former liability, or a new liability created by express agreement, the original liability serving merely as a consideration therefor. Some authorities hold that the cause of action is on the new contract.<sup>1</sup> Other courts hold that the cause of action is on the original liability, the new promise being used merely to prevent the bar of limitations from

& W. 117; *Midgley v. Midgley* [1893], 3 Ch. 282.

**Alabama.** *Pollard v. Scears*, 28 Ala. 484, 65 Am. Dec. 364.

**Iowa.** *In re Baumhover*, 151 Ia. 146, 130 N. W. 817 (obiter).

**Kentucky.** *Northcut v. Wilkinson*, 51 Ky. (12 B. Mon.) 408.

**Massachusetts.** *Emerson v. Thompson*, 16 Mass. 429.

**Tennessee.** *Batson v. Murrell*, 20 Tenn. (10 Humph.) 301, 51 Am. Dec. 707.

For a case of maturity of entire debt on default, see *Linn County Bank v. Grisham*, 105 Kan. 460, 185 Pac. 54.

<sup>12</sup> *Houck v. Houck*, 112 Md. 122, 76 Atl. 581; *Divine v. Miller*, 70 S. Car. 225, 106 Am. St. Rep. 743, 49 S. E. 479.

<sup>13</sup> *Divine v. Miller*, 70 S. Car. 225, 106 Am. St. Rep. 743, 49 S. E. 479.

<sup>14</sup> *Gaulden v. Warnock*, — Fla. —, 84 So. 603.

<sup>1</sup> **California.** *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Chabot v. Tucker*, 39 Cal. 434; *Biddell v. Brizolara*, 56 Cal. 374, 30 Pac. 609; *Rodgers v. Byers*, 127 Cal. 528, 60 Pac. 42; *Dixon v. Bartlett*, 176 Cal. 572, 169 Pac. 236.

**Colorado.** *Richardson v. Bricker*, 7 Colo. 58, 49 Am. Rep. 344, 1 Pac. 433.

**Florida.** *Woodham v. Hill*, 78 Fla. 517, 83 So. 717.

**Massachusetts.** *Little v. Blunt*, 26 Mass. (9 Pick.) 488.

**Ohio.** *Hill v. Henry*, 17 Ohio 9.

**South Carolina.** *McKelvey v. Tate*, 3 Rich. Law (S. Car.) 339; *Smith v. Caldwell*, 15 Rich. L. (S. Car.) 365; *Walters v. Kraft*, 23 S. Car. 578, 55 Am. Rep. 44; *Fleming v. Fleming*, 33 S. Car. 505, 26 Am. St. Rep. 694, 12 S. E. 257; *Martin v. Jennings*, 52 S. Car. 371, 29 S. E. 807.

**Texas.** *Womack v. Womack*, 8 Tex. 397, 58 Am. Dec. 119; *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483; *Interstate Building & Loan Association v. Goforth*, 94 Tex. 250, 59 S. W. 871; *Cain v. Bonner*, 108 Tex. 309, 3 A. L. R. 874, 194 S. W. 1098.

**Utah.** *Ireland v. Mackintosh*, 22 Utah 296, 61 Pac. 901.

**West Virginia.** *Walker v. Henry*, 36 W. Va. 100, 14 S. E. 440.

One of the conclusions reached by the court as settled law was "That where the statutory period, counting from the original accrual of the cause of action, expired before commencement of the suit, a promise shown for the purpose of opposing the plea of the statute is itself the true cause of action, and this, whether such promise was made before or after the expiration of the period just mentioned." *Smith v. Caldwell*, 15 Rich. (S. Car.) 365, 373 [quoted in *Fleming v. Fleming*, 33 S. Car. 505, 509, 26 Am. St. Rep. 694, 12 S. E. 257].

being interposed.<sup>2</sup> By other authorities a more rational and less pedantic view is taken, namely, that if the facts are properly on the record, the plaintiff may take either theory of his case.<sup>3</sup> The question might be dismissed as an academic discussion as to the best way of stating a proposition as to the real nature of which there was no question if it were not for the fact that important legal consequences follow the choice by the plaintiff of one or the other theories of his case. Thus if the cause of action is on the new promise, it must have been made before the action is brought,<sup>4</sup> and in states which take this view of the law plaintiff can not recover as against the plea of the Statute of Limitations if he has alleged the original contract for his cause of action.<sup>5</sup> In any event, the new promise must in itself be valid;<sup>6</sup> and if for any reason the new contract can not be enforced, it can not remove the bar of the statute as a new promise,<sup>7</sup> whatever may be its effect as an acknowledgment.<sup>8</sup> A promise to pay a debt made before limitations has run against it waives so much of the period of limitations as has already elapsed and creates a new point of time from which limitations runs afresh.<sup>9</sup> While recognized as an established rule this doctrine has, however, been criticised.<sup>10</sup>

<sup>2</sup> **England.** *Leaper v. Tatton*, 16 East 420.

**Connecticut.** *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42.

**Illinois.** *Keener v. Crull*, 19 Ill. 189.

**Iowa.** *Mortenson v. Knudson*, — Ia. —, 176 N. W. 892.

**Massachusetts.** *Fiske v. Needham*, 11 Mass. 452.

**New York.** *Esselstyn v. Weeks*, 12 N. Y. 635.

**Ohio.** *Coffin v. Secor*, 40 O. S. 637, 48 Am. Rep. 680.

**Pennsylvania.** *Yaw v. Kerr*, 47 Pa. St. 333.

<sup>3</sup> *Polk v. Butterfield*, 9 Colo. 325, 12 Pac. 216; *Haymaker v. Haymaker*, 4 O. S. 272 (where the court says "The better practice in such case would be to make the issue of the subsequent promise by replication"); *Lonsdale v. Brown*, 4 Wash. (U. S. C. C.) 86.

<sup>4</sup> *Martin v. Jennings*, 52 S. Car. 371, 29 S. E. 807.

<sup>5</sup> *Hill v. Henry*, 17 Ohio 9.

<sup>6</sup> *Cain v. Bonner*, 108 Tex. 399, 3 A. L. R. 874, 194 S. W. 1098.

<sup>7</sup> *Cain v. Bonner*, 108 Tex. 399, 3 A. L. R. 874, 194 S. W. 1098 (usury).

<sup>8</sup> See §§ 3492 et seq.

<sup>9</sup> **Arkansas.** *Kelly v. Telle*, 66 Ark. 464, 51 S. W. 633; *Conley v. Archillion*, 146 Ark. 64, 225 S. W. 5.

**California.** *London & San Francisco Bank v. Bandmann*, 120 Cal. 220, 65 Am. St. Rep. 179, 52 Pac. 583; *Southern Pacific Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145; *London & San Francisco Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164; *Newhall v. Hatch*, 134 Cal. 269, 55 L. R. A. 673, 66 Pac. 266.

**Illinois.** *Abdill v. Abdill*, 202 Ill. 231, 126 N. E. 543.

**Iowa.** *Penley v. Waterhouse*, 3 Ia. 418; *Lindsey v. Lyman*, 37 Ia. 206; *McConaughy v. Wilsey*, 115 Ia. 589, 88 N. W. 1101.

**Kentucky.** *Rankin v. Anderson* (Ky.), 69 S. W. 705.

<sup>10</sup> *McConaughy v. Wilsey*, 115 Ia. 589, 88 N. W. 1101.

A promise before limitations has run does not create a new obligation,<sup>11</sup> and is not subject to the rules which control a promise made after limitations has run.<sup>12</sup> Such a positive and unqualified acknowledgment as is necessary if the promise is made after limitations has run is not necessary if the promise is made before limitations has run.<sup>13</sup>

## VI

## ACKNOWLEDGMENT

**§ 3492. Doctrine of acknowledgment.** When the Statute of Limitations was treated as a rule of presumption merely, any form of acknowledgment which conceded the fact that the claim was unpaid, was sufficient to rebut the presumption of payment.<sup>1</sup> Now that the Statute of Limitations is treated as one of repose, the general rule is that an acknowledgment of a debt barred by the statute waives the bar of the statute only when the acknowledgment is in such form as to amount to an implied promise to discharge the debt.<sup>2</sup> "Loose and general expressions with respect to the acknowledgment of a debt barred by the statute which are

<sup>11</sup> **California.** *Southern Pacific Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145; *Dixon v. Bartlett*, 176 Cal. 572, 169 Pac. 236.

**Florida.** *Vinson v. Palmer*, 45 Fla. 630, 34 So. 276.

**Massachusetts.** *Gilbert v. Collins*, 124 Mass. 174.

**Rhode Island.** *Taylor v. Slater*, 16 R. I. 86, 12 Atl. 727.

**Tennessee.** *Shields v. Dyer*, 86 Tenn. 41, 5 S. W. 439.

<sup>12</sup> *Rankin v. Anderson (Ky.)*, 69 S. W. 705.

<sup>13</sup> *Rankin v. Anderson (Ky.)*, 69 S. W. 705.

<sup>1</sup> *Dowthwaite v. Tibbut*, 5 M. & S. 75; *Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42; *Cobham v. Administra-* 612.

<sup>2</sup> **United States.** *Bell v. Morrison*, 26 U. S. (1 Pet.) 351, 7 L. ed. 174; *Fort Scott v. Hickman*, 112 U. S. 150, 28 L. ed. 636.

**California.** *Pierce v. Merrill*, 128 Cal. 473, 70 Am. St. Rep. 63, 61 Pac. 67.

**Connecticut.** *Ensign v. Batterson*, 68 Conn. 298, 36 Atl. 51.

**Illinois.** *Ennis v. Palace Car Co.*, 165 Ill. 161, 46 N. E. 439.

**Kentucky.** *Schonbachler v. Schonbachler (Ky.)*, 57 S. W. 232.

**Maine.** *Johnston v. Hussey*, 89 Me. 488, 36 Atl. 993.

**Michigan.** *Throop v. Russell*, 145 Mich. 482, 116 Am. St. Rep. 314, 108 N. W. 1013.

**North Carolina.** *Phillips v. Giles*, 175 N. Car. 409, 95 S. E. 772.

merely casual are insufficient to remove the bar."<sup>3</sup> In order to amount to an implied promise to pay, the acknowledgment must recognize the debt as a present existing liability.<sup>4</sup> Nothing short of this will amount by implication to a promise to discharge the debt.<sup>5</sup> At the same time, it is generally held that an acknowledgment of the debt as a present subsisting liability amounts to an implied promise to pay it.<sup>6</sup> In some jurisdictions, a different result is reached on the theory that the running of the statute extinguishes the debt, and that a new promise is accordingly necessary.<sup>7</sup>

**Ohio.** *McNeal v. Pierce*, 73 O. S. 7, 112 Am. St. Rep. 695, 1 L. R. A. (N.S.) 1117, 75 N. E. 938.

**Pennsylvania.** *Ritter's Estate*, 161 Pa. St. 79, 28 Atl. 1011; *Markee v. Reyburn*, 258 Pa. St. 277, 101 Atl. 993.

**Tennessee.** *Warren v. Cleveland*, 111 Tenn. 174, 102 Am. St. Rep. 749, 76 S. W. 910.

**West Virginia.** *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. 986.

**Wisconsin.** *Pierce v. Seymour*, 52 Wis. 272, 38 Am. Rep. 737, 9 N. W. 71.

"An acknowledgment can not be regarded as an admission of indebtedness where the accompanying circumstances are such as to repel that inference or to leave it in doubt whether the party intended to prolong the time of legal limitation." *Fort Scott v. Hickman*, 112 U. S. 150, 163, 28 L. ed. 636.

<sup>3</sup>*Thomas v. Carey*, 26 Colo. 485, 490, 58 Pac. 1093.

<sup>4</sup>**Georgia.** *Slack v. Sexton*, 113 Ga. 617, 38 S. E. 946; *Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280.

**Indiana.** *Olney v. Jackson*, 106 Ind. 286, 4 N. E. 149.

**Kansas.** *Haythorn v. Cooper*, 65 Kan. 338, 69 Pac. 333; *Durban v. Knowles*, 66 Kan. 397, 71 Pac. 829.

**Kentucky.** *Ditto v. Ditto*, 34 Ky. (4 Dana) 502.

**Pennsylvania.** *Henry v. Zurflied*, 203 Pa. St. 440, 53 Atl. 243; *Markee v.*

*Reyburn*, 258 Pa. St. 277, 101 Atl. 993.

**Tennessee.** *Thompson v. French*, 16 Tenn. (10 Yerg.) 452.

<sup>5</sup>"Statutes of limitation are statutes of repose and not merely statutes of presumption of payment. Therefore to deprive a debtor of the benefit of such a statute by an acknowledgment of indebtedness there must be an acknowledgment to the creditor as to the particular claim and it must be shown to have been intentional." *Fort Scott v. Hickman*, 112 U. S. 150, 163, 28 L. ed. 636.

<sup>6</sup>**United States.** *Bell v. Morrison*, 26 U. S. (1 Pet.) 351, 7 L. ed. 174.

**Delaware.** *Palmer v. Lodge*, 30 Del. 537, 109 Atl. 125.

**Florida.** *Hall v. Brown*, — Fla. —, 86 So. 277.

**Illinois.** *Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595.

**Iowa.** *Bakey v. Moeller*, 185 Ia. 946, 171 N. W. 289.

**Maryland.** *Hemsley v. Hollingsworth*, 119 Md. 431 [sub nomine, *Hemsley v. McKim*, 87 Atl. 506].

**Massachusetts.** *Custy v. Donlan*, 159 Mass. 245, 38 Am. St. Rep. 419, 34 N. E. 360.

**Pennsylvania.** *Maniatakis' Estate*, 258 Pa. St. 11, L. R. A. 1918A, 900, 101 Atl. 920.

**Vermont.** *Robinson v. Larabee*, 58 Vt. 652, 5 Atl. 512.

<sup>7</sup>*Carpenter v. State*, 41 Wis. 36;

If this is the effect of the statute, the new promise can be enforced as a contract only by invoking the theory of moral obligation as a consideration, in its most extreme form.<sup>8</sup>

In some jurisdictions in which the acknowledgment is required to be in writing, a new promise is required by the express provisions of the statute.<sup>9</sup>

If an acknowledgment of a debt is made in a sealed instrument which does not contain an express promise to pay, the period of limitations which runs after such acknowledgment, is not that fixed by statute for actions upon sealed instruments, but it is that fixed for unsealed instruments.<sup>10</sup>

**§ 3493. Recognition of existence of debt.** The mere acknowledgment of the existence of the debt which does not treat it as a present subsisting liability is insufficient.<sup>1</sup> A recognition of the existence of a debt without any indication of a willingness to pay it has been said to be insufficient.<sup>2</sup> It is not sufficient that the reference to the debt should be consistent with its validity.<sup>3</sup> An acknowledgment as part of a conditional promise which has not been accepted by the debtor,<sup>4</sup> or a recognition of the debt as a moral obligation,<sup>5</sup> is insufficient.

*Pierce v. Seymour*, 52 Wis. 272, 38 Am. Rep. 737, 9 N. W. 71.

<sup>8</sup> See §§ 632 et seq.

<sup>9</sup> *Pollak v. Billing*, 131 Ala. 519, 32 So. 639.

<sup>10</sup> *Harding v. Covell*, 217 Mass. 120, 104 N. E. 452.

<sup>1</sup> *Kentucky. Davis v. Strange*, 156 Ky. 420, 161 S. W. 217.

*Louisiana. Succession of Slaughter*, 108 La. 492, 58 L. R. A. 408, 32 So. 379.

*Michigan. Throop v. Russell*, 145 Mich. 482, 116 Am. St. Rep. 314, 108 N. W. 1013.

*Ohio. McNeal v. Pierce*, 73 O. S. 7, 112 Am. St. Rep. 695, 1 L. R. A. (N.S.) 1117, 75 N. E. 938.

*Pennsylvania. Markee v. Reyburn*, 258 Pa. St. 277, 101 Atl. 993.

*Tennessee. Warren v. Cleveland*, 111 Tenn. 174, 102 Am. St. Rep. 749, 76 S. W. 910.

*Vermont. Prescott v. Vershire*, 63 Vt. 517, 22 Atl. 655.

<sup>2</sup> *Warren v. Cleveland*, 111 Tenn. 174, 102 Am. St. Rep. 749, 76 S. W. 910.

<sup>3</sup> *Kansas. Hanson v. Toole*, 19 Kan. 273.

*Michigan. Throop v. Russell*, 145 Mich. 482, 116 Am. St. Rep. 314, 108 N. W. 1013.

*Ohio. McNeal v. Pierce*, 73 O. S. 7, 112 Am. St. Rep. 695, 1 L. R. A. (N.S.) 1117, 75 N. E. 938.

*Pennsylvania. Markee v. Reyburn*, 258 Pa. St. 277, 101 Atl. 993.

*Tennessee. Warren v. Cleveland*, 111 Tenn. 174, 102 Am. St. Rep. 749, 76 S. W. 910.

<sup>4</sup> *Throop v. Russell*, 145 Mich. 482, 116 Am. St. Rep. 314, 108 N. W. 1013.

<sup>5</sup> *McNeal v. Pierce*, 73 O. S. 7, 112 Am. St. Rep. 695, 1 L. R. A. (N.S.) 1117, 75 N. E. 938.

To amount to an acknowledgment the reference must unequivocally show that the debt is treated as valid and subsisting. Publishing a debt in question in an official list of liabilities,<sup>6</sup> as in a list of liabilities published by a bank in compliance with the law,<sup>7</sup> or in an official statement of a city's indebtedness,<sup>8</sup> or in a schedule of debts in bankruptcy or insolvency,<sup>9</sup> is not a sufficient acknowledgment. In most of the latter cases, the acknowledgment is also defective as not made to the debtor. A letter by a guarantor of a debt of a corporation acknowledging the debt as binding on the corporation, but not referring to his own contract of guaranty, is not an acknowledgment of his contract.<sup>10</sup> A provision for a creditor by will,<sup>11</sup> or a declaration by the debtor of an intention to make a provision for the creditor by will which does not recognize the debt as a subsisting enforceable liability,<sup>12</sup> does not amount to an acknowledgment.

In some states an admission in effect that the debtor "owed the debt and that it remained unpaid,"<sup>13</sup> even if there is "no expression of willingness to remain bound,"<sup>14</sup> is sufficient. An admission that the debt is valid, even if coupled with a statement of present financial inability to pay,<sup>15</sup> has been held sufficient.

**§ 3494. Negotiations for settlement insufficient.** The fact that the debtor entered into negotiations with the creditor to ascertain the terms on which the debt in question could be settled,<sup>1</sup> or that

<sup>6</sup> *Fort Scott v. Hickman*, 112 U. S. 150, 28 L. ed. 636.

<sup>7</sup> *Blades v. County Deposit Bank* (Ky.), 56 S. W. 415.

<sup>8</sup> *Prescott v. Vershire*, 63 Vt. 517, 22 Atl. 655.

<sup>9</sup> *Davies v. Edwards*, 7 Exch. 22; *Roscoe v. Hale*, 73 Mass. (7 Gray) 274; *Stoddard v. Doane*, 73 Mass. (7 Gray) 387; *Richardson v. Thomas*, 79 Mass. (13 Gray) 381, 74 Am. Dec. 636; *Hidden v. Cozzens*, 2 R. I. 401, 60 Am. Dec. 93.

<sup>10</sup> *Pierce v. Merrill*, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pac. 67.

<sup>11</sup> *McNeal v. Pierce*, 73 O. S. 7, 112 Am. St. Rep. 695, 1 L. R. A. (N.S.) 1117, 75 N. E. 938.

<sup>12</sup> *Schonbachler v. Schonbachler* (Ky.), 57 S. W. 232; *Watson v. Barber*, 105 La. 799, 30 So. 127; *Gill v. Staylor*, 97 Md. 665, 55 Atl. 398.

<sup>13</sup> *Elliott v. Leake*, 5 Mo. 208, 210, 32 Am. Dec. 314 [quoted in *Chidsey v. Powell*, 91 Mo. 622, 626, 60 Am. Rep. 267, 4 S. W. 446].

<sup>14</sup> *Chidsey v. Powell*, 91 Mo. 622, 627, 60 Am. Rep. 267, 4 S. W. 446.

<sup>15</sup> *Boyd v. Hurlbut*, 41 Mo. 264; *Chidsey v. Powell*, 91 Mo. 622, 60 Am. Rep. 267, 4 S. W. 446.

<sup>1</sup> *Colorado. Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093.

*Georgia. Kelly v. Strouse*, 116 Ga. 872, 43 S. E. 280.

*Illinois. Ennis v. Palace Car Co.*, 165 Ill. 161, 46 N. E. 439.

*Kentucky. Schonbachler v. Schonbachler* (Ky.), 57 S. W. 232; *Farrell's Adm'r. v. Records*, 187 Ky. 468, 219 S. W. 792.

*Massachusetts. Mumford v. Freeman*, 49 Mass. (8 Met.) 432, 41 Am. Dec. 532.

he offers a compromise,<sup>2</sup> as by attempting to buy the note in question,<sup>3</sup> is not sufficient. An offer to arbitrate,<sup>4</sup> or to leave the dispute in question to the decision of some third person,<sup>5</sup> is not sufficient to waive the bar of the statute. Suggesting that some third person could be held liable upon the debt in question, as a letter written by a surety to his principal at the request of the payee urging him to pay the obligation,<sup>6</sup> or a letter by the executor of one maker of the note to the holder, advising him to look to the surviving maker for payment,<sup>7</sup> is not a waiver of the bar of the statute. If, however, there is a distinct promise to pay the debt, the fact that the debtor claims that the creditor should voluntarily make some reduction from the total amount does not make the new promise invalid.<sup>8</sup>

**§ 3495. Identification of debt.** In order to waive the bar of the statute, the acknowledgment must clearly identify the debt to which it relates.<sup>1</sup> An acknowledgment which leaves it uncertain to what debt the debtor referred, is insufficient to waive the bar of the statute.<sup>2</sup> A written statement that a specified amount is due is not an acknowledgment of the entire debt if it exceeds such specified amount.<sup>3</sup> It is sufficient if the debt is identified with reasonable certainty.<sup>4</sup> If the debt is sufficiently identified other-

**Nebraska.** *Nelson v. Becker*, 32 Neb. 99, 48 N. W. 962.

**West Virginia.** *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. 986.

<sup>2</sup> *Chism v. Barnes*, 104 Ky. 310, 47 S. W. 232, 47 S. W. 875; *Gardner v. Tudor*, 25 Mass. (8 Pick.) 206; *Andrew v. Kennedy*, 4 Okla. 625, 46 Pac. 485.

<sup>3</sup> *Connecticut Trust & Safe Deposit Co. v. Wead*, 172 N. Y. 497, 92 Am. St. Rep. 756, 65 N. E. 261.

<sup>4</sup> *Curtis v. Sacramento*, 70 Cal. 412, 11 Pac. 748.

<sup>5</sup> *Rossiter v. Colby*, 71 N. H. 386, 52 Atl. 927; *Linderman v. Pomeroy*, 142 Pa. St. 168, 24 Am. St. Rep. 494, 21 Atl. 820.

<sup>6</sup> *Borden v. Fletcher's Estate*, 131 Mich. 220, 91 N. W. 145.

<sup>7</sup> *King v. Rogers*, 31 Ont. 573.

<sup>8</sup> *McNear v. Roberson*, 12 Ind. App. 87, 39 N. E. 896.

<sup>1</sup> *Lambert v. Doyle*, 117 Ga. 81, 43 S. E. 416; *Wejman v. Miner*, 179 Ill. 326, 53 N. E. 609; *Abdill v. Abdill*, 292 Ill. 231, 126 N. E. 543; *Kleis v. McGrath*, 127 Ia. 459, 109 Am. St. Rep. 396, 69 L. R. A. 260, 103 N. W. 371; *Corbett v. Hoss*, 98 Kan. 290, 157 Pac. 1195.

<sup>2</sup> *Connecticut. Buckingham v. Smith*, 23 Conn. 453.

**Georgia.** *Kirven v. Thornton*, 110 Ga. 276, 34 S. E. 848.

**Iowa.** *Stout v. Marshall*, 75 Ia. 498, 39 N. W. 808.

**Massachusetts.** *Gibson v. Grosvenor*, 70 Mass. (4 Gray) 606.

**Pennsylvania.** *Landis v. Roth*, 109 Pa. St. 621, 58 Am. Rep. 747, 1 Atl. 49.

<sup>3</sup> *Porter v. Chicago, Iowa & Dakota Ry. Co.*, 99 Ia. 351, 68 N. W. 724; *Weare v. Chase*, 58 N. H. 225.

<sup>4</sup> *Morrell v. Ferrier*, 7 Colo. 22, 1 Pac. 94; *Doran v. Doran*, 145 Ia. 122, 25 L. R. A. (N.S.) 805, 123 N. W. 996.

wise, it is not necessary that the amount should be given.<sup>5</sup> Reference to "the mortgage you hold against the property," is a sufficient identification of the mortgage debt.<sup>6</sup> If only one debt is owing from the debtor to the creditor, a general acknowledgment of indebtedness without referring specifically to such transaction, has been said to be sufficient.<sup>7</sup>

### § 3496. *Prima facie effect of recognition as subsisting liability.*

A distinct and unqualified admission of a debt as a present subsisting liability, without anything further to rebut the presumption that the debtor promises to pay it, is a sufficient waiver of the bar of the statute.<sup>1</sup> A tender of a small payment on account, which is refused because it is so small, is a sufficient acknowledgment.<sup>2</sup> A written statement by the debtor, estimating his liability in excess of what it really was,<sup>3</sup> or a statement of the debtor that he has

"It is only necessary that the admission appear with reasonable certainty to relate to the debt in question, and, if such relation does reasonably appear, it is for the debtor insisting that the admission relates to some other indebtedness to show its existence." *Doran v. Doran*, 145 Ia. 122, 25 L. R. A. (N.S.) 805, 123 N. W. 906.

<sup>5</sup> *Schmidt v. Pfau*, 114 Ill. 494, 2 N. E. 522; *Bakey v. Moeller*, 185 Ia. 946, 171 N. W. 280; *Eastman v. Walker*, 6 N. H. 367.

<sup>6</sup> *Dern v. Olsen*, 18 Ida. 358, L. R. A. 1915B, 1016, 110 Pac. 164.

<sup>7</sup> *Bailey v. Crane*, 38 Mass. (21 Pick.) 323.

<sup>1</sup> *United States. Bell v. Morrison*, 26 U. S. (1 Pet.) 351, 7 L. ed. 174.

*California. Southern Pacific Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145.

*Colorado. Great Western Mfg. Co. v. Elledge*, 68 Colo. 594, 192 Pac. 498.

*Connecticut. Austin v. Bostwick*, 9 Conn. 496, 25 Am. Dec. 42.

*Delaware. Palmer v. Lodge*, 30 Del. 537, 109 Atl. 125.

*Florida. Hall v. Brown*, — Fla. —, 86 So. 277.

*Georgia. Harrell v. Davis*, 108 Ga. 789, 33 S. E. 852.

*Idaho. Dern v. Olsen*, 18 Ida. 358, L. R. A. 1915B, 1016, 110 Pac. 164.

*Illinois. Walker v. Freeman*, 209 Ill. 17, 70 N. E. 595.

*Iowa. Bakey v. Moeller*, 185 Ia. 946, 171 N. W. 280.

*Maryland. Babylon v. Duttera*, 89 Md. 444, 43 Atl. 938; *Helmsley v. McKim*, 119 Md. 431, 87 Atl. 506.

*Massachusetts. Custy v. Donlan*, 159 Mass. 245, 38 Am. St. Rep. 419, 34 N. E. 360.

*Michigan. Rumsey v. Settle*, 120 Mich. 372, 79 N. W. 579; *De Kruif v. Flieman*, 130 Mich. 12, 89 N. W. 558.

*Pennsylvania. Maniatakis' Estate*, 258 Pa. St. 11, L. R. A. 1918A, 900, 101 Atl. 920.

*Tennessee. Hale v. Hale*, 23 Tenn. (4 Humph.) 183.

*Utah. Thomas v. Glendinning*, 13 Utah 47, 44 Pac. 652.

*Vermont. Robinson v. Larabee*, 58 Vt. 652, 5 Atl. 512.

<sup>2</sup> *Maniatakis' Estate*, 258 Pa. St. 11, L. R. A. 1918A, 900, 101 Atl. 920.

<sup>3</sup> *In re Lorillard*, 107 Fed. 677, 46 C. C. A. 553.

received of the creditor a specified sum "at various times to date, which is hereby acknowledged,"<sup>4</sup> or a statement by a mortgagor to a mortgagee, "now, if I can make this deal, will try and get enough money down to liquidate the mortgage you hold against the property,"<sup>5</sup> or a statement by a mortgagor to the mortgagee, "I shall sell our cattle the first chance. I am tired of the business and want to pay off that mortgage,"<sup>6</sup> or a statement in a memorandum of settlement, "This payment has no bearing upon the amount due (the creditor) by said account dated October 1, 1890,"<sup>7</sup> or a statement by the debtor when an account is presented to him, that he will settle the account and pay what he owes, but that a certain credit, to which he is entitled, has not been given him, and his acquiescence when the entry of such credit is pointed out to him,<sup>8</sup> or apologizing for failure to make a payment upon the debt and promising to make a payment thereon if given time,<sup>9</sup> or a statement by a surety to the payee of the note that the payee must proceed to collect from the principal debtor, and that if it is not promptly collected the surety "will not longer be held good for the note,"<sup>10</sup> or sending a draft with the statement that it "pays interest" upon a specified note,<sup>11</sup> or a statement by the debtor in response to a demand from the creditor that he keep certain mortgaged realty insured for a certain sum, that the property is enough to cover the debt even if the building were to burn without insurance,<sup>12</sup> have each of them been held to be acknowledgments sufficient to waive the bar of the statute. The fact that the grantee accepts a deed in which there is an express exception from the warranties of a mortgage which secures a certain debt, is a sufficient acknowledgment of such debt.<sup>13</sup>

**§ 3497. Effect of express refusal to pay debt.** An admission of the existence of the debt, coupled with a refusal to pay it,<sup>1</sup>

<sup>4</sup> *Custy v. Dolan*, 150 Mass. 245, 38 Am. St. Rep. 419, 34 N. E. 360.

<sup>5</sup> *Dern v. Olsen*, 18 Ida. 358, L. R. A. 1015B, 1016, 110 Pac. 164.

<sup>6</sup> *Reymond v. Newcomb*, 10 N. M. 151, 61 Pac. 205.

<sup>7</sup> *Savage v. Gaut* (Tenn. Ch. App.), 57 S. W. 170.

<sup>8</sup> *Bean v. Wheatley*, 13 D. C. App. 473.

<sup>9</sup> *Brintall v. Graves*, 168 Mass. 384, 47 N. E. 119.

<sup>10</sup> *Harms v. Freytag*, 59 Neb. 350, 80 N. W. 1039.

<sup>11</sup> *Campbell v. Campbell*, 118 Ia. 131, 91 N. W. 894.

<sup>12</sup> *Walsh v. Mayer*, 111 U. S. 31, 28 L. ed. 338.

<sup>13</sup> *Great Western Mfg. Co. v. Elledge*, 68 Colo. 594, 102 Pac. 498.

<sup>1</sup> *Florida. Cosio v. Guerra*, 67 Fla. 331, 65 So. 5.

*Kentucky. Fillett v. Linsey*, 29 Ky.

whether such refusal is based upon the ground of poverty of the debtor,<sup>2</sup> or on the fact that he is angry because he has been sued,<sup>3</sup> or on the fact, though untrue, that the debt has been paid,<sup>4</sup> or that the debtor has a set-off against it,<sup>5</sup> or that the debt is barred by limitations,<sup>6</sup> is insufficient as an acknowledgment. A statement by a vendee of realty in possession that he believes that he can make a payment in a year and that if he does not make such payment he will give up the land, asking the vendor to "give him a show," is not an unequivocal acknowledgment of a subsisting debt.<sup>7</sup>

**§ 3498. By whom acknowledgment can be made.** An acknowledgment can affect only the interests of the party who makes the acknowledgment in person, or whose duly authorized agent makes the acknowledgment.<sup>1</sup> An acknowledgment by one joint debtor does not waive the bar of the statute as to the other joint debtors.<sup>2</sup> A written acknowledgment of the existence of a mortgage made

(6 J. J. Mar.) 337; *Gray v. McDowell*, 69 Ky. (6 Bush) 475.

**Massachusetts.** *Bailey v. Crane*, 38 Mass. (21 Pick.) 323.

**New York.** *Laurence v. Hopkins*, 13 Johns. (N. Y.) 288.

**Wisconsin.** *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614.

**Contra**, *Cobham v. Mosely*, 3 N. Car. 6, 2 Am. Dec. 612.

A submission of the question of the intent of the debtor to the jury is not prejudicial to the creditor, the jury finding in favor of the debtor. *Linsell v. Bonsor*, 2 Bing. N. Cas. 241.

<sup>2</sup> *Bullion & Exchange Bank v. Hegler*, 93 Fed. 800; *Wald v. Arnold*, 168 Mass. 134, 46 N. E. 419.

<sup>3</sup> *Rudolph v. Sellers*, 106 Ga. 485, 32 S. E. 509.

<sup>4</sup> *Bangs v. Hall*, 19 Mass. (2 Pick.) 368, 13 Am. Dec. 437; *Linderman v. Pomeroy*, 142 Pa. St. 168, 24 Am. St. Rep. 494, 21 Atl. 820; *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N. W. 614.

<sup>5</sup> *Bradley v. Field*, 3 Wend. (N. Y.) 272; *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. 986.

<sup>6</sup> *Bangs v. Hall*, 19 Mass. (2 Pick.) 368, 13 Am. Dec. 437.

<sup>7</sup> *Wood v. Merrietta*, 66 Kan. 748, 71 Pac. 579.

<sup>1</sup> *Engand. Whippy v. Hillary*, 3 B. & Ad. 399.

**Kansas.** *Liphart v. Myers*, 97 Kan. 686, 156 Pac. 693.

**Ohio.** *Kerper v. Wood*, 48 O. S. 613, 15 L. R. A. 656, 29 N. E. 501.

**Oklahoma.** *Kelsay v. Kelsay Land Co.*, 64 Okla. 201, 166 Pac. 173.

**Wyoming.** *Cowhick v. Shingle*, 5 Wyom. 87, 63 Am. St. Rep. 17, 25 L. R. A. 608, 37 Pac. 689.

<sup>2</sup> *England. Fordham v. Wallis*, 10 Hare 217.

**Illinois.** *Boynton v. Spafford*, 162 Ill. 113, 53 Am. St. Rep. 274, 44 N. E. 379 [affirming, 61 Ill. App. 384].

**Michigan.** *Myers v. Erwin*, 180 Mich. 469, 147 N. W. 458.

**Pennsylvania.** *Meade v. McDowell*, 5 Binn. (Pa.) 195.

**Vermont.** *Phelps v. Stewart*, 12 Vt. 256.

**Wisconsin.** *State Bank v. Pease*, 153 Wis. 9, 139 N. W. 767.

by persons who succeeded the mortgagor in interest, starts the Statute of Limitations to running again from the date of such acknowledgment as to the mortgage, although no promise is made to pay the mortgage debt.<sup>3</sup> The mortgagor can not, after conveying the realty covered by the mortgage, revive the mortgage as against the grantee by an acknowledgment of the mortgage debt.<sup>4</sup> The act of an assignee in bankruptcy in taking possession of premises mortgaged by the bankrupt, and asking for leave to sell the equity of redemption, amounts, prima facie, to the recognition of the mortgage, and stops the Statute of Limitations from running.<sup>5</sup> Acknowledgment of a mortgage debt by a husband is sufficient to start limitations to running anew as to a mortgage on the homestead executed by husband and wife.<sup>6</sup> An acknowledgment by an executor is held in some jurisdictions not to bind the estate, though it may amount to a new promise imposing a personal liability upon him.<sup>7</sup> Some courts hold that if there are two or more executors, the acknowledgment made by one of them binds the decedent's estate.<sup>8</sup> An acknowledgment by the principal is inoperative as against the surety;<sup>9</sup> and an acknowledgment by the maker is inoperative as against the endorser.<sup>10</sup>

**§ 3499. To whom acknowledgment can be made.** In order that an acknowledgment may operate as a waiver of a statute, it must be made to the creditor or to his duly authorized agent.<sup>1</sup> A

<sup>3</sup> *Foster v. Bowles*, 138 Cal. 346, 71 Pac. 494.

<sup>4</sup> *Cook v. Prindle*, 97 Ia. 464, 59 Am. St. Rep. 424, 66 N. W. 781; *Kelsay v. Kelsay Land Co.*, 64 Okla. 291, 166 Pac. 173.

<sup>5</sup> *Brintnall v. Graves*, 168 Mass. 384, 47 N. E. 119.

<sup>6</sup> *Fuller v. McMahan*, 64 Kan. 441, 67 Pac. 828; *Light's Estate*, 136 Pa. St. 211, 20 Atl. 536, 537; *Claghorn's Estate*, 181 Pa. St. 608, 37 Atl. 921.

See § 3490.

<sup>7</sup> *Fritz v. Thomas*, 1 Whart. (Pa.) 66, 29 Am. Dec. 39.

<sup>8</sup> *In re Macdonald* [1897], 2 Ch. 181. See § 3518.

<sup>9</sup> *Lowther v. Chappell*, 8 Ala. 353, 42 Am. Dec. 643; *Drake v. Stuart*, 87 Ia. 341, 54 N. W. 223.

<sup>10</sup> *Citizens' Bank v. Murdock*, 22 La. Ann. 130.

<sup>1</sup> *United States*. *Fort Scott v. Hickman*, 112 U. S. 150, 28 L. ed. 636.

*California*. *Pierce v. Merrill*, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pa. 67. *Colorado*. *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093.

*Indiana*. *Niblack v. Goodman*, 67 Ind. 174.

*Kentucky*. *Trueedale v. Anderson*, 72 Ky. (9 Bush) 276; *Hargis v. Sewell*, 87 Ky. 63, 7 S. W. 557; *Dowell v. Dowell*, 137 Ky. 167; *Davis v. Strange*, 156 Ky. 420, 161 S. W. 217.

*Pennsylvania*. *Spangler v. Spangler*, 122 Pa. St. 358, 9 Am. St. Rep. 114, 15 Atl. 436.

*South Dakota*. *Dorsey v. Gunkle*, 18 S. D. 454.

letter addressed individually to one member of the creditor firm, acknowledging a debt due to such firm, has been held to be sufficient.<sup>2</sup> An acknowledgment to the attorney of the creditor,<sup>3</sup> or to a stranger, in order that he may communicate such acknowledgment to the creditor,<sup>4</sup> is made to the creditor, in legal effect. The act of a grantee or mortgagee in accepting a deed or mortgage in which a prior mortgage is recognized as a valid lien, is said to be a sufficient acknowledgment.<sup>5</sup>

An acknowledgment which is made to a stranger who is not authorized to communicate to the creditor, and who is not acting as the agent of either party nor as the promisee in a beneficiary contract, is insufficient.<sup>6</sup> Where decedent in his last illness told his nurse that he wanted the creditor paid for certain work, such acknowledgment is insufficient to waive the bar of the statute.<sup>7</sup>

## VII

### PART PAYMENT

**§ 3500. General nature and effect of part payment.** If the debtor voluntarily makes a payment which he intends to be applied upon a debt owing by him, in partial satisfaction thereof, leaving a balance due, such payment is the clearest form of acknowledgment of such debt as a valid and subsisting liability. If such part payment is made before the time fixed by the Statute of Limitations has expired, it operates to create a new point from which the Statute of Limitations begins to run afresh.<sup>1</sup> In South Carolina,

<sup>2</sup> *Yarbrough v. Gilland*, 77 Miss. 139, 24 So. 170.

<sup>3</sup> *Olatmanns v. Glenn*, 78 Okla. 70, 188 Pac. 886.

<sup>4</sup> *Strong v. Andros*, 34 D. C. App. 278; *Miller v. Teeter*, 53 N. J. Eq. 262, 31 Atl. 394; *Roller v. Bachman*, 73 Tenn. (5 Lea) 153.

<sup>5</sup> *Great Western Mfg. Co. v. Elledge*, 68 Colo. 594, 192 Pac. 498.

<sup>6</sup> *United States. Fort Scott v. Hickman*, 112 U. S. 150, 28 L. ed. 636.

*California. Pierce v. Merrill*, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pac. 67.

*Colorado. Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093.

*Indiana. Niblack v. Goodman*, 67 Ind. 174.

*Kentucky. Truesdale v. Anderson*,

72 Ky. (9 Bush) 276; *Hargis v. Sewell*, 87 Ky. 63, 7 S. W. 557; *Dowell v. Dowell*, 137 Ky. 167, *Davis v. Strange*, 156 Ky. 420, 161 S. W. 217.

*Pennsylvania. Spangler v. Spangler*, 122 Pa. St. 358, 9 Am. St. Rep. 114, 15 Atl. 436.

*South Dakota. Dorsey v. Gunkle*, 18 S. D. 454, 101 N. W. 36.

*Contra, Stewart v. Garrett*, 65 Md. 392, 57 Am. Rep. 333, 5 Atl. 324; *Minkler v. Minkler*, 16 Vt. 193.

<sup>7</sup> *Parker v. Remington*, 15 R. I. 300, 2 Am. St. Rep. 897, 3 Atl. 590.

<sup>1</sup> *England. In re Lacey* [1907], 1 Ch. 330.

*Arkansas. Less v. Arndt*, 68 Ark. 390, 59 S. W. 763.

where the cause of action is held to be the new promise, an allegation of the original cause of action and the payments made thereon before limitations has run is not sufficient to avoid the bar of the statute if the action is brought after the statutory period has elapsed since the maturity of the contract.<sup>2</sup> Recovery can be had in such cases by alleging the new promise as the cause of action, and using the payment to prove the promise.<sup>3</sup>

If such part payment is made after the Statute of Limitations has run, it is held, in many jurisdictions, to waive the bar of the statute and to revive the liability of the debtor.<sup>4</sup> In other jurisdictions it is held that a part payment does not of itself revive the debt,<sup>5</sup> and that limitations will continue to operate as to the balance of the debt, unless there has been an express promise to pay it.

**California.** *Young v. Kaufman*, 172 Cal. 546, 157 Pac. 1007.

**Kansas.** *Ellis v. Snyder*, 83 Kan. 638, 32 L. R. A. (N.S.) 253, 112 Pac. 594.

**Kentucky.** *Abner v. York* (Ky.), 41 S. W. 309.

**Louisiana.** *In re Leeds*, 49 La. Ann. 501, 21 So. 617.

**Michigan.** *Miner v. Lorman*, 56 Mich. 212, 22 N. W. 265; *Neilands v. Wright*, 134 Mich. 77, 95 N. W. 997.

**Minnesota.** *Clarkin v. Brown*, 80 Minn. 361, 83 N. W. 351.

**New York.** *Clute v. Clute*, 197 N. Y. 439, 27 L. R. A. (N.S.) 146, 90 N. E. 988.

**Oregon.** *Kaiser v. Idleman*, 57 Or. 224, 28 L. R. A. (N.S.) 169, 108 Pac. 193.

**Pennsylvania.** *Barnes v. Pickett Hardware Co.*, 203 Pa. St. 570, 53 Atl. 378.

**Wisconsin.** *Hughes v. Thomas*, 131 Wis. 315, 11 L. R. A. (N.S.) 744, 111 N. W. 474.

In Tennessee part payment does not as a matter of law affect the running of the statute. *Lock v. Wilson*, 57 Tenn. (10 Heisk.) 441; 56 Tenn. (9 Heisk.) 784.

<sup>2</sup>*Walters v. Kraft*, 23 S. Car. 578,

55 Am. Rep. 44; *Fleming v. Fleming*, 33 S. Car. 505, 26 Am. St. Rep. 694, 12 S. E. 257.

<sup>3</sup>*Jacobs v. Gilreath*, 45 S. Car. 46, 22 S. E. 757.

<sup>4</sup>*Illinois.* *Neish v. Gannon*, 198 Ill. 219, 64 N. E. 1000.

**Maine.** *Medomak National Bank v. Wyman*, 100 Me. 556, 4 L. R. A. (N.S.) 562, 62 Atl. 658; *Haslam v. Perry*, 115 Me. 295, 98 Atl. 812.

**Nebraska.** *Ebersole v. Omaha National Bank*, 71 Neb. 778, 99 N. W. 664.

**Ohio.** *Findlay Brewing Co. v. Brown*, 19 Ohio C. C. 612, 10 Ohio C. D. 100.

**Oklahoma.** *Clark v. Grant*, 26 Okla. 308, 28 L. R. A. (N.S.) 519, 100 Pac. 234; *Rogers v. Hall*, 46 Okla. 773, 149 Pac. 878.

**South Carolina.** *Ewbank v. Ewbank*, 64 S. Car. 434, 42 S. E. 194.

**Washington.** *Eureka Cedar Lumber & Shingle Co. v. Knack*, 95 Wash. 339, 163 Pac. 753.

**Wisconsin.** *Engmann v. Immel*, 59 Wis. 240, 18 N. W. 182; *Marshall v. Holmes*, 68 Wis. 555, 32 N. W. 685; *Lyle v. Esser*, 98 Wis. 234, 73 N. W. 1008.

<sup>5</sup>*Arkansas.* *Slagle v. Box*, 124 Ark. 43, 186 S. W. 299.

Part payment does not create a new cause of action. Hence, part payment made on a note after a surety thereon has died and before an administrator has been appointed, makes limitations run anew from the date of such payment, and does not postpone the running until such administrator is appointed.<sup>6</sup> In computing the time for which limitations has run on a demand note, the date of the payment extending the running of limitations is to be excluded.<sup>7</sup>

Since the theory underlying the doctrine of part payment is that such payment is an implied admission that more is due, it follows that if the circumstances of the payment are such as to rebut the inference of a promise to pay the residue of the debt, the Statute of Limitations is not thereby prevented from running.<sup>8</sup> If the payment is not intended to apply upon the liability in question at all, it does not affect the running of the statute.<sup>9</sup> Payment of interest made directly by a mortgagor to the cestui que trust of the fund for life does not prevent limitations from running in favor of the trustees for an innocent breach of trust in making such mortgage loan upon insufficient security.<sup>10</sup>

**§ 3501. What may constitute payment.** In order to constitute part payment within the meaning of this rule, something of value must be given by the debtor and received by the creditor.<sup>1</sup> The fact that the creditor has power to apply funds of the debtor to the payment of part of the debt, does not affect the operation of

**Florida.** *Woodham v. Hill*, 78 Fla. 517, 83 So. 717.

**Kentucky.** *Duvall v. Parepoint*, 168 Ky. 11, 181 S. W. 653.

**Louisiana.** *Trellsen v. Gantt*, 25 La. Ann. 476; *Succession of Slaughter*, 108 La. 492, 58 L. R. A. 408, 32 So. 370.

**Virginia.** *Gover v. Chamberlain*, 83 Va. 286, 5 S. E. 174.

<sup>6</sup> *Copeland v. Collins*, 122 N. Car. 619, 30 S. E. 315.

<sup>7</sup> *Seward v. Hayden*, 150 Mass. 158, 15 Am. St. Rep. 183, 5 L. R. A. 844, 22 N. E. 629.

<sup>8</sup> *Hale v. Morse*, 49 Conn. 481; *Weston v. Hodgkins*, 136 Mass. 326; *Parsons v. Clark*, 59 Mich. 414; 26 N. W. 656; *Crow v. Gleason*, 141 N. Y. 489, 36 N. E. 497.

<sup>9</sup> *Crow v. Gleason*, 141 N. Y. 489, 36 N. E. 497.

<sup>10</sup> *In re Somerset* [1894], 1 Ch. 231.

<sup>1</sup> **Arkansas.** *Desha Bank & Trust Company v. Quilling*, 118 Ark. 114, L. R. A. 1015E, 794, 176 S. W. 132.

**Kansas.** *Liphart v. Myers*, 97 Kan. 686, 156 Pac. 693.

**Missouri.** *Clark v. Powell*, — Mo. —, 208 S. W. 31.

**New York.** *United States Trust Co. v. Stanton*, 145 N. Y. 620, 40 N. E. 165.

**Washington.** *Arthur v. Burke*, 83 Wash. 600, 145 Pac. 974.

**Wisconsin.** *Lyle v. Esser*, 98 Wis. 234, 73 N. W. 1008.

the statute until such application is made.<sup>2</sup> The debtor entered into an agreement with the creditor for the discontinuance of a suit upon a note, and subsequently, in pursuance of such agreement, paid the amount which he had agreed to pay to procure such discontinuance. The act of the creditor in subsequently crediting such payment as made upon the note without the consent of the debtor can not remove the bar of the statute.<sup>3</sup> An agreement made by the debtor with the consent of the creditor to remit a part of the debt is not such part payment as prevents limitations from running.<sup>4</sup> The creditor's act in giving credit for a payment which the debtor claims that he has already made is not sufficient to prevent the statute from running.<sup>5</sup> The date of a payment is therefore the date at which the creditor received it and not the date at which he credited it.<sup>6</sup> The date of a payment by check is the date at which the check was delivered and not the date at which it was paid,<sup>7</sup> even though the creditor had agreed that he would not present it for payment before the date at which he actually presented it.<sup>8</sup>

Part payment of the principal of a debt secured by mortgage,<sup>9</sup> or payment of interest thereon,<sup>10</sup> prevents limitations from acting as a bar against the mortgage, as well as against the mortgage debt.

Payment of interest is treated as a part payment so as to prevent the statute from operating as a bar against the principal.<sup>11</sup>

<sup>2</sup> Desha Bank & Trust Company v. Quilling, 118 Ark 114, L. R. A. 1915E, 704, 176 S. W. 132.

<sup>3</sup> Terrill v. Deavitt, 73 Vt. 188, 50 Atl. 801.

<sup>4</sup> Wienberger v. Weidman, 134 Cal. 500, 66 Pac. 869.

<sup>5</sup> Erpelding v. Ludwig, 39 Minn. 518, 40 N. W. 820.

<sup>6</sup> Slagle v. Box, 124 Ark. 43, 186 S. W. 299; Riley v. Mankato Loan & Trust Co., 133 Minn. 289, 158 N. W. 391; Arthur v. Burke, 83 Wash. 690, 145 Pac. 974.

<sup>7</sup> Marreco v. Richardson [1908], 2 K. B. 584.

<sup>8</sup> Marreco v. Richardson [1908], 2 K. B. 584.

<sup>9</sup> Kaiser v. Idleman, 57 Or. 224, 28 L. R. A. (N.S.) 169, 108 Pac. 193;

Hughes v. Thomas, 131 Wis. 315, 11 L. R. A. (N.S.) 744, 111 N. W. 474.

<sup>10</sup> In re Lacey [1907], 1 Ch. 330; Clark v. Grant, 26 Okla. 398, 28 L. R. A. (N.S.) 519, 109 Pac. 234; Clute v. Clute, 197 N. Y. 439, 27 L. R. A. (N.S.) 146, 90 N. E. 988.

<sup>11</sup> England. In re Lacey [1907], 1 Ch. 330.

United States. Lyman v. Warner, 113 Fed. 87.

Kansas. Topeka Capital Co. v. Merriam, 60 Kan. 397, 56 Pac. 757.

Maine. Medomak National Bank v. Wyman, 100 Me. 556, 4 L. R. A. (N.S.) 562, 62 Atl. 658.

New York. Clute v. Clute, 197 N. Y. 439, 27 L. R. A. (N.S.) 146, 90 N. E. 988.

Oklahoma. Clark v. Grant, 26 Okla.

A assigned to B a mortgage note executed by X and guaranteed its payment. X made default in interest, but A paid such interest and sued in B's name, though without B's consent, to foreclose the mortgage, and bought the property in at such sale. It was held that such conduct suspended the running of the Statute of Limitations on A's guaranty.<sup>12</sup> Payment of interest, on the other hand, does not revive liability upon installments of interest on the same principal which have already been barred by limitations.<sup>13</sup>

It is the fact of payment and not the memorandum of payment which affects the operation of the Statute of Limitations.<sup>14</sup>

**§ 3502. Payment in something other than money.** Part payment is usually made in money. This is not, however, necessary. Anything which is given by the debtor as partial satisfaction of the debt, and which is so received by the creditor, amounts to a part payment within the meaning of this rule.<sup>1</sup> The note of the debtor given as part payment,<sup>2</sup> or as payment of interest on a number of notes,<sup>3</sup> or the check of the debtor,<sup>4</sup> amounts to payment. The parties to a note agreed that an indebtedness of the holder of the note to a firm, of which the maker was a member, should be credited upon the note as a part payment thereof. Corresponding

398, 28 L. R. A. (N.S.) 519, 109 Pac. 234.

<sup>12</sup> *Spink v. Newby*, 64 Kan. 883, 67 Pac. 437.

<sup>13</sup> *In re Fountaine* [1909], 2 Ch. 382 (payment by trustee).

<sup>14</sup> *Arkansas. Desha Bank & Trust Company v. Quilling*, 118 Ark. 114, L. R. A. 1915E, 794, 176 S. W. 132.

*Kansas. Liphart v. Myers*, 97 Kan. 686, 156 Pac. 693.

*Missouri. Clark v. Powell*, — Mo. —, 208 S. W. 31.

*New York. United States Trust Co. v. Stanton*, 145 N. Y. 620, 40 N. E. 165.

*South Carolina. Merchants' & Planters' National Bank v. Hunter*, 113 S. Car. 394, 102 S. E. 720.

*Washington. Arthur v. Burke*, 83 Wash. 690, 145 Pac. 974.

*Wisconsin. Lyle v. Esser*, 98 Wis. 234, 73 N. W. 1008.

<sup>1</sup> *England. Marreco v. Richardson* [1908], 2 K. B. 584.

*California. London & San Francisco Bank v. Parrott*, 125 Cal. 472, 73 Am. St. Rep. 64, 58 Pac. 164.

*Maine. Medomak National Bank v. Wyman*, 100 Me. 556, 4 L. R. A. (N.S.) 562, 62 Atl. 658.

*Massachusetts. Taylor v. Foster*, 132 Mass. 30.

*Pennsylvania. Souder's Estate*, 169 Pa. St. 239, 32 Atl. 417.

*South Dakota. Johnson v. Butler*, 41 S. D. 236, 170 N. W. 140.

<sup>2</sup> *Pracht v. McNee*, 40 Kan. 1, 18 Pac. 925.

<sup>3</sup> *Medomak National Bank v. Wyman*, 100 Me. 556, 4 L. R. A. (N.S.) 562, 62 Atl. 658.

<sup>4</sup> *Marreco v. Richardson* [1908], 2 K. B. 584.

entries were made upon the books of the holder of the note and of the firm. This was held to be a part payment sufficient to stop the running of the Statute of Limitations.<sup>5</sup> If after the debt has been contracted the debtor assigns to the creditor choses in action,<sup>6</sup> to be applied as far as they would go in payment of the debt, this is such part payment as to prevent the statute from running. Personal property delivered and received as part payment on a debt,<sup>7</sup> or work and labor done and accepted in partial satisfaction of a debt,<sup>8</sup> will start the statute to running anew.

**§ 3503. Intention to satisfy debt.** In order to amount to part payment, the thing of value given by the debtor to the creditor must be intended as a partial satisfaction of the debt. A payment of money made by the debtor to the creditor for some other specific purpose can not be treated by the creditor, without the consent of the debtor, as a part payment on the debt, to prevent the operation of the Statute of Limitations.<sup>1</sup> Thus A released a debt due from B in consideration of a contract by B to pay A an annuity for life. Subsequently, A sued to recover the debt. It was held that payments of the annuity not being intended as credits on the original debt would not prevent the operation of the Statute of Limitations.<sup>2</sup> A tender of an amount as part payment, which is refused as being too small to justify the trouble of accepting it, has been treated as part payment, for the purpose of the Statute of Limitations.<sup>3</sup>

<sup>5</sup> *Vinson v. Palmer*, 45 Fla. 630, 34 So. 276.

To the same effect, *McKeon v. Byington*, 70 Conn. 429, 39 Atl. 853; *Peabody v. North*, 161 Mass. 525, 37 N. E. 744.

<sup>6</sup> Such as book accounts against third persons. *Taylor v. Foster*, 132 Mass. 30.

<sup>7</sup> *Engel v. Brown*, 69 N. H. 183, 45 Atl. 402; *Young v. Alford*, 118 N. Car. 215, 23 S. E. 973; *Rowell v. Lewis's Estate*, 72 Vt. 163, 47 Atl. 783.

<sup>8</sup> *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406.

<sup>1</sup> *Kentucky. Richardson v. Chans-*

*lor's Trustee*, 103 Ky. 425, 45 S. W. 774.

*Massachusetts. Ramsay v. Warner*, 97 Mass. 8.

*New Hampshire. Brown v. Latham*, 58 N. H. 30, 42 Am. Rep. 568.

*New York. Crow v. Gleason*, 141 N. Y. 489, 36 N. E. 497.

*Pennsylvania. Rosencrance v. Johnson*, 191 Pa. St. 520, 43 Atl. 360.

*Wisconsin. Lyle v. Esser*, 98 Wis. 234, 73 N. W. 1008.

<sup>2</sup> *Price's Administratrix v. Price's Administratrix*, 111 Ky. 771, 66 S. W. 529.

<sup>3</sup> *Maniatakis' Estate*, 258 Pa. St. 11, L. R. A. 1918A, 900, 101 Atl. 920.

**§ 3504. Payment must be voluntary.** In order to operate as a waiver of the bar of the Statute of Limitations the payment made must be a voluntary one.<sup>1</sup> A payment made by a debtor to redeem property sold on execution does not revive the original debt.<sup>2</sup>

The fact that the voluntary payment is the legal result of a prior voluntary act of the debtor does not make such payment operate as a waiver of the bar of the statute. A payment of a dividend on the debts of a corporation by a committee of its creditors to whom its property had been assigned for the benefit of all the creditors does not waive the bar of the statute.<sup>3</sup> The payment of a dividend by a trustee or assignee for the benefit of creditors does not prevent limitations from running.<sup>4</sup> A trustee under a deed of trust, given by way of mortgage, sold the trust property and applied the proceeds thereof in payment of debts secured by such trust deed. Such payment did not prevent the operation of the Statute of Limitations.<sup>5</sup> The Statute of Limitations is not

<sup>1</sup> Colorado. *Holmquist v. Gilbert*, 41 Colo. 113, 14 L. R. A. (N.S.) 479, 92 Pac. 232.

Iowa. *Thomas v. Brewer*, 55 Ia. 227, 7 N. W. 571; *Mahaffy v. Faris*, 144 Ia. 220, 24 L. R. A. (N.S.) 840, 122 N. W. 934.

Kentucky. *Samuel v. Samuel's Administrator*, 151 Ky. 235, 42 L. R. A. (N.S.) 1155, 151 S. W. 676.

New Jersey. *Ballentine v. Macken*, 94 N. J. L. 502, 10 A. L. R. 836, 110 Atl. 910.

New York. *Blair v. Lynch*, 105 N. Y. 636, 11 N. E. 947; *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 27 L. R. A. (N.S.) 843, 90 N. E. 834.

Ohio. *Marienthal v. Mosler*, 16 O. S. 566.

Oklahoma. *Berry v. Oklahoma State Bank*, 50 Okla. 484, L. R. A. 1916A, 731, 151 Pac. 210.

South Carolina. *Divine v. Miller*, 70 S. Car. 225, 106 Am. St. Rep. 743, 49 S. E. 479.

<sup>2</sup> *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271. (In this case the original debt was secured by mortgage.

Judgment was taken upon the mortgage notes, execution issued thereon, premises of the mortgagor were sold under such execution, and subsequently the grantee of the property redeemed a portion thereof from the execution sale. This was held not to revive the original debt so as to prevent limitations from running against the original mortgage.)

<sup>3</sup> *Kilton v. Providence Tool Co.*, 22 R. I. 605, 48 Atl. 1039.

See contra, *Peabody v. Tenney*, 18 R. I. 498, 30 Atl. 456.

<sup>4</sup> Massachusetts. *Roscoe v. Hale*, 73 Mass. (7 Gray) 274; *Stoddard v. Doane*, 73 Mass. (7 Gray) 387; *Richardson v. Thomas*, 79 Mass. (13 Gray) 381, 74 Am. Dec. 636.

New York. *Pickett v. Leonard*, 34 N. Y. 175.

North Carolina. *Battle v. Battle*, 116 N. Car. 161, 21 S. E. 177.

Ohio. *Marienthal v. Mosler*, 16 O. S. 566.

Rhode Island. *Read v. Johnson*, 1 R. I. 81.

<sup>5</sup> *Holmquist v. Gilbert*, 41 Colo. 113, 14 L. R. A. (N.S.) 479, 92 Pac. 232;

waived by the act of the grantee in possession under a deed which in equity was treated as a mortgage, who receives the rents and profits of the land and applies them to the payment of his debt.<sup>6</sup>

A creditor can not apply a debt which he owes to his debtor, to the debt which the debtor owes to the creditor, so as to affect the operation of the statute.<sup>7</sup>

**§ 3505. Proceeds of collateral security as payment.** One who deposits collateral for the purpose of securing a debt, usually authorizes a sale thereof, either by express provisions of a contract or by fair implications. Whether the exercise of such power of sale and the application of the proceeds in part payment of the debt is a payment which affects the operation of the Statute of Limitations is a question upon which there is a conflict of authority. The weight of authority holds that this does not amount to a payment, since the debtor did not assent at the time to such sale and such application of the proceeds.<sup>1</sup> Limitations is not waived by the act of the holder of a note secured by a chattel mortgage, which was given contemporaneously with the note, who subsequently sells the mortgaged property under a power of sale in such mortgage and applies the proceeds thereof to the mortgage debt.<sup>2</sup> In some cases, however, it is held that this amounts to a payment which will affect the operation of the Statute of Limitations,<sup>3</sup> on the theory that the creditor is, for this purpose, acting

Moffitt v. Carr, 48 Neb. 403, 58 Am. St. Rep. 696, 67 N. W. 150.

<sup>6</sup> Adams v. Holden, 111 Ia. 54, 82 N. W. 468; Mahaffy v. Faris, 144 Ia. 220, 24 L. R. A. (N.S.) 840, 122 N. W. 934; Welford v. Cook, 71 Minn. 77, 70 Am. St. Rep. 315, 73 N. W. 706.

<sup>7</sup> Samuel v. Samuel's Administrator, 151 Ky. 235, 42 L. R. A. (N.S.) 1155, 151 S. W. 676.

<sup>1</sup> Colorado. Holmquist v. Gilbert, 41 Colo. 113, 14 L. R. A. (N.S.) 479, 92 Pac. 232.

Minnesota. Welford v. Cook, 71 Minn. 77, 70 Am. St. Rep. 315, 73 N. W. 706.

New Hampshire. Brown v. Latham, 58 N. H. 30, 42 Am. Rep. 568.

New Jersey. Ballentine v. Macken,

94 N. J. L. 502, 10 A. L. R. 836, 110 Atl. 910.

New York. Acker v. Acker, 81 N. Y. 143; Brooklyn Bank v. Barnaby, 197 N. Y. 210, 27 L. R. A. (N.S.) 843, 90 N. E. 834.

Oklahoma. Berry v. Oklahoma State Bank, 50 Okla. 484, L. R. A. 1916A, 731, 151 Pac. 210.

See to the same effect, Smith v. Ryan, 66 N. Y. 352, 23 Am. Rep. 60; Gibson v. Loundes, 28 S. Car. 285, 5 S. E. 727.

<sup>2</sup> Westinghouse Co. v. Boyle, 126 Mich. 677, 86 Am. St. Rep. 570, 86 N. W. 136; Ballentine v. Macken, 94 N. J. L. 502, 10 A. L. R. 836, 110 Atl. 910.

<sup>3</sup> Taylor v. Foster, 132 Mass. 30; Sornberger v. Lee, 14 Neb. 193, 45 Am. Rep. 106, 15 N. W. 345; Bosler v. Mc-

with the authority of the debtor, and as his agent, especially if the debtor has given an express power to sell or transfer the collateral.<sup>4</sup> Where this theory is in force, payment to a creditor, of dividends upon stock, which has been transferred to him as collateral security is such a payment.<sup>5</sup> The solution of this problem turns on whether the creditor is to be regarded as the agent of the debtor for the purpose of selling the collateral and applying the payment. Where he is regarded as such agent his act is equivalent to a payment by the debtor.<sup>6</sup> Where the creditor is not regarded as the agent of the debtor, the payment is not only involuntary, but it falls within the rule that the payment affects the operation of the statute only if it is made by the debtor, or by his authorized agent.<sup>7</sup>

**§ 3506. Effect of application of payment by debtor.** If the debtor directs the application of the payments, the effect of such payment upon the bar of the statute depends on whether such payment is to be applied in whole or in part to the debt in question. If two separate notes are given by the debtor to the same creditor, secured by the same mortgage, the payment of one of such notes does not toll the Statute of Limitations as to the other note or as to the mortgage.<sup>1</sup> Where, however, two notes were written upon the same sheet of paper, and payments were made generally upon the two, the debtor not making separate applications of them, and the creditor noting the payments upon the back of the paper on which the notes were written without applying them to either note specifically, such payments operate to prevent both notes from being barred by limitations.<sup>2</sup> If the debtor owes

Shane, 78 Neb. 86, 12 L. R. A. (N.S.) 1032, 110 N. W. 726, 113 N. W. 998; First National Bank v. King, 164 N. Car. 303, 49 L. R. A. (N.S.) 392, 80 S. E. 251.

<sup>4</sup> National State Bank v. Rowland, 1 Colo. App. 468, 29 Pac. 465; First National Bank v. King, 164 N. Car. 303, 49 L. R. A. (N.S.) 392, 80 S. E. 251.

<sup>5</sup> Bosler v. McShane, 78 Neb. 86, 12 L. R. A. (N.S.) 1032, 110 N. W. 726, 113 N. W. 998.

<sup>6</sup> Taylor v. Foster, 132 Mass. 30; Sonrberger v. Lee, 14 Neb. 193, 45 Am.

Rep. 106, 15 N. W. 345; Bosler v. McShane, 78 Neb. 86, 12 L. R. A. (N.S.) 1032, 110 N. W. 726, 113 N. W. 998; First National Bank v. King, 164 N. Car. 303, 49 L. R. A. (N.S.) 392, 80 S. E. 251.

<sup>7</sup> See §§ 3509 et seq.

<sup>1</sup> McManaman v. Hinchley, 82 Minn. 206, 84 N. W. 1018.

<sup>2</sup> Brafford v. Reed, 125 N. Car. 311, 34 S. E. 443.

As where the payments were indorsed on the "within notes." Sanborn v. Cole, 63 Vt. 590, 14 L. R. A. 208, 22 Atl. 716.

several distinct notes on separate pieces of paper and he makes a payment to be applied generally upon all the notes,<sup>3</sup> as where he directs his creditor, referring to a credit in the debtor's favor to "Let it go on the notes,"<sup>4</sup> or directs a payment to be applied to pay the notes as far as it would go,<sup>5</sup> such payment starts limitations anew upon all the notes. A continuing account which amounts in law to a single legal demand will be revived as a whole by a payment made to be credited thereon generally.<sup>6</sup> So payment upon an entire account if made before limitations has run against it, starts limitations to running afresh, and no part thereof is barred until the statutory period from the date of such payment has elapsed.<sup>7</sup> If, however, distinct debts exist between the parties, payment of one debt does not extend the period of limitations as to other debts.<sup>8</sup>

**§ 3507. Effect of application of payments by creditor.** We have seen elsewhere that if a debtor owes two or more debts to the same creditor, and makes a payment to the creditor without indicating upon which debt such payment is to be applied, the creditor has considerable latitude in applying such payment, and may even apply the payment to a debt which is barred by the Statute of Limitations.<sup>1</sup> The question then presented is whether such payment operates to revive the debt already barred by the statute. Upon this there is a conflict of authority. The weight of authority and the better reasoning is that such application does not operate to revive a debt already barred.<sup>2</sup> If a debtor owes a number of

<sup>3</sup>Rowell v. Lewis's Estate, 72 Vt. 163, 47 Atl. 783.

<sup>4</sup>Young v. Alford, 118 N. Car. 215, 23 S. E. 973.

<sup>5</sup>Taylor v. Foster, 132 Mass. 30.

<sup>6</sup>Friend v. Young [1897], 2 Ch. 421.

<sup>7</sup>Connecticut. McKeon v. Byington, 70 Conn. 429, 39 Atl. 853.

<sup>8</sup>Kansas. Gum v. Richert, 9 Kan. App. 570, 58 Pac. 236.

North Carolina. Stancell v. Burgwyn, 124 N. Car. 69, 32 S. E. 378.

Washington. Bellingham Bay Improvement Co. v. Fair Haven & New Whatcom Ry., 17 Wash. 371, 49 Pac. 514.

Wyoming. Hay v. Peterson, 6 Wyom. 419, 34 L. R. A. 581, 45 Pac. 1073.

<sup>1</sup>Harris v. Howard's Estate, 56 Vt. 695.

<sup>2</sup>Williams v. Griffith, 5 M. & W. 300; Thompson v. Richardson, — Mo. —, 195 S. W. 1039.

See § 2835.

<sup>3</sup>England. Mahoney v. McSweeney, 31 N. B. 672.

United States. Becker v. Oliver, 111 Fed. 672, 49 C. C. A. 533.

Arkansas. Armistead v. Brooke, 18 Ark. 521.

Colorado. Holmquist v. Gilbert, 41 Colo. 113, 14 L. R. A. (N.S.) 479, 92 Pac. 232.

separate debts to the same creditor, all of which are barred by limitations, a general payment made by the debtor, and not applied by him to any specific debt will not remove the bar of the statute as to any debt.<sup>3</sup> A minority of the courts hold that the creditor may apply general payments in such a way as to revive debts which have been barred.<sup>4</sup> In some states it is held that while the creditor can not apply payments as he pleases so as to revive debts once barred by the Statute of Limitations, he can apply payments made before the statute has run so as to start the statute to running anew.<sup>5</sup> In other states it is held that the application by the creditor to specific debts not yet barred does not start limitations to running anew.<sup>6</sup>

The application by the creditor of involuntary payments does not affect the operation of the statute,<sup>7</sup> partly on the theory that such payment is not voluntary,<sup>8</sup> and partly on the theory that the payment is not made by the debtor or his authorized agent.<sup>9</sup>

**Maine.** *Blake v. Sawyer*, 83 Me. 129, 23 Am. St. Rep. 762, 12 L. R. A. 712, 21 Atl. 834.

**Massachusetts.** *Pond v. Williams*, 67 Mass. (1 Gray) 630; *Ramsay v. Warner*, 97 Mass. 8.

**Minnesota.** *Reeves v. Sawyer*, 88 Minn. 218, 92 N. W. 962; *Anderson v. Nystrom*, 103 Minn. 168, 13 L. R. A. (N.S.) 1141, 114 N. W. 742.

**New York.** *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 27 L. R. A. (N.S.) 843, 90 N. E. 834.

**Oklahoma.** *Berry v. Oklahoma State Bank*, 50 Okla. 484, L. R. A. 1916A, 731, 151 Pac. 210.

**Pennsylvania.** *In re Montgomery*, 259 Pa. St. 412, 103 Atl. 223.

<sup>3</sup> *Anderson v. Nystrom*, 103 Minn. 168, 13 L. R. A. (N.S.) 1141, 114 N. W. 742.

<sup>4</sup> *Hopper v. Hopper*, 61 S. Car. 124, 89 S. E. 366; *Sanborn v. Cole*, 63 Vt. 590, 14 L. R. A. 208, 22 Atl. 716; *Rowell v. Lewis's Estate*, 72 Vt. 163, 47 Atl. 783; *McDowell v. McDowell*, 75 Vt. 401, 98 Am. St. Rep. 831, 56 Atl. 98.

<sup>5</sup> *Blake v. Sawyer*, 83 Me. 129, 23 Am. St. Rep. 762, 12 L. R. A. 712,

21 Atl. 834; *Beck v. Hass*, 111 Mo. 264, 33 Am. St. Rep. 516, 20 S. W. 19.

<sup>6</sup> *Lyle v. Esser*, 98 Wis. 234, 73 N. W. 1008.

<sup>7</sup> **Colorado.** *Holmquist v. Gilbert*, 41 Colo. 113, 14 L. R. A. (N.S.) 479, 92 Pac. 232.

**Iowa.** *Mahaffy v. Faris*, 144 Ia. 220, 24 L. R. A. (N.S.) 840, 122 N. W. 934.

**Kentucky.** *Samuel v. Samuel's Administrator*, 151 Ky. 235, 42 L. R. A. (N.S.) 1155, 151 S. W. 676.

**New Jersey.** *Ballentine v. Macken*, 94 N. J. L. 502, 10 A. L. R. 836, 110 Atl. 910.

**New York.** *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 27 L. R. A. (N.S.) 843, 90 N. E. 834.

**Oklahoma.** *Berry v. Oklahoma State Bank*, 50 Okla. 484, L. R. A. 1916A, 731, 151 Pac. 210.

**South Carolina.** *Divine v. Miller*, 70 S. Car. 225, 106 Am. St. Rep. 743, 49 S. E. 479.

**Contra, Bosler v. McShane, 78 Neb. 86, 12 L. R. A. (N.S.) 1032, 110 N. W. 726, 113 N. W. 998.**

<sup>8</sup> See § 3504.

<sup>9</sup> See §§ 3509 et seq.

If the debtor has made a payment without an application thereof, and he subsequently consents to a specific application thereof,<sup>10</sup> or if the creditor makes an unauthorized application upon his debt, of a claim which his debtor has against him, and the debtor subsequently acquiesces therein,<sup>11</sup> such application prevents the operation of the Statute of Limitations, but this is rather to be explained as an application by the debtor,<sup>12</sup> than as an application by the creditor. If the creditor has made no application of a debt due from him to his debtor upon the debt in dispute due from his debtor to him, the existence of such debt clearly does not extend limitations.<sup>13</sup> The mere existence of an indebtedness in favor of A as against B is not a payment on a note held by B against A, though it may be used as a set-off.<sup>14</sup>

**§ 3508. Effect of application of payments by the law.** Whether the law will apply a payment to a debt which is barred by limitations, is a question upon which there is a conflict of authority, due in part to the difference between the common-law rule and the civil-law rule.<sup>1</sup> In some jurisdictions, the law will apply a payment to the oldest debt, even though it is barred by limitations;<sup>2</sup> while, in other jurisdictions, a payment will not be applied by the law to a debt which is already barred.<sup>3</sup> The law will apply a payment to a debt which was not barred when the payment is made, but which is barred before the action is brought.<sup>4</sup> If a debt is payable in installments under a continuing contract, general payment which is made by the debtor, will not be applied by the law to any specific installment, but it will prevent the operation of the Statute of Limitations as to the entire debt.<sup>5</sup> In accordance with this principle, a payment by an employer to an employee under a continuing contract will not be applied by the law to any par-

<sup>10</sup> *Thompson v. Richardson*, — Mo. —, 195 S. W. 1039.

<sup>11</sup> *Eureka Cedar Lumber & Shingle Co. v. Knack*, 95 Wash. 339, 163 Pac. 753.

<sup>12</sup> See § 3506.

<sup>13</sup> *Samuel v. Samuel's Administrator*, 151 Ky. 235, 42 L. R. A. (N.S.) 1155, 151 S. W. 676; *Nash v. Woodward*, 62 S. Car. 418, 40 S. E. 895.

<sup>14</sup> *Samuel v. Samuel's Administrator*, 151 Ky. 235, 42 L. R. A. (N.S.) 1155,

151 S. W. 676; *Nash v. Woodward*, 62 S. Car. 418, 40 S. E. 895.

<sup>1</sup> See §§ 2841 et seq.

<sup>2</sup> *Estes v. Fry*, 166 Mo. 70, 65 S. W. 741; *Fletcher v. Gillan*, 62 Miss. 8.

See § 2839.

<sup>3</sup> *Livermore v. Rand*, 26 N. H. 85.

<sup>4</sup> *Robinson v. Allison*, 36 Ala. 525.

<sup>5</sup> *Blair v. Willman's Estate*, — Neb. —, 181 N. W. 615; *Ebersole v. Omaha National Bank*, 71 Neb. 778, 99 N. W. 664.

ticular installment; and it will prevent the operation of the statute as to all payments under such contract.<sup>6</sup>

**§ 3509. By whom part payment may be made—Debtor or agent.** Since part payment extends the period of limitations only when it amounts to an admission by the debtor that more is due, it follows that payment can not have this effect unless it is in some way authorized by the debtor.<sup>1</sup> To operate as a waiver of the bar of the statute a part payment must be made by the debtor,<sup>2</sup> or by his agent duly authorized.<sup>3</sup> The agent must be authorized not only to make the payment which he makes, but to make it when he makes it in order to waive the bar of the statute as to the principal.<sup>4</sup> If authority is given to an agent to make a payment, and he delays making such payment for an unreasonable time, such payment operates, if at all, from the time that the authority was given, and not from the time that the payment was made.<sup>5</sup>

The payment of the debt by a person having no authority to make such payment, does not prevent limitations from running.<sup>6</sup>

<sup>6</sup> *Blair v. Willman's Estate*, — Neb. —, 181 N. W. 615.

<sup>1</sup> *Kansas. Good v. Ehrlich*, 67 Kan. 94, 72 Pac. 545.

*Massachusetts. Fletcher v. Sturtevant*, — Mass. —, 126 N. E. 428.

*Missouri. Engle v. Worth County*, 278 Mo. 295, 213 S. W. 70.

*New York. Murdock v. Waterman*, 145 N. Y. 55, 27 L. R. A. 418, 39 N. E. 829.

*Ohio. Hance v. Hair*, 25 O. S. 349.

*Oklahoma. Kelsay v. Kelsay Land Co.*, 64 Okla. 291, 166 Pac. 173.

*Pennsylvania. White v. Pittsburgh Vein Coal Co.*, 266 Pa. St. 145, 109 Atl. 873.

*South Carolina. Merchants' & Planters' National Bank v. Hunter*, 113 S. Car. 394, 102 S. E. 720.

<sup>2</sup> *Good v. Ehrlich*, 67 Kan. 94, 72 Pac. 545; *Mizer v. Emigh*, 63 Neb. 245, 88 N. W. 479.

<sup>3</sup> *Cone v. Hyatt*, 132 N. Car. 810, 44 S. E. 678; *First National Bank v. King*, 164 N. Car. 303, 49 L. R. A. (N.S.) 392, 80 S. E. 251.

<sup>4</sup> *Colorado. Holmquist v. Gilbert*, 41 Colo. 113, 14 L. R. A. (N.S.) 479, 92 Pac. 232.

*Iowa. Mahaffy v. Faris*, 144 Ia. 220, 24 L. R. A. (N.S.) 840, 122 N. W. 934.

*Kentucky. Samuel v. Samuel's Administrator*, 151 Ky. 235, 42 L. R. A. (N.S.) 1155, 151 S. W. 676.

*Michigan. Sweet v. Ellis*, 109 Mich. 460, 67 N. W. 535.

*New Jersey. Ballentine v. Macken*, 94 N. J. L. 502, 10 A. L. R. 836, 110 Atl. 910.

*New York. Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 27 L. R. A. (N.S.) 843, 90 N. E. 834.

*Oklahoma. Berry v. Oklahoma State Bank*, 50 Okla. 484, L. R. A. 1916A, 731, 151 Pac. 210.

*South Carolina. Divine v. Miller*, 70 S. Car. 225, 106 Am. St. Rep. 743, 49 S. E. 479.

<sup>5</sup> *Sweet v. Ellis*, 109 Mich. 460, 67 N. W. 535.

<sup>6</sup> *Cropley v. Eyster*, 9 D. C. App. 373; *Patterson v. Collier*, 113 Mich. 12, 67 Am. St. Rep. 440, 71 N. W. 327; *Dundee*

Payment made by a third person, under some contract between himself and the debtor, is sufficient, even if such third person is not a general agent of the debtor.<sup>7</sup> A payment made by one acting without authority from the debtor may be ratified by the debtor, and if so ratified will operate as a waiver of the bar of the statute, if it would have had such effect had it been made by the debtor himself.<sup>8</sup> The daughter of a debtor made a payment without his knowledge or consent. Subsequently, a statement of the account was exhibited to the debtor, and he approved it as correct. This was held to be a ratification of such payment, and accordingly it had the same effect in preventing the Statute of Limitations from running as it would have had if made by the debtor himself.<sup>9</sup>

In order to have the debtor bind himself by ratification of the payment, such payment must have been made on his behalf. A promise made by one of two joint and several debtors to pay the residue of the debt left after the other debtor had made a part payment thereon on his own behalf does not amount to a ratification of such payment. Hence, if the new promise is unenforceable because it does not comply with the statutory requirements, the debtor who did not make such payment is not liable.<sup>10</sup>

A promoter has no power to bind a corporation, and a payment by him will not affect the operation of the statute as against the corporation.<sup>11</sup>

**§ 3510. Creditor as agent of debtor.** The act of the creditor in making a credit upon the debt without the assent of the debtor, can not prevent the statute from running.<sup>1</sup>

The creditor can not act as agent of the debtor in applying to the payment of the debt, a claim which the debtor has against the creditor, so as to affect the operation of the statute;<sup>2</sup> but if the debtor subsequently assents to such application, such payment affects the operation of the statute.<sup>3</sup>

*Mortgage & Trust Inv. Co. v. Horner*,  
30 Or. 558, 48 Pac. 175.

<sup>7</sup> *Huntington v. Chesmore*, 60 Vt. 566,  
15 Atl. 173.

<sup>8</sup> *Clarkin v. Brown*, 80 Minn. 361, 83  
N. W. 351.

<sup>9</sup> *Clarkin v. Brown*, 80 Minn. 361, 83  
N. W. 351.

<sup>10</sup> *Pfenninger v. Kokesch*, 68 Minn. 81,  
70 N. W. 867.

<sup>11</sup> *White v. Pittsburgh Vein Coal Co.*,  
266 Pa. St. 145, 109 Atl. 873.

<sup>1</sup> *Samuel v. Samuel's Administrator*,  
151 Ky. 235, 42 L. R. A. (N.S.) 1155,  
151 S. W. 676; *Bay City Iron Co. v.*  
*Emery*, 128 Mich. 506, 87 N. W. 652;  
*Merchants' & Planters' National Bank*  
*v. Hunter*, 113 S. Car. 394, 102 S. E.  
720.

<sup>2</sup> *Samuel v. Samuel's Administrator*,  
151 Ky. 235, 42 L. R. A. (N.S.) 1155,  
151 S. W. 676.

<sup>3</sup> *Eureka Cedar Lumber & Shingle Co.*  
*v. Knack*, 95 Wash. 295, 163 Pac. 753.

A debtor frequently gives to a creditor, or to a trustee, a power to sell certain property and to apply the proceeds to the payment of such debt. In many jurisdictions this is not regarded as a payment by an agent, so as to affect the operation of the Statute of Limitations.<sup>4</sup> This result is reached upon the theory that such payment is not, properly speaking, voluntary,<sup>5</sup> and in part on the theory that the giving of such power to the adversary party, does not make him the agent of the debtor. In some jurisdictions, however, it is held that power given by the debtor when the debt is incurred, creates an agency, for the purpose of making such payments, so that such payment will affect the operation of the statute.<sup>6</sup> This result has been reached where the payment was made in exercise of a power to sell collateral and to apply the proceeds to the payment of a debt,<sup>7</sup> and to payment by a corporation of dividends upon stock which had been transferred by the debtor to the creditor as collateral security.<sup>8</sup>

**§ 3511. Payment by partnership.** Before dissolution, a payment made by a partner upon a partnership debt starts limitations to running afresh.<sup>1</sup> This doctrine is qualified in some jurisdictions by the rule that if such payment is made out of the personal funds of the partner it does not stop limitations from running against the partnership.<sup>2</sup> A payment made by a member of a partnership after the dissolution thereof is held by some authorities to operate as a waiver of the bar of the statute as to such payees as did not know

<sup>4</sup> Colorado. *Holmquist v. Gilbert*, 41 Colo. 113, 14 L. R. A. (N.S.) 479, 92 Pac. 232.

Iowa. *Mahaffy v. Faris*, 144 Ia. 220, 24 L. R. A. (N.S.) 840, 122 N. W. 934.

New Jersey. *Ballentine v. Macken*, 94 N. J. L. 502, 10 A. L. R. 836, 110 Atl. 910.

New York. *Brooklyn Bank v. Barnaby*, 197 N. Y. 210, 27 L. R. A. (N.S.) 843, 90 N. E. 834.

Oklahoma. *Berry v. Oklahoma State Bank*, 50 Okla. 484, L. R. A. 1916A, 731, 161 Pac. 210.

South Carolina. *Divine v. Miller*, 70 S. Car. 225, 106 Am. St. Rep. 743, 49 S. E. 479.

See § 3512.

<sup>5</sup> See § 2074.

<sup>6</sup> *National State Bank v. Rowland*, 1 Colo. App. 468, 29 Pac. 465; *First National Bank v. King*, 164 N. Car. 303, 49 L. R. A. (N.S.) 392, 80 S. E. 251; *Bosler v. McShane*, 78 Neb. 86, 12 L. R. A. (N.S.) 1032, 110 N. W. 726, 113 N. W. 998.

<sup>7</sup> *National State Bank v. Rowland*, 1 Colo. App. 468, 29 Pac. 465; *First National Bank v. King*, 164 N. Car. 303, 49 L. R. A. (N.S.) 392, 80 S. E. 251.

<sup>8</sup> *Bosler v. McShane*, 78 Neb. 86, 12 L. R. A. (N.S.) 1032, 110 N. W. 726, 113 N. W. 998.

<sup>1</sup> *Harding v. Butler*, 156 Mass. 34, 30 N. E. 168.

<sup>2</sup> *Blethen v. Murch*, 80 Me. 313, 14 Atl. 208.

of the dissolution.<sup>3</sup> If the creditor has notice of the dissolution, a part payment made by the liquidating partner does not waive the bar as to the other partners,<sup>4</sup> even under a statute providing that on dissolution each partner may with consent of his creditor settle for his own share of the firm debts.<sup>5</sup> Some authorities hold that even if the creditor knows of the dissolution a payment by the partners who remain in the business prevents limitations from running as to all.<sup>6</sup> If a judgment has been rendered against a partnership, and one of the partners individually, a payment made upon the judgment by the latter does not revive the obligation as against a partner who was not served in the original action, and who had not authorized such payment expressly.<sup>7</sup>

**§ 3512. Payment by joint debtor.** A payment by one of two or more joint debtors is not, according to the weight of authority, a waiver of the bar as to the other debtors;<sup>1</sup> nor will such a payment, if made before the statute has run, prevent the running of the statute as to any but the debtor making the payment.<sup>2</sup> Some authorities hold, however, that a payment by one of two or more joint debtors, if made before the cause of action is barred, starts

<sup>3</sup>In re Tucker [1894], 1 Ch. 724; Campbell v. Herrick, 104 Kan. 657, 180 Pac. 237; Davison v. Sherburne, 57 Minn. 355, 47 Am. St. Rep. 618, 59 N. W. 316; Clement v. Clement, 69 Wis. 589, 2 Am. St. Rep. 760, 35 N. W. 17.  
<sup>4</sup>Kerper v. Wood, 48 O. S. 613, 15 L. R. A. 656, 29 N. E. 501.

<sup>5</sup>Turner v. Ross, 1 R. I. 88.

<sup>6</sup>Campbell v. Floyd, 153 Pa. St. 84, 25 Atl. 1033.

<sup>7</sup>Northern Commercial Co. v. Big Four Trading Co., 86 Wash. 589, 150 Pac. 1151.

<sup>1</sup>State Loan & Trust Co. v. Cochran, 130 Cal. 245, 62 Pac. 466, 600 (obiter); Kallenbach v. Dickinson, 100 Ill. 427, 39 Am. Rep. 47; Gowdy v. Gillam, 6 Rich. L. (S. Car.) 28.

<sup>2</sup>United States. Clementson v. Williams, 12 U. S. (8 Cranch) 72, 3 L. ed. 30; Bell v. Morrison, 26 U. S. (1 Pet. 351, 7 L. ed. 174; Underwood v. Patrick, 94 Fed. 468, 36 C. C. A. 330.

Illinois. Boynton v. Spafford, 162 Ill.

113, 53 Am. St. Rep. 274, 44 N. E. 379. Kansas. Elmore v. Fanning, 85 Kan. 501, 38 L. R. A. (N.S.) 685, 117 Pac. 1019.

Kentucky. Tate v. Hawkins, 81 Ky. 577, 50 Am. Rep. 181.

Maine. Quimby v. Putnam, 28 Me. 419.

Michigan. Rogers v. Anderson, 40 Mich. 290.

Montana. First National Bank v. Bullard, 20 Mont. 118, 49 Pac. 658.

Nebraska. Mayberry v. Willoughby, 5 Neb. 368, 25 Am. Rep. 491.

North Dakota. Grovenor v. Signor, 10 N. D. 503, 88 N. W. 278.

Pennsylvania. White v. Pittsburgh Vein Coal Co., 266 Pa. St. 145, 109 Atl. 873.

Washington. Stubblefield v. McAuliff, 20 Wash. 442, 55 Pac. 637; Hanna v. Kasson, 26 Wash. 568, 67 Pac. 271.

Wisconsin. National Bank v. Cotton, 53 Wis. 31, 9 N. W. 926.

limitations anew as to all the debtors.<sup>3</sup> Even where such payment before the bar has run has such effect, a second payment made within the statutory period after the first payment, but after the statutory period from the maturity of the original debt, does not extend the period a second time.<sup>4</sup>

If the estate of a deceased joint obligor is not liable to the obligee, a payment upon a debt by the administrator of such deceased joint maker has no effect upon the operation of the statute.<sup>5</sup>

If one of two joint debtors makes a payment through the other as his agent, and such facts are known to the creditor, the operation of the statute in favor of the joint debtor, who acted as agent in making such payment, is not affected.<sup>6</sup>

**§ 3513. Payment by joint and several debtor.** If the obligation is a joint and several one, payment by one of such debtors should affect the rights of the other, even less than in cases of joint obligation. In some cases it is held that a payment by one joint and several debtor before the debt is barred does not affect the statute,<sup>1</sup> and it does not revive the debt if it is made after the debt has been barred.<sup>2</sup> In other jurisdictions, payment by a joint and several debtor, before the debt is barred, sets the statutes to running anew as against the other debts;<sup>3</sup> and accordingly pay-

<sup>3</sup> *Moore v. Goodwin*, 109 N. Car. 218, 13 S. E. 772; *Moore v. Beaman*, 111 N. Car. 328, 16 S. E. 177; *Partlow v. Singer*, 2 Or. 307.

<sup>4</sup> *Smith v. Caldwell*, 15 Rich. L. (S. Car.) 365.

<sup>5</sup> *McLaughlin v. Head*, 86 Or. 361, L. R. A. 1918B, 303, 168 Pac. 614.

<sup>6</sup> *Elmore v. Fanning*, 85 Kan. 501, 38 L. R. A. (N.S.) 685, 117 Pac. 1019.

<sup>1</sup> *Indiana*. *Bottles v. Miller*, 112 Ind. 584, 14 N. E. 728; *Koontz v. Hammond*, 21 Ind. App. 76, 51 N. E. 506.

*Kansas*. *Wellington National Bank v. Thomson*, 9 Kan. App. 667, 59 Pac. 178.

*Massachusetts*. *Fletcher v. Sturtevant*, — Mass. —, 126 N. E. 428.

*Minnesota*. *Willoughby v. Irish*, 35 Minn. 63, 59 Am. Rep. 297, 27 N. W. 379.

*Ohio*. *Hance v. Hair*, 25 O. S. 349.

*New York*. *Littlefield v. Littlefield*, 91 N. Y. 203, 43 Am. Rep. 663.

*Wyoming*. *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17, 25 L. R. A. 608, 37 Pac. 689.

<sup>2</sup> *Atkins v. Tredgold*, 2 Barn. & C. 23; *Slagle v. Box*, 124 Ark. 43, 186 S. W. 299;; *Parker v. Butterworth*, 46 N. J. L. 244, 50 Am. Rep. 407; *Northern Commercial Co. v. Big Four Trading Co.*, 86 Wash. 589, 150 Pac. 1151.

<sup>3</sup> *Arkansas*. *Trustees Real Estate Bank v. Hartfield*, 5 Ark. 551; *Hicks v. Lusk*, 19 Ark. 692; *Burr v. Williams*, 20 Ark. 177; *Fendley v. Shulta*, 142 Ark. 180, 218 S. W. 197.

*Maryland*. *Burgoon v. Bixler*, 55 Md. 384, 39 Am. Rep. 417.

*Massachusetts*. *Sigourney v. Drury*, 31 Mass. (14 Pick.) 387.

*New Jersey*. *Parker v. Butterworth*, 46 N. J. L. 244, 50 Am. Rep. 407 (obiter).

ment by an administrator of a deceased joint and several debtor, sets the statutes to running anew against the other debtors.<sup>4</sup>

**§ 3514. Payment by principal debtor or by surety.** A part payment upon a debt made by the principal debtor does not, according to the weight of authority, prevent the running of the statute in favor of a surety;<sup>1</sup> nor does it waive the bar of the statute after it has once run.<sup>2</sup> Certain stockholders of a corporation executed an accommodation note to obtain a loan for the corporation which was not a party to the note. Subsequently the corporation made payments upon such note. These payments were held not to waive the bar of the statute.<sup>3</sup> If the principal debtor is the president of a corporation to which the note is endorsed, payments by him upon such note after limitations has run do not revive the note as against an accommodation party.<sup>4</sup> The fact that the surety at the request of the creditor writes to the principal a letter urging him to pay the debt, does not make the surety a party to a payment made in consequence thereof by the maker, and such payment does not operate to prevent the statute from running in favor of the surety.<sup>5</sup>

This principle has been applied by some authorities to a case where a husband has made a payment upon a debt secured by a mortgage executed jointly by himself and his wife, encumbering her property,<sup>6</sup> or community property,<sup>7</sup> or which is secured by a

**South Carolina.** *Silman v. Silman*, 2 Hill (S. Car.) 416.

<sup>4</sup> *Fendley v. Shults*, 142 Ark. 180, 218 S. W. 197.

<sup>1</sup> **Georgia.** *Hunter v. Robertson*, 30 Ga. 479.

**Indiana.** *Mozingo v. Ross*, 150 Ind. 688, 65 Am. St. Rep. 387, 41 L. R. A. 612, 50 N. E. 887; *Meitzler v. Todd*, 12 Ind. App. 381, 54 Am. St. Rep. 531, 39 N. E. 1046.

**Kansas.** *Steele v. Souder*, 20 Kan. 39.

**New Jersey.** *Smith v. Dowden*, 92 N. J. L. 317, 105 Atl. 720.

**New York.** *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Winchell v. Hicks*, 18 N. Y. 558.

**North Carolina.** *Barber v. William Absher Co.*, 175 N. C. 602, 96 S. E. 43.

**Ohio.** *Hance v. Hair*, 25 O. S. 349.

**Pennsylvania.** *Homewood People's Bank v. Hastings*, 263 Pa. St. 260, 106 Atl. 308; *White v. Pittsburgh Vein Coal Co.*, 266 Pa. St. 146, 109 Atl. 873.

<sup>2</sup> *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Davis v. Mann*, 43 Ill. App. 301; *Homewood People's Bank v. McCutcheon*, 266 Pa. St. 116, 109 Atl. 873.

<sup>3</sup> *Patterson v. Collier*, 113 Mich. 12, 67 Am. St. Rep. 440, 71 N. W. 327.

<sup>4</sup> *Homewood People's Bank v. McCutcheon*, 266 Pa. St. 116, 109 Atl. 873 ('in this case, as against the maker').

<sup>5</sup> *Borden v. Fletcher's Estate*, 131 Mich. 220, 91 N. W. 145.

<sup>6</sup> *Curtiss v. Perry*, 126 Mich. 600, 85 N. W. 1131.

<sup>7</sup> *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637.

vendor's lien upon land belonging to her.<sup>8</sup> Such payments have been held not to waive the bar of the statute as to her.

Even where payment by the principal does not extend limitations as to a surety, the surety may be bound if he authorizes such payment.<sup>9</sup> If an official of a corporation is an accommodation party, the corporation being the principal debtor, and such official makes a payment with corporation funds, such payment suspends such statute as to him.<sup>10</sup> A was principal and B, C and D his sureties. The creditor called on B and C for payment, and they asked him to see A. A made a payment as the result of the creditors' application to him. Such payment was held to extend the time of limitations as to B and C, but not as to D.<sup>11</sup>

Some authorities hold, on the other hand, that payments made by the principal prevent the Statute of Limitations from running in favor of the surety.<sup>12</sup> This principle has been applied where such payments were made before the cause of action was barred.<sup>13</sup> Payment by one who has given bond with sureties to secure the repayment of money which he has borrowed, suspends the running of the statute as to his sureties.<sup>14</sup> Under this principle, where a husband and wife executed a mortgage on their homestead, and the husband made payments upon such debt, such payments have been held to prevent the running of the statute as to the wife.<sup>15</sup> Where the mortgage covers her separate property a payment by the husband on his debt has been held to prevent limitations from running against the mortgage.<sup>16</sup>

<sup>8</sup> *Poindexter v. Rawlings*, 106 Tenn. 97, 82 Am. St. Rep. 869, 59 S. W. 766.

<sup>9</sup> *Gordon v. Russell*, 98 Kan. 537, 158 Pac. 661; *Glick v. Crist*, 37 O. S. 388; *Winchell v. Hicks*, 18 N. Y. 558.

<sup>10</sup> *Gordon v. Russell*, 98 Kan. 537, 158 Pac. 661.

<sup>11</sup> *Winchell v. Hicks*, 18 N. Y. 558.

<sup>12</sup> *Clinton County v. Smith*, 238 Mo. 118, 37 L. R. A. (N.S.) 272, 141 S. W. 1091; *Engle v. Worth County*, 278 Mo. 295, 213 S. W. 70; *Moore v. Carr*, 123 N. Car. 425, 31 S. E. 832; *Woonsocket Institution v. Ballou*, 16 R. I. 351, 1 L. R. A. 555, 16 Atl. 144; *Dickson v. Gourdin*, 29 S. Car. 343, 1 L. R. A. 628, 7 S. E. 510.

<sup>13</sup> *Burleigh v. Stott*, 8 B. & C. 36;

*Clinton County v. Smith*, 238 Mo. 118, 37 L. R. A. (N.S.) 272, 141 S. W. 1091; *Engle v. Worth County*, 278 Mo. 295, 213 S. W. 70; *Moore v. Goodwin*, 109 N. Car. 218, 13 S. E. 772.

<sup>14</sup> *Clinton County v. Smith*, 238 Mo. 118, 37 L. R. A. (N.S.) 272, 141 S. W. 1091; *Engle v. Worth County*, 278 Mo. 295, 213 S. W. 70.

<sup>15</sup> *Skinner v. Moore*, 64 Kan. 360, 91 Am. St. Rep. 244, 67 Pac. 827; *Clift v. Williams*, 105 Ky. 559, 51 S. W. 821, 49 S. W. 328; *Roberts v. Roberts*, 10 N. D. 531, 88 N. W. 289.

<sup>16</sup> *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843. (Payments made after the death of the wife were held to have this effect against her heirs.)

Payments made by a surety, as upon an official bond,<sup>17</sup> have been held to prevent limitations from running in favor of the maker.

**§ 3515. Payment by maker as against indorser.** In jurisdictions where a payment by the principal prevents limitations from running in favor of the surety and an indorser is treated as a surety, the question is presented, whether payments by the maker of the note can prevent the Statute of Limitations from running in favor of the indorser. On this question there is a divergence of authority. In some jurisdictions it is held that such payment does not affect the statute as between the creditor and the indorser,<sup>1</sup> while other cases hold that such payment affects the statute as to the indorser.<sup>2</sup> If the contract contains a provision to the effect that extensions of time and part payments before or after maturity, shall not operate to the prejudice of the holder if the note is not paid at maturity, a payment by the principal debtor suspends the statute as to an indorser.<sup>3</sup>

**§ 3516. Payment by purchaser, etc., of mortgaged realty as against mortgagor.** If A buys mortgaged realty from the mortgagor, B, payments made by A upon the mortgage debt will prevent limitations from operating as a bar to the foreclosure of the mortgage,<sup>1</sup> whether A has<sup>2</sup> or has not<sup>3</sup> assumed and agreed to pay the mortgage debt.

Whether payments made under such circumstances by A will prevent limitations from running against B's personal liability is a different question. The weight of authority is that payments

<sup>17</sup> *State v. Finn*, 98 Mo. 532, 14 Am. St. Rep. 654, 11 S. W. 994.

<sup>1</sup> *Maddox v. Duncan*, 143 Mo. 613, 65 Am. St. Rep. 678, 41 L. R. A. 581, 45 S. W. 688.

<sup>2</sup> *Indiana*. *Nicholas v. Porter*, 181 Ind. 332, 103 N. E. 842.

*Maine*. *Colburn v. Averill*, 30 Me. 310, 50 Am. Dec. 630.

*Maryland*. *Schindel v. Gates*, 46 Md. 604, 24 Am. Rep. 526; *Hooper v. Hooper*, 81 Md. 155, 48 Am. St. Rep. 496, 31 Atl. 508.

*Massachusetts*. *Hunt v. Bridgham*, 16 Mass. (2 Pick.) 581, 13 Am. Dec. 458.

*North Carolina*. *Copeland v. Collins*, 122 N. Car. 619, 30 S. E. 315; *Moore v. Carr*, 123 N. Car. 425, 31 S. E. 832; *Garrett v. Reeves*, 125 N. Car. 529, 34 S. E. 636.

<sup>3</sup> *Schreiner v. City National Bank*, 76 Okla. 76, 183 Pac. 905 (instrument executed before Negotiable Instrument law was enacted).

<sup>1</sup> *Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728.

<sup>2</sup> *Harts v. Emery*, 184 Ill. 560, 56 N. E. 865; *Murray v. Emery*, 187 Ill. 408, 58 N. E. 327.

<sup>3</sup> *McLane v. Allison*, 60 Kan. 441, 56 Pac. 747.

made by A have no effect upon the running of the statute against B's liability on the debt,<sup>4</sup> even if A has assumed and agreed to pay the mortgage debt.<sup>5</sup> Some authorities hold, however, that if A has covenanted to pay the mortgage debt, payments by A will keep the mortgage debt alive as to B, the original debtor.<sup>6</sup> If the mortgage debt has become barred by limitations, B, the original mortgagor, can not revive the lien of the mortgage as against A, his grantee, by making a payment upon the mortgage debt after such conveyance.<sup>7</sup>

Payment upon a mortgage debt, made by the grantee of part of the premises to protect his interest, does not waive the bar of the statute as to the owners of the residue of the premises;<sup>8</sup> nor does such payment waive the bar of the statute as to the grantee of part of the premises if made by a grantee of the rest of the premises who has covenanted to pay the mortgage debt.<sup>9</sup>

If a devisee of a specific tract of realty pays interest upon a debt, which is secured by a mortgage upon such tract, such payment keeps the mortgage debt alive as against the devisees of other tracts, which were not covered by such mortgage,<sup>10</sup> so that, in case of a deficiency, the mortgagee can recover against the devisees of such other tracts.<sup>11</sup>

### § 3517. Payment by mortgagor, etc., as against purchaser, etc.

If the mortgagor makes a payment upon the mortgage debt while he is still the owner of the mortgaged realty, such payment starts limitations to running again, as against a subsequent purchaser.<sup>1</sup> As to the lien of the mortgage, limitations is said to run from the date of the last payment made by the mortgagor before he conveys the realty.<sup>2</sup>

<sup>4</sup> Trustees of the Alms House Farm v. Smith, 52 Conn. 434; Home Life Insurance Co. v. Elwell, 111 Mich. 689, 70 N. W. 334.

<sup>5</sup> Cottrell v. Shepherd, 86 Wis. 649, 39 Am. St. Rep. 919, 57 N. W. 983.

<sup>6</sup> Biddle v. Pugh, 59 N. J. Eq. 480, 45 Atl. 626.

<sup>7</sup> Day v. Baldwin, 34 Ia. 380; Schumacker v. Sibert, 18 Kan. 104, 26 Am. Rep. 765; Mack v. Anderson, 165 N. Y. 529, 59 N. E. 289; Damon v. Leque, 17 Wash., 573, 61 Am. St. Rep. 927, 50 Pac. 485.

<sup>8</sup> Murdock v. Waterman, 145 N. Y. 55, 27 L. R. A. 418, 39 N. E. 829.

<sup>9</sup> Contra, Longstreet v. Brown (N. J. Eq.), 37 Atl. 56.

<sup>10</sup> Mack v. Anderson, 165 N. Y. 529, 59 N. E. 289.

<sup>11</sup> In re Lacey [1907], 1 Ch. 330.

<sup>12</sup> In re Lacey [1907], 1 Ch. 330.

<sup>1</sup> Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130.

<sup>2</sup> Cook v. Union Trust Co., 106 Ky. 803 [sub nomine, Cook v. Bramel, 45 L. R. A. 212, 51 S. W. 600.

If the mortgage debt is not barred when the mortgagor conveys the premises, it is held in some courts that payments thereon made by the mortgagor after the conveyance do not start limitations to running afresh as to the lien of the mortgage.<sup>3</sup> If mortgaged premises are sold under execution on a judgment against the mortgagor, a part payment made by the mortgagor upon the mortgage debt will not stop the running of the Statute of Limitations against the mortgage in favor of the purchaser at such execution sale.<sup>4</sup>

In other courts it is held that a payment by the original debtor, before such debt is barred, starts limitations to running again as against the mortgage, even if the mortgaged realty has been conveyed before such payment is made.<sup>5</sup>

Under some authorities which treat lapse of time in enforcing a mortgage as merely raising a presumption of payment, payment by anyone interested in either the debt or the equity of redemption is sufficient to rebut the presumption of payment. Payment by the mortgagor after he has conveyed the mortgaged premises to another is sufficient to rebut such presumption as in favor of his grantee,<sup>6</sup> and payment by one interested in the equity of redemption repels such presumption as to others interested therein.<sup>7</sup>

A payment by the original debtor before the debt is barred, keeps alive a mortgage given by a third person to secure such debt.<sup>8</sup>

A payment made by the debtor upon a mortgage debt which has been barred by limitations, revives such debt as against the

<sup>3</sup> *Newbould v. Smith*, 14 App. Cas. 423; *Cook v. Union Trust Co.*, 106 Ky. 803 [sub nomine, *Cook v. Bramel*, 45 L. R. A. 212, 51 S. W. 600; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271.

<sup>4</sup> *Raymond v. Bales*, 26 Wash. 493, 67 Pac. 269.

<sup>5</sup> *Kansas. Perry v. Horack*, 63 Kan. 88, 88 Am. St. Rep. 225, 64 Pac. 990; *Jackson v. Longwell*, 63 Kan. 93, 64 Pac. 991.

*Nebraska. Teegarden v. Burton*, 62 Neb. 639, 87 N. W. 337.

*New York. Mack v. Anderson*, 165 N. Y. 529, 59 N. E. 289..

*Oregon. Kaiser v. Idleman*, 57 Or. 224, 28 L. R. A. (N.S.) 169, 108 Pac. 193.

*Vermont. Barrett v. Prentiss*, 57 Vt. 297; *Kendall v. Tracy*, 64 Vt. 522, 24 Atl. 1118.

<sup>6</sup> *Kendall v. Tracy*, 64 Vt. 522, 24 Atl. 1118.

However, in *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 146, which is often cited on this point, it does not appear from the opinion whether the payment involved was made before or after the conveyance by the mortgagor.

<sup>7</sup> *Longstreet v. Brown* (N. J. Eq.), 37 Atl. 56; *Hollister v. York*, 59 Vt. 1, 9 Atl. 2.

<sup>8</sup> *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843.

interest of such debtor;<sup>8</sup> and such mortgage is therefore a prior lien as against a subsequent judgment creditor.<sup>10</sup>

**§ 3518. Payment by executor, heir, etc.** Payment made by an administrator after decedent's death has been held to waive the bar of the Statute of Limitations,<sup>1</sup> at least where the widow and heirs acquiesce in such payments upon a debt, secured by mortgage, upon realty in which they are interested, some of the heirs being minors.<sup>2</sup> This power clearly exists where limitations has not run at the death of the decedent.<sup>3</sup> It has been held, however, that payment by personal representatives is of no more effect than a new promise by them, and that accordingly such payment, whether it makes an executor liable personally or not, does not revive a claim which has already been barred.<sup>4</sup> Under a special statute, a payment made upon a claim which has not been authenticated as required by statute does not operate to prevent the running of the Statute of Limitations thereon.<sup>5</sup> If an obligation does not survive against the estate of a joint maker, a payment made by the administrator of a deceased joint maker, has no effect upon the statute.<sup>6</sup> If payment by one of two or more joint and several makers starts the statute to running anew, a payment by an administrator of one of such deceased joint and several makers has the same effect.<sup>7</sup> Whether payment by a widow upon a debt of her husband's made to protect her homestead and dower interest in his realty waives the bar of the statute against his estate generally, is a question upon which there is a conflict of authority.<sup>8</sup> Payment made by an heir has no effect upon the statute in favor

<sup>8</sup> *Clark v. Grant*, 26 Okla. 398, 28 L. R. A. (N.S.) 519, 109 Pac. 234.

<sup>10</sup> *Clark v. Grant*, 26 Okla. 398, 28 L. R. A. (N.S.) 519, 109 Pac. 234.

<sup>1</sup> *Waughop v. Bartlett*, 165 Ill. 124, 46 N. E. 197; *Slattery v. Doyle*, 180 Mass. 27, 61 N. E. 264; *Niemcewicz v. Bartlett*, 13 Ohio 271.

<sup>2</sup> *Hemphill v. Pry*, 183 Pa. St. 593, 38 Atl. 1020.

<sup>3</sup> *Foster v. Starkey*, 66 Mass. (12 Cush.) 324; *McLaren v. McMartin*, 36 N. Y. 88; *Holly v. Gibbons*, 176 N. Y. 520, 98 Am. St. Rep. 694, 68 N. E. 889.

<sup>4</sup> *McLaren v. McMartin*, 36 N. Y. 88;

*In re Claghorn's Estate*, 181 Pa. St. 608, 37 Atl. 921.

<sup>5</sup> *Cox v. Phelps*, 65 Ark. 1, 45 S. W. 990.

<sup>6</sup> *McLaughlin v. Head*, 86 Or. 361, L. R. A. 1918B, 303, 168 Pac. 614.

<sup>7</sup> *Fendley v. Shults*, 142 Ark. 180, 218 S. W. 197.

<sup>8</sup> That such payment waives the bar generally. *Perry v. Horack*, 63 Kan. 88, 88 Am. St. Rep. 225, 64 Pac. 990.

That such payment does not waive the bar. *Aetna Life Ins. Co. v. McNeely*, 166 Ill. 540, 46 N. E. 1130 [affirming, 65 Ill. App. 222].

of the other heirs;<sup>8</sup> but if such heir is in position with the acquiescence of the remaining heirs and handles the income of the property on their behalf, such payment prevents the statute from running in favor of such other heirs.<sup>10</sup>

**§ 3519. Payment by other persons.** A receiver, appointed under a mortgage which authorizes the mortgagee to appoint a receiver with power to manage and carry on the business as he may think fit, has been held to have authority to make part payments on an unsecured business debt to waive limitations in favor of the mortgagor.<sup>1</sup> Payment by an assignee of an insolvent debtor does not revive a debt,<sup>2</sup> since such payment is not voluntary.<sup>3</sup>

Payment by a corporation does not revive a cause of action against its stockholders,<sup>4</sup> or against its directors on their statutory liability because they declared a dividend while the corporation was insolvent,<sup>5</sup> or against the directors because of their failure to file the report required by statute.<sup>6</sup>

If a tenant makes payments upon a mortgage debt with the consent of the lessor,<sup>7</sup> and, after his death, with the consent of his heirs,<sup>8</sup> such payments prevent the statute from operating.

**§ 3520. Effect of indorsement of part payment.** An indorsement of payment without a payment to indorse has no effect upon the operation of the statute.<sup>1</sup> If an indorsement of a payment upon a debt is made by the debtor,<sup>2</sup> or by his agent,<sup>3</sup> or by the creditor with the consent of the debtor,<sup>4</sup> such indorsement is clearly sufficient to show that such payment has been made and that the Statute of Limitations does not operate. If the indorsement is made by the creditor and he seeks to use such indorsement to

<sup>8</sup> Haines v. Haines, 69 N. J. L. 39, 54 Atl. 401.

<sup>10</sup> Clute v. Clute, 107 N. Y. 439, 27 L. R. A. (N.S.) 146, 90 N. E. 988.

<sup>1</sup> In re Hale [1899], 2 Ch. 107.

<sup>2</sup> Marienthal v. Mosler, 16 O. S. 566.

<sup>3</sup> See § 3504.

<sup>4</sup> Close v. Potter, 155 N. Y. 145, 49 N. E. 686.

<sup>5</sup> Patterson v. Thompson, 86 Fed. 85.

<sup>6</sup> Chapman v. Lynch, 156 N. Y. 551, 51 N. E. 275.

<sup>7</sup> Ellis v. Snyder, 83 Kan. 638, 32 L. R. A. (N.S.) 253, 112 Pac. 594.

<sup>8</sup> Ellis v. Snyder, 83 Kan. 638, 32 L. R. A. (N.S.) 253, 112 Pac. 594.

<sup>1</sup> Wellman v. Miner, 179 Ill. 326, 53 N. E. 600; Clark v. Powell's Estate, — Mo. —, 208 S. W. 31; Lyle v. Esser, 98 Wis. 234, 73 N. W. 1008.

<sup>2</sup> Gay v. Hassom, 64 Vt. 495, 24 Atl. 715.

<sup>3</sup> Foster v. Cochran, 89 Ga. 466, 15 S. E. 551.

<sup>4</sup> Less v. Arndt, 68 Ark. 399, 59 S. W. 763; Sibley v. Phelps, 60 Mass. (6 Cush.) 172.

prevent the Statute of Limitations from operating, the question of the effect of such indorsement then depends upon the circumstances under which it was made. Indorsement by the creditor of a payment on a debt is, if made a considerable time before the debt is barred by statute, an admission against his own interest, and hence is admissible in evidence to prove such payment for the purpose of extending the period of limitations.<sup>5</sup> If made after the statute has run,<sup>6</sup> or shortly before the statutory period has elapsed, it is in favor of the creditor and not against his interest, and hence not admissible in evidence if the fact of payment is not otherwise shown. Since the date determines the admissibility of the entry, the entry is not proof of its own date.<sup>7</sup> In any event, an indorsement is not competent evidence as to a fact not within the personal knowledge of the party making it. Thus if the payment is actually made by a third person the indorsement is incompetent to show that the money was in fact furnished by the maker.<sup>8</sup> If the fact of payment is otherwise shown, the indorsement of the credit by the creditor may be considered as evidence.<sup>9</sup>

**§ 3521. To whom payment may be made.** A payment to the creditor or his authorized agent,<sup>1</sup> such as an agent for the purpose of collection,<sup>2</sup> prevents the operation of the statute. If the debtor makes a payment to the assignee of the debt, after the assignment, and with knowledge of it, such payment waives the bar of the statute.<sup>3</sup> If, however, the debtor makes a payment after the assignment and without knowledge thereof, to the assignor, such

<sup>5</sup> *Clark v. Lesser*, 106 Ark. 207, 153 S. W. 112; *Wester v. Wester*, — Mo. —, 189 S. W. 608; *Mills v. Davis*, 113 N. Y. 243, 3 L. R. A. 394, 21 N. E. 68.

<sup>6</sup> *Wellman v. Miner*, 179 Ill. 326, 53 N. E. 609; *Easter v. Easter*, 44 Kan. 151, 24 Pac. 57; *Roseboom v. Billington*, 17 Johns. 182; *Mills v. Davis*, 113 N. Y. 243, 3 L. R. A. 394, 21 N. E. 68; *Bond v. Wilson*, 129 N. Car. 387, 40 S. E. 182.

So by statute even if made before limitations have run. *Fowles v. Joslyn*, 130 Mich. 272, 89 N. W. 946; *Christopher v. Wilkins*, 64 N. J. Eq. 354, 51 Atl. 728.

Contra, even after debt is barred,

*McDowell v. McDowell*, 75 Vt. 401, 98 Am. St. Rep. 831, 56 Atl. 98.

<sup>7</sup> *Biscoe v. Huff*, 75 Mo. App. 288; *Smith v. Wells*, 70 N. H. 49, 46 Atl. 51.

<sup>8</sup> *Arbuckle v. Templeton*, 65 Vt. 205, 25 Atl. 1095.

<sup>9</sup> *Wellman v. Miner*, 179 Ill. 326, 53 N. E. 609; *Judson v. Pratt*, 208 Mich. 286, 175 N. W. 184.

<sup>1</sup> *National Savings & Trust Co. v. Ryan*, 262 Fed. 613; *Kisler v. Sanders*, 40 Ind. 78; *Mortenson v. Knudson*, — Ia. —, 176 N. W. 892.

<sup>2</sup> *Warnock v. Itawis*, 38 Wash. 144, 80 Pac. 297.

<sup>3</sup> *McBrayer v. Mills*, 62 S. Car. 36, 39 S. E. 788.

payment does not waive the bar of the statute.<sup>4</sup> Under most recording acts, a payment to one who appears of record to be the mortgagee, operates as a payment to the assignee or real party in interest; and accordingly a payment to the mortgagee of record affects the Statute of Limitations in favor of an assignee who does not appear of record.<sup>5</sup>

## VIII

### STATUTORY PROVISIONS AS TO FORM OF NEW PROMISE OR ACKNOWLEDGMENT

**§ 3522. History and construction.** At common law there were no specific requirements as to the outward form of a new promise or acknowledgment. If the new promise or acknowledgment possessed the requisite essential elements, it was sufficient, even though made orally. The feeling that, on the one hand, a chance was given for fraud and perjury, and, on the other, that the courts were beginning to ignore the plain requirements of the statute by treating many cases as exceptions to the statute, which were in fact within its plain terms, led to the passage in England of a statute known as Lord Tenterden's act,<sup>1</sup> which has been adopted by many states of the Union, although with some modifications.<sup>2</sup> Under such statutes the new promise or acknowledgment must be in writing, in order to waive the bar of the statute, or to extend the period for which the statute was to run. Many of the statutes further provide that such promise or acknowledgment must be signed by the party to be charged therewith.

This statute does not change the common-law requisite of an acknowledgment or a new promise, but only the form in which such acknowledgment or new promise is to be made, or the evidence by which it is to be proved.<sup>3</sup> Such statute is to be construed in favor of the bar of the Statute of Limitations, and not in favor

<sup>4</sup> *Investment Securities Co. v. Berghold*, 60 Kan. 813, 58 Pac. 469.

<sup>5</sup> *Girard Trust Company v. Owen*, 83 Kan. 692, 33 L. R. A. (N.S.) 262, 112 Pac. 619.

<sup>1</sup> 9 Geo. IV, C. 14, § 1.

<sup>2</sup> "Courts, by their decisions as to the effect of loose and unsatisfactory oral admissions and new promises, had almost frittered away the statute of

limitations, and to remedy this, statutes similar to the one in force in this state have been quite generally enacted." *Barlow v. Barner*, 1 Dill. (U. S. C. C.) 418, 419 [quoted in *Fort Scott v. Hickman*, 112 U. S. 150, 164, 28 L. ed. 636].

<sup>3</sup> *Phillips v. Giles*, 175 N. Car. 409, 95 S. E. 772.

of the new promise or acknowledgment.<sup>4</sup> It is said not to apply to a promise of marriage, if, by specific statutory provision, such contract may be oral,<sup>5</sup> although the latter statute is enacted to avoid any question as to the effect of the clause of the Statute of Frauds with reference to agreements in consideration of marriage.<sup>6</sup> Such a statute applies to debts which were created before the passage of such a statute,<sup>7</sup> but it does not apply to oral promises made before the passage of the statute,<sup>8</sup> nor to the extension of a mortgage by renewal of the debt made before the statute was passed,<sup>9</sup> nor, where the statute applies to part payments, does it apply to part payments made before the statute was passed.<sup>10</sup>

**§ 3523. Effect of statute on oral promise.** Under a statute of this sort, an oral promise or acknowledgment has no legal effect.<sup>1</sup> An oral account stated has no effect upon a debt, included in such account, which is barred by limitations.<sup>2</sup> An oral promise can not be considered in connection with a writing which fails to show an express promise, to supplement the deficiencies of the writing.<sup>3</sup>

Since an express oral contract is invalid, an estoppel in pais is without effect as against such statutory provision.<sup>4</sup>

<sup>4</sup> Shaw v. Bubier, 119 Me. 83, 109 Atl. 373.

<sup>5</sup> Smith v. McPherson, 176 Cal. 144, L. R. A. 1918B, 66, 167 Pac. 875.

<sup>6</sup> See § 1250.

<sup>7</sup> Esselstyn v. Weeks, 12 N. Y. 635.

<sup>8</sup> Vinson v. Palmer, — Fla. —, 34 So. 276.

<sup>9</sup> Wilson v. Pickering, 28 Mont. 435, 72 Pac. 821.

<sup>10</sup> Fayetteville Building & Loan Association v. Bowlin, 63 Ark. 573, 39 S. W. 1046.

<sup>1</sup> Alabama. Jasper Trust Co. v. Lamkin, 162 Ala. 388, 24 L. R. A. (N.S.) 1237, 50 So. 337.

California. Morehouse v. Morehouse (Cal.), 69 Pac. 625; Powell v. Petch, 166 Cal. 329, 136 Pac. 55.

Florida. Woodham v. Hill, 78 Fla. 517, 83 S. E. 717.

Georgia. Hughes v. Treadway, 116 Ga. 663, 42 S. E. 1035.

Iowa. Mortenson v. Knudson, — Ia. —, 176 N. W. 892.

Louisiana. Adams v. Mills, 49 La. Ann. 775, 22 So. 257.

Maine. Shaw v. Bubier, 119 Me. 83, 109 Atl. 373.

Massachusetts. King v. Davis, 168 Mass. 133, 46 N. E. 418.

North Carolina. Phillips v. Giles, 175 N. Car. 409, 95 S. E. 772.

New York. Shapley v. Abbott, 42 N. Y. 443, 1 Am. Rep. 548.

Oklahoma. Froage v. Webb, — Okla. —, 165 Pac. 150.

Utah. Whitehill v. Lowe, 10 Utah 419, 37 Pac. 589.

Wisconsin. Moore v. Blackman, 109 Wis. 528, 85 N. W. 429.

<sup>2</sup> Jasper Trust Co. v. Lamkin, 162 Ala. 388, 24 L. R. A. (N.S.) 1237, 50 So. 337.

<sup>3</sup> Johnston v. Hussey, 92 Me. 92, 42 Atl. 312.

<sup>4</sup> Shapley v. Abbott, 42 N. Y. 443, 1 Am. Rep. 548.

Under a statute providing that a mortgage can be renewed or extended only by a writing executed with the formalities of a deed, a written acknowledgment of the debt not executed with the formalities of a deed is insufficient to extend the lien of a mortgage,<sup>5</sup> or of a deed of trust.<sup>6</sup> A note which recites that it "shall be held good on or by the same mortgage that was given" to secure an earlier note does not renew or extend the original mortgage.<sup>7</sup>

Under a statute requiring a new promise to be in writing, a new promise which refers to a specific debt is sufficient even if extrinsic evidence is necessary to identify the debt.<sup>8</sup> It is admissible to show under a promise to "attend to yours in a short time," referring to a debt, that only one debt was owing or claimed to be due between the parties.<sup>9</sup> On the other hand, a general promise in writing to pay, which does not identify the debt, is insufficient if there are several debts to which it might refer.<sup>10</sup>

A promise need not indicate the official character of the promisee. A letter sent by the debtor to one of the two administrators of the estate of the creditor, not describing him by his official capacity, is sufficient.<sup>11</sup>

**§ 3524. Effect of new consideration.** Such a statute does not apply to a promise upon a new and distinct consideration to pay a debt barred by limitations.<sup>1</sup> The waiver of the right to enforce a claim is sufficient consideration for a promise to make compensation, in a different manner, and such promise is not within the statute.<sup>2</sup> If the oral promise is to pay to someone other than the original creditor, and the creditor does not assent thereto, such promise lacks consideration, and is therefore not a new contract;

<sup>5</sup> *Moulton v. Williams*, 6 Ida. 424, 55 Pac. 1019.

<sup>6</sup> *Union & Planter's Bank v. Smith*, 107 Tenn. 476, 64 S. W. 756.

<sup>7</sup> *Randolph v. Thomas*, 107 Tenn. 132, 64 S. W. 5.

<sup>8</sup> *First National Bank v. Woodman*, 93 Ia. 668, 57 Am. St. Rep. 287, 62 N. W. 28; *Miller v. Beardsley*, 81 Ia. 720, 45 N. W. 756; *Stout v. Marshall*, 75 Ia. 498, 39 N. W. 808; *Russell v. Davis*, 51 Minn. 482, 53 N. W. 766; *Hill v. Hill*, 51 S. Car. 134, 28 S. E. 309.

<sup>9</sup> *Woodbridge v. Allen*, 53 Mass. (12 Met.) 470.

<sup>10</sup> *Cotulla v. Urbahn*, 104 Tex. 208, 34 L. R. A. (N.S.) 345, 135 S. W. 1159.

<sup>11</sup> *Hill v. Hill*, 51 S. Car. 134, 28 S. E. 309.

<sup>1</sup> *Christian Women's Board of Missions v. Clark*, 140 Ark. 262, 215 S. W. 631; *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023; *Devine v. Murphy*, 168 Mass. 249, 46 N. E. 1066; *Davis v. Teachout's Estate*, 126 Mich. 135, 86 Am. St. Rep. 531, 85 N. W. 475; *Murtha v. Donohoo*, 149 Wis. 481, 41 L. R. A. (N.S.) 246, 136 N. W. 158.

<sup>2</sup> *Murtha v. Donohoo*, 149 Wis. 483, 41 L. R. A. (N.S.) 246, 136 N. W. 158.

and it can not be treated as an acknowledgment or new promise to pay the original debt, since it is not in writing.<sup>3</sup>

**§ 3525. Form requisite by statute.** If the statute provides that a new promise or acknowledgment must be in writing, but does not provide that it must be signed by the debtor, a written promise or acknowledgment to which the debtor has assented is sufficient.<sup>1</sup>

If the statute requires the new promise or acknowledgment to be in writing and signed by the party to be charged therewith, a signature is sufficient if made by the debtor himself or by his authorized agent,<sup>2</sup> as by the president of the debtor corporation.<sup>3</sup> Where the debtor dictated a letter to his stenographer, and it was typewritten by the latter, and signed by the latter with the name of the debtor by means of a rubber stamp, such acknowledgment was held to comply with the statute.<sup>4</sup> Letters signed by the debtor may be a sufficient acknowledgment or new promise.<sup>5</sup> The assumption of a mortgage, and the agreement to pay the same, made by the grantee of realty, is a sufficient new promise in writing to start the Statute of Limitations to running anew.<sup>6</sup> The acquiescence of a debtor in an account presented to him by his creditor is not a sufficient compliance with the statute requiring an acknowledgment to be in writing and signed by the party to be charged;<sup>7</sup> nor is an account stated orally, which includes a debt which is barred by limitations.<sup>8</sup> An entry by the debtor on his books is insufficient.<sup>9</sup>

Writing the acknowledgment upon a statement of the account furnished to the debtor,<sup>10</sup> or acknowledging the liability in some

<sup>3</sup> *Mortenson v. Knudson*, — Ia. —, 176 N. W. 892.

<sup>1</sup> *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371.

<sup>2</sup> *Union Oil Co. v. Purissima Hills Oil Co.*, 181 Cal. 479, 185 Pac. 381; *Liberman v. Gurensky*, 27 Wash. 410, 67 Pac. 998.

<sup>3</sup> *Union Oil Co. v. Purissima Hills Oil Co.*, 181 Cal. 479, 185 Pac. 381.

<sup>4</sup> *In re Deep River National Bank*, 73 Conn. 341, 47 Atl. 675.

<sup>5</sup> *Concannon v. Smith*, 134 Cal. 14, 66 Pac. 40; *Dern v. Olsen*, 18 Ida. 358, L. R. A. 1915B, 1016, 110 Pac. 164; *Miller v. Beardsley*, 81 Ia. 720, 45 N.

W. 756; *Howard v. Windom*, 86 Tex. 560, 26 S. W. 483.

<sup>6</sup> *Daniels v. Johnson*, 129 Cal. 415, 79 Am. St. Rep. 123, 61 Pac. 1107.

<sup>7</sup> *Magarity v. Shipman*, 93 Va. 64, 24 S. E. 466; *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. 986; *Moore v. Blackman*, 100 Wis. 528, 85 N. W. 429.

<sup>8</sup> *Jasper Trust Co. v. Lamkin*, 162 Ala. 388, 24 L. R. A. (N.S.) 1237, 50 So. 337.

<sup>9</sup> *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. 986.

<sup>10</sup> *King v. Davis*, 168 Mass. 133, 46 N. E. 418; *Tennessee Brewing Co. v. Hendricks*, 77 Miss. 491, 27 So. 526.

form in a pleading filed in court,<sup>11</sup> or acknowledging it by corporate action thereon, recognizing its validity, as where county commissioners,<sup>12</sup> or a board of arbitration authorized by the constitution of a benefit society,<sup>13</sup> recognize the liability as subsisting, has in each case been held sufficient.

If the acknowledgment is made by a public corporation, however, the corporation is not bound unless the acknowledgment was made by its authorized agent. Where the secretary of a city published an annual statement of the official affairs of the city, and included therein certain bonds as valid obligations, such statement does not amount to an acknowledgment if the secretary was not authorized to bind the city by a new promise.<sup>14</sup> Levying taxes to create a sinking fund to meet interest which is due is not an acknowledgment of the validity of the bond.<sup>15</sup> If a town has no authority to vote money for bounties other than the original authority to the town to grant bounties, the vote of the town to pay a bounty claim to a drafted man which has been barred by limitations does not amount to an acknowledgment so as to waive the bar of the statute.<sup>16</sup> A default judgment in a foreclosure suit is not a compliance with the statute requiring the new promise to be in writing.<sup>17</sup>

**§ 3526. Effect of statute upon part payment.** Lord Tenterden's act, and the American statutes which follow it most closely, do not include part payment, but refer solely to a new promise and to a new acknowledgment. Accordingly, part payment may be proved in accordance with the ordinary rules of evidence, without reference to the statutory requirements.<sup>1</sup> In some states the statute specifically provides that part payment is not included under such statute.<sup>2</sup> Other statutes, either by their express terms or by the

<sup>11</sup> *Kelley v. Graham*, 70 Ark. 490, [sub nomine, *Raines v. Graham*, 69 S. W. 551]; *Roberts v. Leak*, 108 Ga. 806, 33 S. E. 995.

Account of guardian. *Blakeney v. Wyland*, 115 Ia. 607, 89 N. W. 16.

<sup>12</sup> *Coffin v. Kearney County*, 114 Fed. 518.

<sup>13</sup> *Dearborn v. Grand Lodge*, 138 Cal. 658, 72 Pac. 154.

<sup>14</sup> *Houston v. Jankowski*, 76 Tex. 368, 18 Am. St. Rep. 57, 13 S. W. 269.

<sup>15</sup> *Houston v. Jankowski*, 76 Tex. 368, 18 Am. St. Rep. 57, 13 S. W. 269.

<sup>16</sup> *O'Connor v. Waterbury*, 69 Conn. 206, 37 Atl. 499.

<sup>17</sup> *Boone v. Colehour*, 165 Ill. 305, 46 N. E. 253.

<sup>1</sup> *Phifer v. Abbott*, 73 Fla. 402, 74 So. 488; *Gillingham v. Brown*, 178 Mass. 417, 55 L. R. A. 320, 60 N. E. 122; *Utica First National Bank v. Ballou*, 49 N. Y. 155.

<sup>2</sup> *Pond v. French*, 97 Me. 403, 54 Atl. 920; *Mills v. Davis*, 113 N. Y. 243, 3

necessary effect of their phraseology, require written evidence of a part payment.<sup>3</sup> By some statutes it must be either written and signed by the debtor or his agent, or if unsigned, must be in the handwriting of the debtor.<sup>4</sup> Such statute, though referring to new promises, has been held to apply to payments, even if an oral promise is made therewith,<sup>5</sup> or to an unsigned credit indorsed upon the note by the agent of the maker.<sup>6</sup> Under such statute, an entry of payment made by one partner upon a partnership note after limitations has run is, in legal effect, a new contract in writing to pay the entire amount.<sup>7</sup> Under a statute providing that "if any payment or new promise to pay shall have been made in writing on any note within or after the statutory period," an action may be commenced thereon at any time within the statutory period from the time of such payment or promise to pay, the court has expressly refused to decide whether the payment must be in writing,<sup>8</sup> holding in the particular case that indorsement by a payee of a payment conceded to have been made was a sufficient compliance with such statute, even if it included payment.

## IX

## WHO CAN INVOKE LIMITATIONS AS DEFENSE

**§ 3527. Personal character of defense.** The defense of limitations is usually treated as one personal to the debtor.<sup>1</sup> Since it is personal to him, he may waive it if he sees fit to do so.<sup>2</sup> His

L. R. A. 394, 21 N. E. 68; *Horsfall v. Logan*, 72 Or. 150, 142 Pac. 760; *Marshall v. Holmes*, 68 Wis. 555, 32 N. W. 685.

<sup>3</sup> *Gray v. Pierson*, 7 Ida. 540, 64 Pac. 233; *Perry v. Ellis*, 62 Miss. 711.

<sup>4</sup> *Black v. Holland*, 102 Ga. 523, 27 S. E. 671; *Watkins v. Harris*, 83 Ga. 680, 10 S. E. 447.

<sup>5</sup> *Poole v. Trimble*, 102 Ga. 773, 29 S. E. 871.

<sup>6</sup> *Moore v. Moore*, 103 Ga. 517, 30 S. E. 535.

<sup>7</sup> *Powell v. Fraley*, 98 Ga. 370, 25 S. E. 450 (hence under the parol evidence rule the partner can not show an oral contract to release him on payment of one-half the amount of the debt).

<sup>8</sup> *Willett v. Maxwell*, 169 Ill. 540, 48 N. E. 473 [affirming, 68 Ill. App. 119].

<sup>1</sup> *Sanger v. Nightingale*, 122 U. S. 176, 30 L. ed. 1105; *Corbey v. Rogers*, 152 Ind. 160, 52 N. E. 748; *First National Bank v. Security Mutual Life Ins. Co.*, — Mo. —, 222 S. W. 832; *In re Passmore*, 194 Pa. St. 632, 45 Atl. 417.

"The right to plead the statute of limitations has always been held to be a personal privilege of which the debtor could avail himself or not, as he might choose." *Sanger v. Nightingale*, 122 U. S. 176, 183, 30 L. ed. 1105.

<sup>2</sup> *Clark v. Augustine*, 62 N. J. Eq. 689, 51 Atl. 68.

waiver of such defense by a new promise, acknowledgment or part payment is discussed elsewhere.<sup>3</sup> He may also waive such defense by failure to plead it in an action against him on the cause of action barred by the statute.<sup>4</sup>

**§ 3528. Representatives, assignees, etc.** Persons who represent and stand in the place of the person to whom the privilege of pleading limitations belongs may also plead the statute.<sup>1</sup> The widow,<sup>2</sup> or heirs,<sup>3</sup> of a debtor, who have acquired an interest in the debtor's realty, may plead limitations as against a mortgage. If an attempt is made under statutes authorizing the sale of realty to pay the debts of the decedent, to sell realty to pay debts barred by the Statute of Limitations, the heir to whom such realty has descended may interpose the defense of the statute.<sup>4</sup> An executor represents his decedent and may plead limitations on behalf of the estate.<sup>5</sup> A grantee of realty may plead limitations against a debt incurred by his grantor which has become a lien on such realty.<sup>6</sup> It has been held that the assignee of a claim may plead limitations against a set-off if his assignor could have pleaded it.<sup>7</sup>

**§ 3529. Other creditors, etc.** Since the right to plead the statute is personal, others can not invoke it as a defense if the debtor wishes to waive it.<sup>1</sup> A second mortgagee can not compel

<sup>3</sup> See §§ 3479 et seq., 3492 et seq., 3500 et seq.

<sup>4</sup> *Allen v. Smith*, 129 U. S. 465, 32 L. ed. 732; *Parker v. Irvin*, 47 Ga. 405; *Anderson v. McNeal*, — Miss. —, 34 So. 1.

<sup>1</sup> *Hopkins v. Clyde*, 71 O. S. 141, 104 Am. St. Rep. 737, 72 N. E. 846.

"The general rule is that the right to plead the statute of limitations is a personal privilege, but persons standing in the place of the party having the personal privilege, such (as) grantees, mortgagees, executors, administrators, trustees, heirs, devisees, or other persons holding under him, may set up such a defense." *Corbey v. Rogers*, 152 Ind. 169, 171, 52 N. E. 748.

<sup>2</sup> *Hopkins v. Clyde*, 71 O. S. 141, 104 Am. St. Rep. 737, 72 N. E. 846.

<sup>3</sup> *Hopkins v. Clyde*, 71 O. S. 141, 104 Am. St. Rep. 737, 72 N. E. 846.

<sup>4</sup> *Alabama*. *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15.

*Indiana*. *Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740.

*New York*. *Rogers v. Rogers*, 3 Wend. (N. Y.) 503, 20 Am. Dec. 716.

*North Carolina*. *Smith v. Brown*, 99 N. Car. 377, 6 S. E. 667.

*Tennessee*. *Gilman v. Tisdale*, 7 Tenn. (1 Yerg.) 285.

<sup>5</sup> *Michetree v. Veach*, 31 Pa. St. 455.

<sup>6</sup> *Colonial & United States Mortgage Co. v. Northwest Thresher Co.*, 14 N. D. 147, 116 Am. St. Rep. 642, 70 L. R. A. 814, 103 N. W. 919.

<sup>7</sup> *Walker v. Burgess*, 44 W. Va. 399, 67 Am. St. Rep. 775, 30 S. E. 99.

<sup>1</sup> *United States*. *Allen v. Smith*, 129 U. S. 465, 32 L. ed. 732.

*California*. *Ward v. Waterman*, 85 Cal. 488, 24 Pac. 930.

his debtor to plead the Statute of Limitations as against a first mortgagee,<sup>2</sup> and unsecured creditors can not set up limitations as a defense against other creditors whose claims are secured.<sup>3</sup> A judgment creditor having a second lien can not compel the debtor to plead limitations against another judgment creditor who has a lien, prior, but barred by limitations,<sup>4</sup> and failure to plead the statute can not be treated as fraudulent on the application of other judgment creditors.<sup>5</sup> In foreclosure proceedings one who does not allege an interest in the realty mortgaged can not plead the Statute of Limitations against the mortgage debt.<sup>6</sup>

In some jurisdictions a different rule is followed, and it is held that a creditor may invoke, as against other creditors, the defense that limitations has run in favor of their common debtor.<sup>7</sup> This last rule is, however, usually limited to cases of insolvency.<sup>8</sup> In such jurisdictions, a subsequent mortgagee may interpose the defense of limitations as against a prior mortgagee.<sup>9</sup> A judgment creditor may interpose limitations against a prior mortgagee,<sup>10</sup> and

**Indiana.** Brookville National Bank v. Kimble, 76 Ind. 203.

**Kansas.** Ordway v. Cowles, 45 Kan. 447, 25 Pac. 862.

**Mississippi.** Anderson v. McNeal, 82 Miss. 542, 34 So. 1.

**Nebraska.** Plummer v. Rohman, 61 Neb. 61, 84 N. W. 600; Dayton Spice Mills Co. v. Sloan, 40 Neb. 622, 68 N. W. 1040.

**Pennsylvania.** Sheppard's Estate, 180 Pa. St. 57, 36 Atl. 422.

**Tennessee.** Stanford v. Andrews, 59 Tenn. (12 Heisk.) 664.

**Texas.** Columbia Avenue Savings Fund, Safe Deposit, Title & Trust Co. v. Strawn, 93 Tex. 48, 53 S. W. 342.

**West Virginia.** Welton v. Boggs, 45 W. Va. 620, 72 Am. St. Rep. 833, 32 S. E. 232; Baltimore & Ohio Ry. v. Vanderwerker, 44 W. Va. 220, 28 S. E. 829.

<sup>2</sup> Sanger v. Nightingale, 122 U. S. 176, 30 L. ed. 1105; Gault v. Equitable Trust Co., 100 Ky. 578, 38 S. W. 1065.

Contra, Lent v. Shear, 26 Cal. 361.

<sup>3</sup> Anderson v. McNeal, 82 Miss. 542, 34 So. 1; First National Bank v. Se-

curity Mutual Life Ins. Co., — Mo. —, 222 S. W. 832.

<sup>4</sup> Welton v. Boggs, 45 W. Va. 620, 72 Am. St. Rep. 833, 32 S. E. 232.

<sup>5</sup> Allen v. Smith, 129 U. S. 465, 32 L. ed. 732.

<sup>6</sup> Corbey v. Rogers, 152 Ind. 169, 52 N. E. 748 (even if in the petition he is alleged to have or claim some interest in the realty).

<sup>7</sup> California Bank v. Brooks, 126 Cal. 198, 59 Pac. 302; Buss v. Kemp Lumber Co., 23 N. M. 567, L. R. A. 1918C, 1015, 170 Pac. 54; Hill v. Hilliard, 103 N. Car. 34, 9 S. E. 639; Callaway's Administrator v. Saunders, 99 Va. 350, 38 S. E. 182.

<sup>8</sup> Sawyer v. Sawyer, 74 Me. 579; Oates v. Lilly, 84 N. Car. 643.

<sup>9</sup> California Bank v. Brooks, 126 Cal. 198, 59 Pac. 302; Hill v. Hilliard, 103 N. Car. 34, 9 S. E. 639.

<sup>10</sup> Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744; Buss v. Kemp Lumber Co., 23 N. M. 567, L. R. A. 1918C, 1015, 170 Pac. 54; De Voe v. Rundle, 33 Wash. 604, 74 Pac. 836.

an attaching creditor may interpose limitations as against a mortgagee.<sup>11</sup>

In no case can a creditor interpose limitations on behalf of the common debtor as against another creditor who offers to pay the claim of such creditor,<sup>12</sup> or who assents to the priority of lien of such creditor.<sup>13</sup>

Limitations can not be set up in a foreclosure proceeding by persons against whom no personal judgment is sought.<sup>14</sup>

## X

### ESTOPPEL

**§ 3530. Estoppel and waiver.** As has already been said,<sup>1</sup> it is held that the parties may make a valid contract for a period of limitations shorter than that fixed by statute,<sup>2</sup> or they may extend the period of limitations.<sup>3</sup> Whatever may be thought of the wisdom of permitting the parties to modify, by private agreements, statutes with reference to the right to apply for relief to the courts, which have been enacted by the legislature after careful consideration, the rule seems to be well settled.

A promise of this sort is sometimes upheld on the theory of estoppel.<sup>4</sup> At the same time, estoppel is wider than contract, and it includes cases in which it may not be possible to establish a valid contract.<sup>5</sup> Conduct on the part of the debtor which in-

<sup>11</sup> *Watt v. Wright*, 66 Cal. 202, 5 Pac. 91.

<sup>12</sup> *Neill v. Burke*, 81 Neb. 125, 115 N. W. 321.

<sup>13</sup> *Tinsley v. Lombard*, 46 Or. 9, 114 Am. St. Rep. 844, 78 Pac. 895.

<sup>14</sup> *Figh v. Taber*, 203 Ala. 253, 82 So. 495.

If the debt falls within one of the exceptions to the statute of limitations, the lien which secures the debt is subject to the same exception. *Dighton v. First Exchange National Bank*, — Ida. —, 192 Pac. 832.

<sup>1</sup> See §§ 732 et seq.

<sup>2</sup> *Beeson v. Schloss*, — Cal. —, 192 Pac. 292; *Clark v. Lund*, — Utah —, 184 Pac. 821.

<sup>3</sup> See § 731.

<sup>4</sup> *Randon v. Toby*, 52 U. S. (11 How.) 493.

<sup>5</sup> *California. State Loan & Trust Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466.

*Iowa. Wilson v. McElroy*, 83 Ia. 593, 50 N. W. 55; *Holman v. Omaha & Council Bluffs Ry. & Bridge Co.*, 117 Ia. 263, 94 Am. St. Rep. 293, 62 L. R. A. 395, 90 N. W. 833 (action for personal injuries).

*Oklahoma. Depuy v. Selby*, 76 Okla. 307, 185 Pac. 107.

*Utah. Anderson v. Cercone*, 54 Utah 345, 180 Pac. 586.

*Vermont. Burton v. Stevens*, 24 Vt. 131, 58 Am. Dec. 153.

duces the creditor to refrain from bringing an action until after the period of limitations has elapsed, is said to estop the debtor from taking advantage of the Statute of Limitations.<sup>6</sup> Negotiations with the debtor which are prolonged until after the period of limitations has elapsed,<sup>7</sup> or the acceptance by a wife of the benefits of a promise made to her husband which includes a promise not to enforce a claim against the wife,<sup>8</sup> is said to estop the debtor from taking advantage of limitations.

On the other hand, conduct on the part of the debtor which does not mislead the creditor does not operate as estoppel, even if it amounts to a recognition by the debtor of the existence of the debt.<sup>9</sup> In cases of this sort, estoppel is frequently invoked by a creditor who is unable to establish a new promise, acknowledgment, or part payment, and who wishes to make use of conduct which does not establish one of these methods of avoiding the effect of the statute, by the device of calling it estoppel. The fact that one who is liable secondarily, or who has entered into a contract of indemnity, undertakes the defense of the original action,<sup>10</sup> or the fact that a purchaser buys subject to a mortgage,<sup>11</sup> or the fact that an offer of compromise has been rejected,<sup>12</sup> or that a conditional promise has been made, the condition to which has not

<sup>6</sup> **Arkansas.** *Baker-Matthews Mfg. Co. v. Grayling Lumber Co.*, 134 Ark. 351, 203 S. W. 1021.

**California.** *State Loan & Trust Co. v. Cochran*, 130 Cal. 245, 62 Pac. 466; *Phillips v. Phillips*, 163 Cal. 530, 127 Pac. 346.

**Iowa.** *Wilson v. McElroy*, 83 Ia. 503, 50 N. W. 55.

**New Jersey.** *Crawford v. Winterbottom*, 88 N. J. L. 588, 96 Atl. 497.

**Oklahoma.** *Depuy v. Selby*, 76 Okla. 307, 185 Pac. 107.

**Utah.** *Anderson v. Cercone*, 54 Utah 345, 180 Pac. 586.

**Vermont.** *Burton v. Stevens*, 24 Vt. 131, 58 Am. Dec. 153.

<sup>7</sup> *Baker-Matthews Mfg. Co. v. Grayling Lumber Co.*, 134 Ark. 351, 203 S. W. 1021; *Crawford v. Winterbottom*, 88 N. J. L. 588, 96 Atl. 497.

<sup>8</sup> *Phillips v. Phillips*, 163 Cal. 530, 127 Pac. 346.

<sup>9</sup> **California.** *Carter v. Canty*, 181 Cal. 749, 186 Pac. 346; *Trail v. Firth*, — Cal. —, 198 Pac. 1033.

**Illinois.** *United States Fidelity & Guaranty Co. v. Dickason*, 277 Ill. 77, 115 N. E. 173.

**Maine.** *Gray v. Day*, 109 Me. 492, 43 L. R. A. (N.S.) 535, 84 Atl. 1073.

**New Jersey.** *Limpert v. Stitt*, 94 N. J. L. 472, 110 Atl. 832.

**New York.** *Viets v. Union National Bank*, 101 N. Y. 563, 54 Am. Rep. 743, 5 N. E. 457.

**Washington.** *Marshall-Wells Hardware Co. v. Title Guaranty & Surety Co.*, 89 Wash. 404, 154 Pac. 801.

<sup>10</sup> *United States Fidelity & Guaranty Co. v. Dickason*, 277 Ill. 77, 115 N. E. 173.

<sup>11</sup> *Hubbard v. Dahlke*, 277 Mo. 516, 210 S. W. 652.

<sup>12</sup> *Gray v. Day*, 109 Me. 492, 43 L. R. A. (N.S.) 535, 84 Atl. 1073.

been performed,<sup>13</sup> does not amount to estoppel. The fact that a dispute has existed between the debtor and the creditor,<sup>14</sup> or that the debtor has admitted the existence of the debt,<sup>15</sup> does not amount to an estoppel. Unless such admission amounts to a new promise, or an acknowledgment, no effect can be given thereto.

An innocent misrepresentation of law made as an opinion only,<sup>16</sup> such as an opinion that a presentation of the claim has stopped the running of the statute,<sup>17</sup> has been said not to amount to an estoppel. Failure to set up the statute as a defense, at the earliest opportunity, does not operate as estoppel,<sup>18</sup> especially if the plaintiff declares his intention to amend.<sup>19</sup> Estoppel to set up the statute is said to be restricted to equity.<sup>20</sup>

Waiver, as applied to the Statute of Limitations, is used to include all cases in which the debtor has given up his opportunity to take advantage of the statute. It includes the new promise, the acknowledgment, part payment, and the omission of the debtor to set up limitations as a defense, as well as estoppel.<sup>21</sup> As has already been pointed out,<sup>22</sup> the term "waiver" can be used in this broad way because waiver is rather the consequences of acts or conduct, than the acts or conduct in themselves.

## XI

### PRESUMPTION OF PAYMENT

**§ 3531. Presumption of payment—History of rule.** At common law, independently of statute, a presumption arose after twenty years from the time that a right of action upon a debt accrued that such debt had been paid.<sup>1</sup> The origin of this rule is hard to trace. It has been said that it was formulated by the

<sup>13</sup> *Marshall-Wells Hardware Co. v. Title Guaranty & Surety Co.*, 89 Wash. 404, 154 Pac. 801 (conditioned on establishing claims).

<sup>14</sup> *Logan v. Davis*, — Ia. —, 174 N. W. 791.

<sup>15</sup> *Carter v. Canty*, 181 Cal. 749, 186 Pac. 346.

<sup>16</sup> *Andreae v. Redfield*, 98 U. S. 225, 25 L. ed. 158.

<sup>17</sup> *Andreae v. Redfield*, 98 U. S. 225, 25 L. ed. 158.

<sup>18</sup> *Sullivan v. North Pratt Coal Co.*, — Ala. —, 87 So. 804.

<sup>19</sup> *Sullivan v. North Pratt Coal Co.*, — Ala. —, 87 So. 804.

<sup>20</sup> *Freeman v. Conover*, — N. J. —, 112 Atl. 324.

<sup>21</sup> See §§ 3479 et seq., 3492 et seq. and 3500 et seq.

<sup>22</sup> See § 2656.

<sup>1</sup> *England. Gratwick v. Simpson*, 2 Atk. 144; *Hillary v. Waller*, 12 Ves. Jr. 239; *Oswald v. Legh*, 1 T. R. 270.

*United States. Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 142; *Chesapeake & Delaware Canal*

courts in analogy to the Statute of Limitations.<sup>2</sup> In the latter part of the eighteenth century,<sup>3</sup> it was said that the doctrine of twenty years' presumption was first taken up by Lord Hale, who thought it a circumstance from which the jury might infer payment; and that Lord Holt extended the rule so as to require the jury to find payment unless a demand or a good cause of long forbearance was shown. Equity would enjoin an action to enforce a bond after a delay exceeding twenty years.<sup>4</sup> While the period of twenty years was suggested in other cases, by way of analogy, the period of twenty years which would cause a presumption of payment to arise on the bond seems to be regarded as a settled rule from which other analogies may be drawn;<sup>5</sup> and this is looked upon as an arbitrary and fixed rule, differing from analogous cases in which a reasonable time is to be taken, and twenty years is said, by analogy, to be a reasonable time.<sup>6</sup> There seems to have been some doubt as to whether this presumption might not arise in less than twenty years.<sup>7</sup> The period was finally fixed at twenty years,<sup>8</sup>

Co. v. United States, 223 Fed. 926, L. R. A. 1916B, 734.

Alabama. Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894, 6 So. 46, 9 So. 265; Spencer v. Hurd, — Ala. —, 1 A. L. R. 761, 77 So. 683.

Connecticut. Judson v. Phelps, 87 Conn. 495, 1 A. L. R. 768, 89 Atl. 161.

Illinois. Locke v. Caldwell, 91 Ill. 417.

Kansas. Courtney v. Standenmeyer, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758.

Kentucky. Anderson v. Smith, 60 Ky. (3 Met.) 491.

Massachusetts. Denny v. Eddy, 39 Mass. (22 Pick.) 533.

New Hampshire. Barker v. Jones, 62 N. H. 497, 13 Am. St. Rep. 586.

New York. Bean v. Tonnele, 94 N. Y. 381, 46 Am. Rep. 153.

Ohio. Allen v. Everly, 24 O. S. 97; Wright v. Hull, 83 O. S. 385, 94 N. E. 813.

Oregon. Beekman v. Hamlin, 19 Or. 383, 20 Am. St. Rep. 827, 10 L. R. A. 454, 24 Pac. 195.

Pennsylvania. Hummel v. Lilly, 188 Pa. St. 463, 68 Am. St. Rep. 879, 41

Atl. 613; Sheaffer v. Woodside, 257 Pa. St. 276, 1 A. L. R. 775, 101 Atl. 753.

South Carolina. Merchants' & Planters' National Bank v. Hunter, — S. Car. —, 102 S. E. 720.

Tennessee. Gwyn v. Porter, 52 Tenn. (5 Heisk.) 253.

Virginia. Doyle's Administrator v. Beasley, 99 Va. 428, 39 S. E. 152.

West Virginia. Seymour v. Alkire, 47 W. Va. 302, 34 S. E. 953.

Wisconsin. Holway v. Sanborn, 145 Wis. 151, 130 N. W. 95.

See also, Cacy v. Slay, 127 Md. 493, 1 A. L. R. 764, 96 Atl. 690.

<sup>2</sup> See discussion in Hale v. Pack, 10 W. Va. 145.

<sup>3</sup> Oswald v. Legh, 1 T. R. 270 (1786).

<sup>4</sup> Powell v. Godsale, Cases Temp. Finch 77 (delay of fifty years).

<sup>5</sup> Winchelsea Cases, 4 Burr. 1062.

<sup>6</sup> Rex v. Stephens, 1 Burr. 433.

<sup>7</sup> For a suggestion of an eighteen year period, see opinion of Mansfield in Weldon v. Davis, cited in Oswald v. Legh, 1 T. R. 270.

See also opinion of Mansfield in Oswald v. Legh, 1 T. R. 270.

<sup>8</sup> See opinion of Buller in Oswald v.

and it was said to be an invariable rule that if no demand was made for money due upon a bond for twenty years, the court would direct the jury to find the bond satisfied from a presumption arising from the length of time.<sup>9</sup> At the same time, a plea that the defendant had paid at maturity was not supported by evidence that he made a payment at a considerable period after maturity, even if more than twenty years had elapsed after the date of such payment.<sup>10</sup>

**§ 3532. Length of time necessary to presumption.** When the rule first appears, there is some doubt as to whether any fixed period is necessary.<sup>1</sup> At modern law, in most jurisdictions, no presumption of payment arises because of delay for a period less than the common-law period, or the period fixed by statute as that after which such presumption will arise,<sup>2</sup> even if only a day less.<sup>3</sup> In Tennessee sixteen years is taken as the time after which a presumption of payment would arise,<sup>4</sup> and in some other states statutes have been passed shortening the time after which such presumption arises.<sup>5</sup> A statute shortening the time within which a presumption of payment arises does not apply to pre-existing liabilities, such as judgments<sup>6</sup> which were due and owing when the statute was passed:

Legh, 1 T. R. 270; Gratwick v. Simpson, 2 Atk. 144.

See Length of Time, in Viner's Abridgement.

<sup>9</sup> Gratwick v. Simpson, 2 Atk. 144.

See also, Leman v. Newnham, 1 Ves. Sr. 51.

<sup>10</sup> Morland v. Bennett, 1 Strange 652.

<sup>1</sup> See § 3531.

<sup>2</sup> Alabama. Shockley v. Christopher, 180 Ala. 140, 60 So. 317.

Indiana. Swatts v. Bowen, 141 Ind. 322, 40 N. E. 1057.

Iowa. Ludwig v. Blackshere, 102 Ia. 366, 71 N. W. 356.

Kentucky. Stockton v. Johnson, 45 Ky. (6 B. Mon.) 408.

New Jersey. Paterson General Hospital Association v. Blauvelt, 72 N. J. Eq. 725, 66 Atl. 1055.

Vermont. Fletcher v. Fletcher's Estate, 72 Vt. 268, 47 Atl. 777.

<sup>3</sup> Ayres v. Waite, 64 Mass. (10 Cush.) 72; Booker v. Booker, 70 Va. (29 Gratt.) 605, 26 Am. Rep. 401; Calwell v. Prindle, 19 W. Va. 604.

<sup>4</sup> Connecticut Mutual Life Ins. Co. v. Dunscomb, 108 Tenn. 724, 91 Am. St. Rep. 769, 58 L. R. A. 694, 69 S. W. 345; McDaniel v. Goodall, 42 Tenn. (2 Coldw.) 391; Gwyn v. Porter, 52 Tenn. (5 Heisk.) 253.

<sup>5</sup> Wingard v. Smith, 95 Kan. 84, 148 Pac. 250; St. Francis Mill Co. v. Sugg, 169 Mo. 130, 69 S. W. 359; Fisher v. New York, 67 N. Y. 73; Wingett's Appeal, 122 Pa. St. 486, 15 Atl. 863.

<sup>6</sup> Wencker v. Thompson's Administrator, 96 Mo. App. 59, 69 S. W. 743.

However, lapse of time less than the requisite period may be considered as a material fact in determining whether as a fact payment has or has not been made.<sup>7</sup>

**§ 3533. Obligations as to which presumption arises.** This rule applies to the so-called contracts of record, such as judgments,<sup>1</sup> to specialties,<sup>2</sup> and to simple contracts, such as negotiable instruments.<sup>3</sup> No presumption of payment arises from mere lapse of time in case of a decree declaring a vendor's lien on certain realty and ordering a sale thereof, but not rendering a personal judgment.<sup>4</sup>

<sup>7</sup>Alabama. Phillips v. Adams, 78 Ala. 225.

Indiana. Swatts v. Bowen, 141 Ind. 322, 40 N. E. 1057.

Iowa. Manning v. Meredith, 69 Ia. 430, 29 N. W. 336.

Kentucky. Moore v. Pogue, 67 Ky. (1 Duv.) 327.

Pennsylvania. Walls v. Walls, 170 Pa. St. 48, 32 Atl. 649.

Virginia. Clendenning v. Thompson, 91 Va. 518, 22 S. E. 233.

<sup>1</sup>England. Flower v. Bolingbroke, 1 Strange 639.

United States. Gaines v. Miller, 111 U. S. 395, 28 L. ed. 466.

California. Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855.

Connecticut. Judson v. Phelps, 87 Conn. 495, 1 A. L. R. 768, 89 Atl. 161.

Delaware. Maxwell v. De Valinger, 2 Penne. (Del.) 504, 47 Atl. 381; Knowles v. Waller, 7 Penne. (Del.) 220, 78 Atl. 611.

Nebraska. Alberts v. Courtland Wagon Co., 94 Neb. 313, 143 N. W. 313.

Oregon. Beekman v. Hamlin, 19 Or. 383, 20 Am. St. Rep. 827, 10 L. R. A. 454, 24 Pac. 195.

Pennsylvania. Smith v. Schoenberger, 176 Pa. St. 95, 34 Atl. 954; Hummel v. Lilly, 188 Pa. St. 463, 68 Am. St. Rep. 879, 41 Atl. 613.

South Carolina. Latimer v. Trowbridge, 52 S. Car. 193, 68 Am. St. Rep. 893, 29 S. E. 634.

<sup>2</sup>England. Gratwick v. Simpson, 2 Atk. 144; Powell v. Godsale, Cases Temp. Finch 77.

United States. Gaines v. Miller, 111 U. S. 395, 28 L. ed. 466.

Missouri. Williams v. Mitchell, 112 Mo. 300, 20 S. W. 647.

Pennsylvania. Devereux's Estate, 184 Pa. St. 429, 39 Atl. 225.

South Carolina. Dickson v. Gourdin, 26 S. Car. 391, 2 S. E. 303.

Virginia. Doyle's Administrator v. Beasley, 99 Va. 428, 39 S. E. 152.

The rule seems to have arisen with reference to specialties. Gratwick v. Simpson, 2 Atk. 144.

<sup>3</sup>England. Anonymous, 6 Mod. 22 (case 23).

Kansas. Courtney v. Staudenmayer, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758.

Kentucky. Owens v. Owens (Ky.), 52 S. W. 943.

New Hampshire. Barker v. Jones, 62 N. H. 497, 13 Am. St. Rep. 586.

New Jersey. Ayres v. Ayres, 69 N. J. Eq. 343, 60 Atl. 422.

Pennsylvania. Walls v. Walls, 170 Pa. St. 48, 32 Atl. 649.

Virginia. Taylor v. Carter, 117 Va. 845, 86 S. E. 120.

Wisconsin. Holway v. Sanborn, 145 Wis. 151, 130 N. W. 95.

<sup>4</sup>Moore v. Williams, 129 Ala. 329, 29 So. 795.

The English courts of chancery held at one time that a presumption of payment would not run as against a mortgage, at least unless it could be shown that the mortgagor had repudiated all liability thereunder. This was put upon the theory that the court would presume that the mortgagee was in possession, and that the mortgagor, although actually in possession, would be regarded at law as the mortgagee's tenant; and, since the mortgagee was constructively in possession, lapse of time would not create a presumption against him.<sup>5</sup> This view has been abandoned, in part, because of the theory that a mortgage is a mere lien; and if the mortgagor is in possession, a presumption of payment arises after the lapse of the requisite period.<sup>6</sup> This presumption does not arise, however, if the mortgagor is not in possession.<sup>7</sup>

The presumption arises in a particular case only when the debtor denies the debt. A third person, claiming title to realty adversely to a mortgagor and his mortgagee, can not, in an action in ejectment brought by the mortgagee, invoke lapse of time between the execution of such mortgage and its foreclosure to show that the mortgage debt has been paid.<sup>8</sup>

**§ 3534. Computation of period.** The time after which this presumption arises begins to run only at the maturity of the debt. If the contract provides that payment for services rendered should be made when the party for whom they were rendered wished no further rendition, no presumption arises that such services were paid for before their termination, though they extended over a long period of time.<sup>1</sup> If a mortgage has been given to secure a

<sup>5</sup> *Leman v. Newnham*, 1 Ves. Sr. 51.

<sup>6</sup> *England. Trash v. White*, 3 Brown Ch. Cas. 289.

*United States. Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 142.

*Alabama. Spencer v. Hurd*, 201 Ala. 269, 1 A. L. R. 761, 77 So. 683.

*Maine. Abbott v. Fellows*, 116 Me. 173, 100 Atl. 657.

*Massachusetts. Crowley v. Adams*, 226 Mass. 582, 116 N. E. 241.

*New Hampshire. Frye v. Hubbell*, 74 N. H. 358, 17 L. R. A. (N.S.) 1197, 68 Atl. 325.

*New Jersey. Wallace v. Coward*, 79 N. J. Eq. 243, 81 Atl. 739.

*Pennsylvania. Fidelity Title & Trust Co. v. Chapman*, 226 Pa. St. 312, 75 Atl. 428.

*Rhode Island. Glezen v. Haskins*, 23 R. I. 601, 51 Atl. 219.

*Virginia. Turnbull v. Mann*, 99 Va. 41, 37 S. E. 288.

The mortgagor can not have affirmative relief. *Cacy v. Slay*, 127 Md. 493, 1 A. L. R. 764, 96 Atl. 690.

<sup>7</sup> *Creighton v. Procker*, 66 Mass. (12 Cush.) 433.

<sup>8</sup> *Glezen v. Haskins*, 23 R. I. 601, 51 Atl. 219.

<sup>1</sup> *Ryans v. Hospes*, 167 Mo. 342, 67 S. W. 285.

debt which is already due, the presumption as to the mortgage begins to run with the execution of the mortgage, and not with the maturity of the debt.<sup>2</sup> If a judgment has been taken by confession upon an obligation, the period for the presumption of payment begins to run as against the judgment, from the date thereof, and not from the maturity of the original obligation.<sup>3</sup> Time during which a suit is pending to set aside an alleged fraudulent conveyance made by the judgment debtor should not be counted in determining whether judgments recovered by the creditors who brought such suit are presumed to have been paid.<sup>4</sup>

**§ 3535. Rebuttable character of presumption.** The presumption of payment which arises from lapse of time is, at most, a prima facie presumption only, which may be rebutted.<sup>1</sup> Whether the fact that the debtor and creditor are closely related and that the enforcement of the debt will inconvenience the debtor seriously, rebuts the presumption, is a question upon which there is a conflict of authority. In some cases it is held that such facts do not rebut the presumption,<sup>2</sup> while in other cases the opposite view

<sup>2</sup> *Braun v. Pettyjohn*, 176 Ala. 594, 58 So. 907.

<sup>3</sup> *Cloud v. Temple*, 5 Houst. (Del.) 587.

<sup>4</sup> *St. Francis Mill Co. v. Sugg*, 169 Mo. 130, 69 S. W. 359.

<sup>1</sup> *England*. In re *Dixon* [1899], 2 Ch. 561.

*United States*. *Brobst v. Brock*, 77 U. S. (10 Wall.) 519.

*Alabama*. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 6 So. 46, 9 So. 265.

*Connecticut*. *Judson v. Phelps*, 87 Conn. 495, 1 A. L. R. 768, 89 Atl. 161.

*Kansas*. *Courtney v. Staudenmayer*, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758.

*Kentucky*. *Herndon v. Bartlett*, 46 Ky. (7 T. B. Mon.) 449.

*Maine*. *Talbot v. Hathaway*, 113 Me. 324, 1 A. L. R. 772, 93 Atl. 834.

*Massachusetts*. *Fuller v. Cushman*, 170 Mass. 286, 49 N. E. 631.

*New Hampshire*. *Barker v. Jones*, 62 N. H. 497, 13 Am. St. Rep. 586.

*New York*. *Macaulay v. Palmer*, 125 N. Y. 742, 26 N. E. 912.

*North Carolina*. *Alston v. Hawkins*, 105 N. Car. 3, 18 Am. St. Rep. 874, 11 S. E. 164.

*Ohio*. *Allen v. Everly*, 24 O. S. 97.

*Pennsylvania*. *Smith's Estate*, 177 Pa. St. 437, 35 Atl. 680; *Miller's Estate*, 243 Pa. St. 328, 90 Atl. 77; *Sheafer v. Woodside*, 257 Pa. St. 276, 1 A. L. R. 775, 101 Atl. 753.

*South Carolina*. *Latimer v. Trowbridge*, 52 S. Car. 193, 68 Am. St. Rep. 893, 29 S. E. 634.

*Tennessee*. *Lyon v. Guild*, 52 Tenn. (5 Heisk.) 175; *Connecticut Mutual Life Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769, 58 L. R. A. 694, 69 S. W. 345.

*Virginia*. *Jameson v. Rixey*, 94 Va. 342, 64 Am. St. Rep. 726, 26 S. E. 861.

<sup>2</sup> *Spencer v. Hurd*, 201 Ala. 269, 1 A. L. R. 761, 77 So. 683; *Swinley v. Force*, 78 N. J. Eq. 52, 78 Atl. 249.

is taken.<sup>3</sup> Insolvency of the debtor may be shown to rebut the presumption of payment,<sup>4</sup> but to do so insolvency must be shown to have lasted during the entire period,<sup>5</sup> and actual insolvency as distinguished from lack of affluence is necessary to produce this result.<sup>6</sup> The facts that the debtor has been nearly insolvent and that the note evidencing the debt, and the collateral security out of which the creditor is seeking to enforce the debt are both in the hands of the creditor, have been held sufficient to rebut such presumption.<sup>7</sup> The fact that the enforcement of the claim would inconvenience the debtor seriously, that the debtor made a request for indulgence and that the creditor gave a written promise not to enforce the debt during the lifetime of the debtor, is sufficient to rebut the presumption.<sup>8</sup>

Evidence which would have prevented limitations from running is sufficient to rebut the presumption of payment. Absence of the debtor from the state rebuts such presumption.<sup>9</sup>

**§ 3536. Acknowledgment and part payment as rebutting presumption.** An acknowledgment of the debt within twenty years preceding the action, if made by the debtor, rebuts such presumption.<sup>1</sup> A deed, made by the trustee of a trust deed by way of

<sup>3</sup> *Coleman v. Erie Trust Co.*, 255 Pa. St. 63, 99 Atl. 217; *Holway v. Sanborn*, 145 Wis. 151, 130 N. W. 95.

<sup>4</sup> *Boardman v. De Forest*, 5 Conn. 1; *Wanamaker v. Van Buskirk*, 1 N. J. Eq. 685, 23 Am. Dec. 748; *Devereux's Estate*, 184 Pa. St. 429, 39 Atl. 225; *Connecticut Mutual Life Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769, 58 L. R. A. 694, 69 S. W. 345.

<sup>5</sup> *Farmers' Bank v. Leonard*, 4 Har. (Del.) 536; *Alston v. Hawkins*, 105 N. Car. 3, 18 Am. St. Rep. 874, 11 S. E. 164.

<sup>6</sup> *Rogers v. Judd*, 5 Vt. 236, 26 Am. Dec. 301.

<sup>7</sup> *Connecticut Mutual Life Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 Am. St. Rep. 769, 58 L. R. A. 694, 69 S. W. 345.

<sup>8</sup> *Sheafer v. Woodside*, 257 Pa. St. 276, 1 A. L. R. 775, 101 Atl. 753.

<sup>9</sup> *England. Newman v. Newman*, 1 Starkie 101.

*Maine. Talbot v. Hathaway*, 113 Me. 324, 1 A. L. R. 772, 93 Atl. 834 (together with the fact that the plaintiff, who had been defendant's surety, had possession of the notes).

*South Carolina. Latimer v. Trowbridge*, 52 S. Car. 103, 68 Am. St. Rep. 893, 29 S. E. 634.

*Virginia. Cheatham v. Aistrop*, 97 Va. 457, 34 S. E. 57.

*Wisconsin. Holway v. Sanborn*, 145 Wis. 151, 130 N. W. 95.

*Contra, Roach v. Cox*, 160 Ala. 425, 135 Am. St. Rep. 107, 49 So. 578.

See also, *Courtney v. Staudenmayer*, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758.

<sup>1</sup> *United States. Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 146.

*Alabama. Braun v. Pettyjohn*, 176 Ala. 592, 58 So. 907.

*New Jersey. Ayres v. Ayres*, 69 N. J. Eq. 343, 30 Atl. 422; *Metlar v. Williams*, 86 N. J. Eq. 330, 97 Atl. 961.

mortgage, after the maturity of the deed, is sufficient to rebut the presumption of payment.<sup>2</sup>

Unlike the rule which applies to acknowledgments which prevent the application of the Statutes of Limitation, such acknowledgment need not recognize the debt as a valid and subsisting obligation, and need not expressly nor impliedly contain a promise to pay. It is sufficient if it shows that the debt in question has never been paid.<sup>3</sup> An admission of non-payment coupled with a refusal to pay is sufficient to rebut the presumption of payment.<sup>4</sup> Such an acknowledgment is sufficient if made to a third person and not to the creditor, on the theory of an admission contrary to interest.<sup>5</sup>

Part payment by a debtor within twenty years before action is begun rebuts such presumption.<sup>6</sup> Unlike part payment which prevents limitations from running,<sup>7</sup> part payment to rebut such presumption may be made by one of several joint debtors.<sup>8</sup> The entry of a credit by the creditor is not such part payment as will rebut the presumption.<sup>9</sup>

**§ 3537. Effect of Statute of Limitations on presumption of payment.** The passage of the Statute of Limitations has not deprived the rule of presumption of payment of all force and effect in law.<sup>1</sup> The presumption of payment may operate where for

**North Carolina.** Cartwright v. Kerman, 105 N. Car. 1, 10 S. E. 870.

**Ohio.** Bissell v. Jaudon, 16 O. S. 498.

**Pennsylvania.** Smith v. Schoenberger, 176 Pa. St. 95, 34 Atl. 954; White v. White, 200 Pa. St. 565, 50 Atl. 157.

<sup>2</sup> Lewis v. Schwenn, 93 Mo. 26, 3 Am. St. Rep. 511, 2 S. W. 391.

<sup>3</sup> Hughes v. Edwards, 22 U. S. (9 Wheat.) 489, 6 L. ed. 146; Bissell v. Jaudon, 16 O. S. 498; Breneman's Appeal, 121 Pa. St. 641, 15 Atl. 650.

<sup>4</sup> Gregory v. Commonwealth, 121 Pa. St. 611, 6 Am. St. Rep. 804, 15 Atl. 452.

<sup>5</sup> Braun v. Pettyjohn, 176 Ala. 592, 58 So. 907; Cape Girardeau County v. Harbison, 58 Mo. 90; Swinley v. Force, 78 N. J. Eq. 52, 78 Atl. 249; Runner's Appeal, 121 Pa. St. 649, 15 Atl. 650; O'Hara v. Corr, 210 Pa. St. 341, 59 Atl. 1099.

<sup>6</sup> In re Dixon [1899], 2 Ch. 561; Denny v. Eddy, 39 Mass. (22 Pick.) 533; White v. Beaman, 96 N. Car. 122, 1 S. E. 789; Bissell v. Jaudon, 16 O. S. 498.

<sup>7</sup> See § 3511 et seq.

<sup>8</sup> Denny v. Eddy, 39 Mass. (22 Pick.) 533; Dickson v. Gourdin, 29 S. Car. 343, 1 L. R. A. 628, 7 S. E. 510.

<sup>9</sup> Merchants' & Planters' National Bank v. Hunter, — S. Car.—, 102 S. E. 720.

<sup>1</sup> Chesapeake & Delaware Canal Co. v. United States, 223 Fed. 926, L. R. A. 1916B, 734; Wright v. Hull, 83 O. S. 385, 94 N. E. 813; Booker v. Booker, 70 Va. (29 Gratt.) 605, 26 Am. Rep. 401; Holway v. Sanborn, 145 Wis. 151, 130 N. W. 95.

some cause,<sup>2</sup> such as absence of the defendant from the state,<sup>3</sup> limitations has not run.

The rule as to presumption of payment is not necessarily subject to all of the statutory exceptions to the Statute of Limitations.<sup>4</sup> An acknowledgment or part payment may be sufficient to rebut the presumption when it would not be sufficient to suspend the operation of the Statute of Limitations.<sup>5</sup> While the Statute of Limitations does not apply as against the state,<sup>6</sup> the presumption of payment applies as against the state,<sup>7</sup> as far as the state is attempting to assert its rights as a property owner.<sup>8</sup>

In some jurisdictions, however, the passage of the Statute of Limitations has been held to reduce the period after which this presumption arises from the common-law period of twenty to the period of limitations fixed by statute.<sup>9</sup>

<sup>2</sup> *Wright v. Mars*, 22 S. Car. 585; *Hale v. Pack*, 10 W. Va. 145; *Holway v. Sanborn*, 145 Wis. 151, 130 N. W. 95.

<sup>3</sup> *Courtney v. Staudenmayer*, 56 Kan. 392, 54 Am. St. Rep. 592, 43 Pac. 758; *Holway v. Sanborn*, 145 Wis. 151, 130 N. W. 95.

<sup>4</sup> *Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466.

<sup>5</sup> See §§ 3492 et seq. and 3500 et seq.

<sup>6</sup> See § 3428.

<sup>7</sup> *Chesapeake & Delaware Canal Co.*

*v. United States*, 223 Fed. 926, L. R. A. 1916B, 734; *In re Ash's Estate*, 202 Pa. St. 422, 90 Am. St. Rep. 658, 51 Atl. 1030.

<sup>8</sup> *Chesapeake & Delaware Canal Co. v. United States*, 223 Fed. 926, L. R. A. 1916B, 734.

<sup>9</sup> *Atkinson v. Dance*, 15 Tenn. (9 Yerg.) 424, 30 Am. Dec. 422; *Walker v. Emerson*, 20 Tex. 706, 73 Am. Dec. 207.

## CHAPTER XCII

### LIMITATIONS IN EQUITY AND LACHES

- § 3538. Limitations in equity.
- § 3539. Laches—General nature and theory.
- § 3540. Laches—Analogous principles.
- § 3541. Elements of laches—Lapse of time—Before right of action.
- § 3542. Laches as affected by the period of limitations—Specific illustrations of laches.
- § 3543. Lapse of time—No prejudice resulting.
- § 3544. Prejudice resulting from lapse of time—Interests of third persons.
- § 3545. Change of position.
- § 3546. Fluctuation in value of property.
- § 3547. Loss of evidence.
- § 3548. Presumption of prejudice.
- § 3549. Explanation and excuse for delay.
- § 3550. Excuse for delay—Disability.
- § 3551. Ignorance of rights.
- § 3552. Delay caused by defendant.
- § 3553. Laches as affecting specific performance.
- § 3554. Specific illustrations of delay as affecting specific performance.

**§ 3538. Limitations in equity.** If the Statute of Limitations is so worded as to apply to actions at law, it does not uniformly restrict the power of the courts of equity to administer equitable relief,<sup>1</sup> and such relief may in proper cases be granted after the time fixed by limitations has elapsed,<sup>2</sup> "for the reason that the words of the statute apply only to particular legal remedies."<sup>3</sup>

<sup>1</sup>Presley v. Weakley, 135 Ala. 517, 93 Am. St. Rep. 39, 33 So. 434; Depue v. Miller, 65 W. Va. 120, 23 L. R. A. (N.S.) 775, 64 S. E. 740; White v. Bailey, 65 W. Va. 573, 23 L. R. A. (N.S.) 232, 64 S. E. 1019; Likens v. Likens, 136 Wis. 321, 117 N. W. 799; Armstrong v. Morrow, 166 Wis. 1, 163 N. W. 179; Lingelbach v. Luckenbach, 168 Wis. 481, 170 N. W. 711.

See on this question generally, The effect of Lapse of Time on Suits in Equity, by George Wharton Pepper, 32 American Law Register (N.S.) 319.

<sup>2</sup>United States. Michoud v. Girod, 45 U. S. (4 How.) 503, 11 L. ed. 1076. Connecticut. Belknap v. Gleason, 11 Conn. 160, 27 Am. Dec. 721.

New Jersey. Lincoln v. Judd, 49 N. J. Eq. 387, 24 Atl. 318.

Tennessee. McLain v. Ferrell, 31 Tenn. (1 Swan.) 48.

West Virginia. White v. Bailey, 65 W. Va. 573, 23 L. R. A. (N.S.) 232, 64 S. E. 1019.

<sup>3</sup>Colton v. Depew, 60 N. J. Eq. 454, 458, 83 Am. St. Rep. 650, 46 Atl. 728.

In such cases the effect of limitations upon equitable jurisdiction turns on the question whether the jurisdiction of equity is exclusive or concurrent. If the jurisdiction of equity is exclusive the Statute of Limitations is not binding upon courts of equity if it purports to apply only to actions at law.<sup>4</sup> Equity will, however, in the absence of exceptional facts, treat the Statutes of Limitations as a legal analogy,<sup>5</sup> which, though not binding upon them, they will follow.<sup>6</sup>

If the jurisdiction of equity is concurrent with that of law, the Statute of Limitations is looked upon as binding upon courts of equity.<sup>7</sup> If a debt enforceable at law is created by the trustee

<sup>4</sup> **United States.** McKnight v. Taylor, 42 U. S. (1 How.) 161, 11 L. ed. 86.

**Alabama.** Presley v. Weakley, 135 Ala. 517, 93 Am. St. Rep. 39, 33 So. 434.

**Illinois.** Locke v. Caldwell, 91 Ill. 417.

**Kentucky.** Gates v. Jacob, 40 Ky. (1 B. Mon.) 306.

**Tennessee.** McLain v. Ferrell, 31 Tenn. (1 Swan.) 48.

**West Virginia.** Depue v. Miller, 65 W. Va. 120, 23 L. R. A. (N.S.) 775, 64 S. E. 740; White v. Bailey, 65 W. Va. 573, 23 L. R. A. (N.S.) 232, 64 S. E. 1019.

See also, Hutchinson v. Hutchinson, 92 Kan. 518, 52 L. R. A. (N.S.) 1165, 141 Pac. 589.

<sup>5</sup> "The statute is an expression of public policy and as such is proper to be looked to by courts of equity in determining the proper limit of time to be ordinarily allowed." Presley v. Weakley, 135 Ala. 517, 521, 93 Am. St. Rep. 39, 33 So. 434.

<sup>6</sup> **United States.** Sullivan v. Portland & Kennebec Ry., 94 U. S. 806, 24 L. ed. 324.

**Alabama.** Presley v. Weakley, 135 Ala. 517, 93 Am. St. Rep. 39, 33 So. 434.

**Iowa.** Tilton v. Bader, 181 Ia. 473, 164 N. W. 871.

**Missouri.** Faris v. Moore, 256 Mo. 123, 165 S. W. 311.

**Nebraska.** Klug v. Seegabarth, 98 Neb. 272, 152 N. W. 385.

**Texas.** Taylor v. Campbell, 59 Tex. 315.

**Virginia.** Switzer v. Noffsinger, 82 Va. 518.

**West Virginia.** Wheeling v. Campbell, 12 W. Va. 36.

<sup>7</sup> **United States.** Miller v. M'Intyre, 31 U. S. (6 Pet.) 61, 8 L. ed. 320; Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436, 37 L. ed. 799; Baker v. Cummings, 169 U. S. 189, 42 L. ed. 711.

**Arizona.** Fleming v. Black Warrior Copper Co., 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

**Illinois.** Harding v. Durand, 138 Ill. 515, 28 N. E. 948.

**Kentucky.** Waller v. Demint, 31 Ky. (1 Dana) 92, 25 Am. Dec. 134.

**New Jersey.** Gutch v. Fosdick, 48 N. J. Eq. 353, 27 Am. St. Rep. 473, 22 Atl. 590.

**New York.** Mills v. Mills, 115 N. Y. 80, 21 N. E. 714.

**Ohio.** Yearly v. Long, 40 O. S. 27.

**Tennessee.** Hughes v. Brown, 88 Tenn. 578, 8 L. R. A. 480, 13 S. W. 286.

**Texas.** Smith v. Fly, 24 Tex. 345, 76 Am. Dec. 109.

**Virginia.** Drumright v. Hite, 2 Va. Dec. 465, 26 S. E. 583.

**Washington.** Roche v. Madar, 104 Wash. 21, 175 Pac. 314.

for the benefit of the trust estate, and in equity can be enforced against such estate, such right in equity is barred when the right of action at law on the debt would be barred.<sup>8</sup>

A cause of action for fraud,<sup>9</sup> or for conversion,<sup>10</sup> is barred in equity when it is barred at law. Whether a vendor's lien is barred in equity when an action at law upon the debt is barred, is a question upon which there is a conflict of authority.<sup>11</sup>

If the law gives two legal remedies, which are barred at different intervals of time, a concurrent equitable remedy is not barred until both legal remedies are barred.<sup>12</sup> If at law the mortgagee has two remedies, one on the debt for a personal judgment and one on the mortgage to recover the land, the equitable remedy of foreclosure is not barred until both legal remedies are barred.<sup>13</sup>

In some states, however, statutes of limitation are so worded as to include equitable suits as well as legal actions.<sup>14</sup> Among these states are those in which the code of civil procedure has been adopted. Where such statutes are in force no question exists as to their effect on suits in equity.

**§ 3539. Laches—General nature and theory.** Independent of the Statutes of Limitations, and in cases to which for the most part such statutes could not apply, equity has developed the doctrine of laches as a bar to a suit in equity.<sup>1</sup> The theory of laches is not

**West Virginia.** *Sibley v. Stacey*, 53 W. Va. 292, 44 S. E. 420.

"Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern actions at law." Syllabus in *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436 [quoted in *Baker v. Cummings*, 169 U. S. 189, 206].

<sup>8</sup> *Hughes v. Brown*, 88 Tenn. 578, 8 L. R. A. 480, 13 S. W. 286.

<sup>9</sup> *Baker v. Cummings*, 169 U. S. 189, 42 L. ed. 711.

<sup>10</sup> *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 37 L. ed. 799.

<sup>11</sup> That suit in equity is not barred. *Hardin v. Boyd*, 113 U. S. 756, 28 L. ed. 1141.

That suit in equity is barred. *Thompson v. Thompson*, 71 Tenn. (3 Lea.) 126.

<sup>12</sup> *Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728; *Burdoin v. Shelton*, 16 Tenn. (10 Yerg.) 41.

<sup>13</sup> *Colton v. Depew*, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728.

<sup>14</sup> *Teall v. Schroeder*, 158 U. S. 172, 39 L. ed. 938; *La Roque v. United States*, 239 U. S. 62, 60 L. ed. 147; *Fleming v. Black Warrior Copper Co.*, 15 Ariz. 1, 51 L. R. A. (N.S.) 99, 136 Pac. 273; *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. 643; *Casey v. Smith*, 36 S. D. 36, 153 N. W. 918.

See also, *Weathersby v. Springfield Lumber Co.*, 141 La. 577, 75 So. 416.

<sup>1</sup> *Polianski v. Polianski*, — Md. —, 114 Atl. 571. "There is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim where no statute of limitations directly governs the case. In such cases

that lapse of time alone is a bar, for, as has been stated elsewhere, lapse of time is not of itself a bar in equity in the absence of express statute. The underlying theory is, without reference to the amount of time which has elapsed,<sup>2</sup> that if the injured party has full knowledge of the facts and is in no way prevented or hindered from bringing suit, but instead of suing in a reasonable time waits until circumstances intervene either in the condition of the adverse party, the nature and value of the property, the evidence available to the adversary party, or the rights of third persons, which make it inequitable to allow relief, equity will refuse relief.<sup>3</sup>

courts of equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights or long acquiescence in the assertion of adverse rights." *Wagner v. Baird*, 48 U. S. (7 How.) 234, 12 L. ed. 681 [quoted in *Abraham v. Ordway*, 158 U. S. 416, 422, 39 L. ed. 1036].

See for similar language *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134; *Patterson v. Hewitt*, 11 N. M. 1, 55 L. R. A. 658, 66 Pac. 552.

<sup>2</sup>"Laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Galliher v. Cadwell*, 145 U. S. 368, 373, 36 L. ed. 738 [quoted in *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, 699, 42 L. ed. 626].

<sup>3</sup>*United States. Speidel v. Henrici*, 120 U. S. 377, 30 L. ed. 718; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134; *Willard v. Wood*, 164 U. S. 502, 41 L. ed. 531; *Whitney v. Fox*, 166 U. S. 637, 41 L. ed. 1145; *United States v. Martinez*, 184 U. S. 441, 46 L. ed. 632; *Potts v. Alexander*, 118 Fed. 885.

*California. Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Bell v. Hudson*, 73

Cal. 285, 2 Am. St. Rep. 791, 14 Pac. 791.

*Colorado. Halm v. Wright*, 63 Colo. 419, 168 Pac. 36.

*Florida. Hendry v. Benlisa*, 37 Fla. 609, 34 L. R. A. 283, 20 So. 800.

*Georgia. Boyd Lumber Co. v. Mills*, 146 Ga. 794, 92 S. E. 534.

*Illinois. Walker v. Ray*, 111 Ill. 315; *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229.

*Kentucky. Kirby v. Jacobs*, 52 Ky. (13 B. Mon.) 435; *Finlayson v. Cuyuga Coal & Coke Co.*, 173 Ky. 763, 191 S. W. 486; *Head v. Oglesby*, 175 Ky. 613, 194 S. W. 793.

*Minnesota. Ayer v. Stewart*, 14 Minn. 97.

*Missouri. Hobbs v. Henley*, — Mo. —, 186 S. W. 981.

*New Jersey. De Graw v. Mechan*, 48 N. J. Eq. 219, 21 Atl. 193; *Gardner Valve Mfg. Co. v. Halyburton*, 87 N. J. Eq. 689, 102 Atl. 893.

*New Mexico. Patterson v. Hewitt*, 11 N. M. 1, 55 L. R. A. 658, 66 Pac. 552; *Raton Waterworks Co. v. Raton*, 22 N. M. 464, 164 Pac. 826.

*Oregon. Wilson v. Wilson*, 41 Or. 459, 60 Pac. 923.

*Pennsylvania. In re Wehrle's Estate*, 205 Pa. St. 62, 54 Atl. 511.

*South Carolina. Phillips v. Yon*, 61 S. Car. 426, 30 S. E. 618; *Young v. Young*, 111 S. Car. 347, 97 S. E. 839.

Laches is a doctrine of equity, and it has no application to actions at law,<sup>4</sup> although an unreasonable delay in prosecuting an action may be considered in determining whether the claim was a valid one.<sup>5</sup>

Laches is ordinarily merely a defense. In some exceptional cases, however, it may be the basis of affirmative relief. A agreed to buy land from B and gave notes therefor. Judgment was subsequently taken on such notes, but the judgments were never paid. Years after, when the land had risen in value greatly and A had become insolvent, it was held that B's administrator could have such contract canceled, since A, by reason of his laches, had lost the right to specific performance.<sup>6</sup>

**Tennessee.** *Campbell v. Bartlett*, 122 Tenn. 208, 25 L. R. A. (N.S.) 639, 122 S. W. 250.

**Virginia.** *Doggett v. Helm*, 58 Va. (17 Gratt.) 96; *Hoster's Committee v. Zollman*, 122 Va. 41, 94 S. E. 164.

**Washington.** *Faucett v. Northern Clay Co.*, 93 Wash. 239, 160 Pac. 643.

**West Virginia.** *Ohio River Ry. Co. v. Johnson*, 50 W. Va. 499, 40 S. E. 407; *Phillips v. Piney Coal Co.*, 53 W. Va. 543, 44 S. E. 774; *Depue v. Miller*, 65 W. Va. 120, 23 L. R. A. (N.S.) 775, 64 S. E. 740; *White v. Bailey*, 65 W. Va. 573, 23 L. R. A. (N.S.) 232, 64 S. E. 1019.

"The doctrine of laches is an equitable principle which is applied to promote, but never to defeat, justice. Under ordinary circumstances, a suit in equity will not be stayed on account of laches, before, and it will be stayed after, the analogous statutes of limitations at law. But, if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. When a suit is brought within the time fixed by the analogous statute, the burden is on the defend-

ants to show, either from the face of the bill, or by their answer, that extraordinary circumstances exist which require the application of the doctrine of laches in order to secure a just result. *Brun v. Mann*, 151 Fed. 145, 12 L. R. A. (N.S.) 154.

<sup>4</sup>**United States.** *Wehrman v. Conklin*, 155 U. S. 314, 39 L. ed. 167.

**Arkansas.** *McFarlane v. Grober*, 70 Ark. 371; *Davis v. Neal*, 100 Ark. 399, 140 S. W. 278.

**California.** *Trail v. Firth*, — Cal. —, 108 Pac. 1033.

**Iowa.** *Wells v. Western Union Telegraph Co.*, 144 Ia. 605, 138 Am. St. Rep. 317, 24 L. R. A. (N.S.) 1045, 123 N. W. 371.

**Missouri.** *Hunter v. Moore*, — Mo. —, 202 S. W. 544.

**Montana.** *First State Bank v. Lang*, 55 Mont. 146, 9 A. L. R. 1139, 174 Pac. 597.

**New York.** *Pollitz v. Wabash Ry.*, 207 N. Y. 113, 100 N. E. 721.

**Oklahoma.** *Flesner v. Cooper*, 62 Okla. 263, 162 Pac. 1112.

**South Dakota.** *Kenny v. McKenzie*, 25 S. D. 485, 49 L. R. A. (N.S.) 782, 127 N. W. 597.

<sup>5</sup>**Dalberg v. Jung Brewing Co.**, 155 Wis. 185, 144 N. W. 198.

<sup>6</sup>**Hendry v. Benlisa**, 37 Fla. 609, 34 L. R. A. 283, 20 So. 800.

**§ 3540. Laches—Analogous principles.** There are a number of different principles which induce a court of equity to refuse to enforce a claim because of a delay in applying for relief. These doctrines have the common idea of a loss of legal right because of delay, and in many cases two or more of these principles are applicable to the same state of facts. Since, under other combinations of fact, only one of these principles may apply, they must, nevertheless, be distinguished from one another no matter how close the analogy may be. Laches is variously explained as based on equitable estoppel,<sup>1</sup> or a doctrine analogous thereto,<sup>2</sup> or on a presumption of abandonment of claim.<sup>3</sup>

The doctrine of laches is analogous to the Statute of Limitations.<sup>4</sup> The difference between them is that the statute is enacted by the legislature in positive terms, and as a result, a right of action is barred by the lapse of the prescribed period of time without regard to any prejudice which has been sustained by the party who seeks to invoke it.<sup>5</sup> Laches, on the other hand, is a doctrine of equity, and it applies, as a rule, only where some loss or prejudice has been sustained by reason of the delay. The doctrine of laches is also analogous to the doctrine that equity will not enforce a stale claim. They differ, however, since laches ordinarily applies only where some prejudice has been sustained,<sup>6</sup> while the doctrine of the stale claim is more like the Statute of Limitations and involves the idea that equity may refuse to grant relief because of an unreasonable delay, although there may be no other facts which make it inequitable to grant relief.<sup>7</sup>

<sup>1</sup> *Fleming v. Black Warrior Copper Co.*, 15 Ariz. 1, 51 L. R. A. (N.S.) 99, 136 Pac. 273; *Wilder v. Wilder*, 82 Vt. 123, 72 Atl. 203; *Gray v. Reeves*, 60 Wash. 374, 125 Pac. 162; *Likens v. Likens*, 136 Wis. 321, 117 N. W. 799.

<sup>2</sup> *Harris v. Defenbaugh*, 82 Kan. 765, 109 Pac. 681; *Troll v. St. Louis*, 257 Mo. 626, 168 S. W. 167.

<sup>3</sup> *Snyder v. Charleston & Southside Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616; *White v. Bailey*, 65 W. Va. 573, 23 L. R. A. (N.S.) 232, 64 S. E. 1019.

<sup>4</sup> See § 3439.

<sup>5</sup> See § 3424.

<sup>6</sup> See § 3453.

<sup>7</sup> *United States. Creswill v. Grand*

*Lodge, Knights of Pythias*, 225 U. S. 246, 56 L. ed. 1074.

*Colorado. Woodruff v. Williams*, 35 Colo. 28, 5 L. R. A. (N.S.) 986, 85 Pac. 90.

*Kansas. Osincup v. Henthorn*, 89 Kan. 58, 46 L. R. A. (N.S.) 174, 130 Pac. 652.

*Montana. American Mining Co. v. Basin & Bay State Mining Co.*, 39 Mont. 476, 24 L. R. A. (N.S.) 305, 104 Pac. 525.

*New Mexico. Patterson v. Hewitt*, 11 N. M. 1, 55 L. R. A. 658, 66 Pac. 552.

*Rhode Island. Fogarty v. Fogarty*, — R. I. —, 103 Atl. 737.

Laches is also analogous, in some respects, to the doctrine of ratification and waiver, in cases in which a contract is induced by fraud and the like,<sup>8</sup> or in which it is entered into by a party who lacks full capacity.<sup>9</sup> The difference between these principles is that ratification involves right of election between two inconsistent rights. The party who elects to ratify may elect to disaffirm. He may choose either, but he can not have both. Laches deprives a party of a right without giving him anything in return. There is no election between inconsistent rights. By reason of the delay which results in an alteration of position on the part of the adversary party, the right of action is lost.

The doctrine of laches owes its existence and its present form to a number of different reasons. The fact that the delay of the plaintiff has resulted in a prejudice to the debtor, is possibly the most weighty of these.<sup>10</sup> Another consideration which controls the action of the court is the fact that evidence may be lost through delay and that the defendant may thus be prevented from making a successful defense of which he might have availed himself if the action had been brought promptly.<sup>11</sup> In addition to these reasons, and in part overlapping them, is the theory that the granting of equitable remedies, is a matter of discretion rather than of strict right, and that equity may grant remedies to the vigilant that it refuses to the negligent. Relief will not be refused on the ground that the plaintiff has delayed his application if an injustice will be done thereby.<sup>12</sup>

**§ 3541. Elements of laches—Lapse of time before right of action.** Laches is ordinarily said to exist where there is a delay for an unreasonable time, which is not satisfactorily explained, and which will result in prejudice to the adversary party or to third parties, if equitable relief is allowed to the plaintiff. Since a delay is an essential element of laches, laches does not exist if the plaintiff has acted promptly.<sup>1</sup> Until a right of action arises,

**West Virginia.** *Depue v. Miller*, 65 1709 et seq., 1764 et seq., 1790 et seq.,  
W. Va. 120, 23 L. R. A. (N.S.) 775, 1803 et seq. and 1838.  
64 S. E. 740.      <sup>10</sup> See § 3454 et seq.

**Wisconsin.** *Dorner v. Luxemburg*      <sup>11</sup> See § 3457.  
School District, 137 Wis. 147, 19 L. R.      <sup>12</sup> *Bucher v. Hohl*, 199 Mo. 320, 116  
A. (N.S.) 171, 118 N. W. 353.      Am. St. Rep. 492, 97 S. W. 922.

<sup>8</sup> See §§ 276, 354 et seq., 378, 480 and      <sup>1</sup> *Alabama. First National Bank v.*  
507.      *McIntosh*, 201 Ala. 649, L. R. A. 1918F,  
353, 79 So. 121.

<sup>9</sup> See §§ 1602 et seq., 1636, 1652, 1682,

delay can not amount to laches.<sup>2</sup> One who is in possession of property, can not be regarded as guilty of laches because of his delay in bringing a suit to perfect his title thereto.<sup>3</sup> Delay in enforcing a trust does not amount to laches if the trustees have not repudiated it,<sup>4</sup> although such delay, after they have repudiated it, may amount to laches.<sup>5</sup> If the adversary party has a considerable period of time in which to perform, delay during such period of time, and until the fact of breach is established, is not laches.<sup>6</sup> If litigation is pending in which the performance of a contract is involved, the defeated contractor can not be charged with laches in delaying an attempt to recover the materials which he has furnished, until the action which is based on the theory of performance has been decided against him.<sup>7</sup>

**§ 3542. Laches as affected by the period of limitations—Specific illustrations of laches.** The effect of the Statute of Limitations upon the doctrine of laches depends on the extent to which such statute is treated as either binding on courts of equity or merely

**California.** Steinberger v. Young, 175 Cal. 81, 165 Pac. 432.

**Connecticut.** Millard v. Green, 94 Conn. 597, 9 A. L. R. 1610, 110 Atl. 177.

**District of Columbia.** Bradley v. Davidson, 47 D. C. App. 266.

**Florida.** Harvey v. Hayes, 71 Fla. 346, 71 So. 282; Southern Colonization Company v. Derfler, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

**Georgia.** Crawford v. Wilson, 139 Ga. 654, 44 L. R. A. (N.S.) 773, 78 S. E. 30; Anderson v. Crawford, 147 Ga. 455, L. R. A. 1918B, 894, 94 S. E. 574.

**Indiana.** Brannon v. Hayes, — Ind. —, 130 N. E. 803.

**Iowa.** Snouffer v. Tipton, 161 Ia. 223, L. R. A. 1915B, 173, 142 N. W. 97.

**Illinois.** Farwell v. Pyle-National Electric Headlight Co., 289 Ill. 157, 10 A. L. R. 363, 124 N. E. 449.

**New Mexico.** Locke v. Murdoch, 20 N. M. 522, L. R. A. 1917B, 267, 151 Pac. 298 (ten months).

**Utah.** Weyant v. Utah Savings & Trust Co., 54 Utah 181, 9 A. L. R. 1119, 182 Pac. 189.

**Washington.** Crodle v. Dodge, 99 Wash. 121, 168 Pac. 986.

<sup>2</sup> Ward v. Meredith, 186 Ia. 1108, 173 N. W. 246.

<sup>3</sup> Ashurst v. Peck, 101 Ala. 499, 14 So. 541; Treadwell v. Torbert, 122 Ala. 297, 25 So. 216; Haney v. Legg, 129 Ala. 619, 87 Am. St. Rep. 81, 30 So. 34; Zeigler v. Zeigler, 180 Ala. 246, 60 So. 810; Veitch v. Woodward Iron Co., 200 Ala. 358, 76 So. 124; First National Bank v. McIntosh, 201 Ala. 649, L. R. A. 1918F, 353, 79 So. 121.

<sup>4</sup> Reynolds v. Sumner, 126 Ill. 58, 9 Am. St. Rep. 523, 1 L. R. A. 327, 18 N. E. 334; Carter v. Cohen, 181 Ia. 588, 164 N. W. 1040.

<sup>5</sup> Patterson v. Hewitt, 195 U. S. 309, 49 L. ed. 214; Stianson v. Stianson, 40 S. D. 322, 6 A. L. R. 280, 167 N. W. 237.

<sup>6</sup> Steinberger v. Young, 175 Cal. 81, 165 Pac. 432 (contract to make will); Harvey v. Hayes, 71 Fla. 346, 71 So. 282; Crawford v. Wilson, 139 Ga. 654, 44 L. R. A. (N.S.) 773, 78 S. E. 30 (contract to make will).

<sup>7</sup> Snouffer v. Tipton, 161 Ia. 223, L. R. A. 1915B, 173, 142 N. W. 97.

an analogy which in proper cases courts of equity will follow. In some jurisdictions limitations applies to suits at equity,<sup>1</sup> and is subject to the same exceptions as those recognized at law.<sup>2</sup> In such jurisdictions the doctrine of laches does not apply in cases of concurrent jurisdiction.<sup>3</sup> Delay short of the period of limitations is no bar in equity.<sup>4</sup>

In other jurisdictions the doctrine of laches is invoked irrespective of the Statute of Limitations.<sup>5</sup> Equity may, therefore, refuse relief, though the time fixed by the Statute of Limitations has not expired.<sup>6</sup>

Delay not exceeding the statutory period of limitations does not necessarily amount to laches,<sup>7</sup> though special facts may make laches exist within a period shorter than that of limitations.<sup>8</sup>

<sup>1</sup> *Fleming v. Black Warrior Copper Co.*, 15 Ariz. 1, 51 L. R. A. (N.S.) 99, 136 Pac. 273; *Sioux City & St. Paul Ry. v. O'Brien County*, 118 Ia. 582, 92 N. W. 857; *Burckhalter v. Vann*, — Okla. —, 157 Pac. 1148.

<sup>2</sup> *Newberger v. Wells*, 51 W. Va. 624, 42 S. E. 625.

<sup>3</sup> *Higgins Oil & Fuel Co. v. Snow*, 113 Fed. 433, 51 C. C. A. 267.

<sup>4</sup> *Fleming v. Black Warrior Copper Co.*, 15 Ariz. 1, 51 L. R. A. (N.S.) 99, 136 Pac. 273; *Roche v. Madar*, 104 Wash. 21, 175 Pac. 314; *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571.

<sup>5</sup> *Patterson v. Hewitt*, 195 U. S. 309, 49 L. ed. 214; *Guarantee Trust & Safe Deposit Co. v. Delta & Pine Land Co.*, 104 Fed. 5, 43 C. C. A. 396; *Patterson v. Hewitt*, 11 N. M. 1, 55 L. R. A. 658, 66 Pac. 552; *Likens v. Likens*, 136 Wis. 321, 117 N. W. 799.

<sup>6</sup> *United States. Sena v. United States*, 189 U. S. 233, 47 L. ed. 787; *Patterson v. Hewitt*, 195 U. S. 309, 49 L. ed. 214; *Potts v. Alexander*, 118 Fed. 885.

<sup>7</sup> *Colorado. Great Western Mining Co. v. Alston Mining Co.*, 14 Colo. 90, 23 Pac. 908.

<sup>8</sup> *Massachusetts. Phillips v. Rogers*, 53 Mass. (12 Met.) 405.

<sup>9</sup> *New York. Peters v. Delaplaine*, 49 N. Y. 362.

*Oregon. Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923.

*West Virginia. Wilson v. Harper*, 25 W. Va. 279.

"Equity will sometimes refuse relief where a shorter time than that prescribed by the statute of limitations has elapsed without suit. It ought always to do so where, as in this case, the delay in the assertion of rights is not adequately explained and such circumstances have intervened in the condition of the adverse party as to render it unjust to him or to his estate that a court of equity should assist the plaintiff." *Whitney v. Fox*, 166 U. S. 637, 647, 41 L. ed. 1148.

<sup>1</sup> *United States. Brun v. Mann*, 151 Fed. 145, 12 L. R. A. (N.S.) 154, 80 C. C. A. 513.

*Arizona. Fleming v. Black Warrior Copper Co.*, 15 Ariz. 1, 51 L. R. A. (N. S.) 99, 136 Pac. 273.

*Arkansas. Reaves v. Davidson*, 129 Ark. 88, 195 S. W. 19.

*Nebraska. Michigan Trust Co. v. Red Cloud (Neb.)*, 92 N. W. 900.

*Wisconsin. Schuster v. Milwaukee Electric Railway & Light Co.*, 142 Wis. 578, 126 N. W. 26.

<sup>1</sup> *Ide v. Trorlicht, Duncker & Renard Carpet Co.*, 115 Fed. 137.

The period of limitations is in the absence of controlling facts to the contrary taken as an analogy.<sup>9</sup> In case of delay beyond the statutory period of limitations the party seeking relief must, in order to obtain it, show facts excusing such delay.<sup>10</sup> Considerations of public policy may induce the courts to grant relief in spite of a delay which would have amounted to laches without such special considerations.<sup>11</sup>

If the requisite elements of prejudice are present, delay for two years,<sup>12</sup> two years and a half,<sup>13</sup> three years,<sup>14</sup> four years,<sup>15</sup> or twenty years,<sup>16</sup> has been held to amount to laches.

**§ 3543. Lapse of time—No prejudice resulting.** Lapse of time is not of itself laches if the party against whom relief is sought is not prejudiced by the delay.<sup>1</sup> Delay in bringing a suit for refor-

<sup>9</sup> *Brun v. Mann*, 151 Fed. 145, 12 L. Conn. 597, 9 A. L. R. 1610, 110 Atl. R. A. (N.S.) 154, 80 C. C. A. 513. 177.

<sup>10</sup> *Boynton v. Haggart*, 120 Fed. 819.

<sup>11</sup> *Bruce v. Bibb*, — Va. —, 105 S. E. 570 (contract between attorney and client).

<sup>12</sup> *Hardin v. Adair*, 140 Ga. 263, 47 L. R. A. (N.S.) 896, 78 S. E. 1073; *Boyd Lumber Co. v. Mills*, 146 Ga. 794, L. R. A. 1918A, 1154, 92 S. E. 534.

<sup>13</sup> *Todd v. Loomis*, 161 Wis. 233, 152 N. W. 447.

<sup>14</sup> *Finlayson v. Cuyuga Coal & Coke Co.*, 173 Ky. 763, 191 S. W. 486.

<sup>15</sup> *Faucett v. Northern Clay Co.*, 93 Wash. 239, 160 Pac. 643.

<sup>16</sup> *Young v. Young*, 111 S. Car. 347, 97 S. E. 839.

<sup>1</sup> *United States. Johnson v. Atlantic Gulf & West India Transit Co.*, 156 U. S. 618, 39 L. ed. 556; *Merrill v. National Bank*, 173 U. S. 131, 43 L. ed. 640; *Slater v. Ruggles*, 263 Fed. 1021.

**Arkansas.** *Reaves v. Davidson*, 129 Ark. 88, 195 S. W. 19; *Paynter v. Littlefield*, 132 Ark. 300, 200 S. W. 995; *Edwards v. Locke*, 134 Ark. 80, 203 S. W. 286.

**Colorado.** *Consolidated Juchem Ditch & Reservoir Co. v. Old*, 62 Colo. 470, 163 Pac. 78.

**Connecticut.** *Millard v. Green*, 94

**Florida.** *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790.

**Georgia.** *Crawford v. Wilson*, 139 Ga. 654, 44 L. R. A. (N.S.) 773, 78 S. E. 30; *Louisville & Nashville Ry. Co. v. Nelson*, 145 Ga. 594, 89 S. E. 693.

**Illinois.** *De Proft v. Heydecker*, 297 Ill. 541, 131 N. E. 114.

**Indiana.** *Citizens' National Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

**Iowa.** *Luke v. Koenen*, 120 Ia. 103, 94 N. W. 278; *Kinman v. Hill*, — Ia. —, 156 N. W. 168; *Farmers' Loan & Trust Co. v. Brown*, 182 Ia. 1044, 165 N. W. 70; *Wachsmut v. Miller*, — Ia. —, 168 N. W. 344.

**Kansas.** *Leavenworth v. Douglass*, 59 Kan. 416, 53 Pac. 123; *Arnett v. Westcott*, 107 Kan. 693, 193 Pac. 377; *Hutchinson v. Hutchinson*, 92 Kan. 518, 52 L. R. A. (N.S.) 1165, 141 Pac. 589.

**Kentucky.** *Thomas v. Haly Coal Co.*, 189 Ky. 698, 225 S. W. 1053.

**Minnesota.** *Eyre v. Faribault*, 121 Minn. 233, L. R. A. 1917A, 685, 141 N. W. 170.

**South Carolina.** *Fanning v. Bogacki*, 111 S. Car. 376, 98 S. E. 137

mation of an instrument from which the name of one of the parties was omitted,<sup>2</sup> or in which the amount is incorrectly stated, no one being misled thereby,<sup>3</sup> or delay in pushing a suit against an indorser whereby he is benefited, inasmuch as the party primarily liable is induced to make payments upon the debt,<sup>4</sup> is not laches.

**§ 3544. Prejudice resulting from lapse of time—Interests of third persons.** Prejudice resulting to the adversary party or to a third party from lapse of time is an essential element of laches, without which mere delay does not amount to laches.<sup>1</sup> If such prejudice results from such unreasonable and unexplained delay, however, laches exists.<sup>2</sup> The acquisition by innocent third persons of interests in the property the recovery of which is sought, as by

Utah. *Hamilton v. Dooly*, 15 Utah 280, 49 Pac. 769.

West Virginia. *Pethtel v. McCullough*, 49 W. Va. 520, 39 S. E. 199; *White v. Bailey*, 65 W. Va. 573, 23 L. R. A. (N.S.) 232, 64 S. E. 1019.

Wisconsin. *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.*, 79 Wis. 297, 48 N. W. 371.

<sup>2</sup> *Farmers' Loan & Trust Co. v. Brown*, 182 Ia. 1044, 165 N. W. 70.

<sup>3</sup> *Kinman v. Hill*, — Ia. —, 156 N. W. 168.

<sup>4</sup> *Tidball's Executors v. Shenandoah National Bank*, 100 Va. 741, 42 S. E. 867.

<sup>1</sup> *Slater v. Ruggles*, 263 Fed. 1021.

See §§ 3543 et seq.

<sup>2</sup> *United States. Abraham v. Ordway*, 158 U. S. 416, 39 L. ed. 1036; *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626; *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. ed. 636.

Arkansas. *Nobles v. Poe*, 121 Ark. 613, 182 S. W. 270.

California. *Stevenson v. Boyd*, 153 Cal. 630, 19 L. R. A. (N.S.) 525, 96 Pac. 284.

Colorado. *Halm v. Wright*, 63 Colo. 419, 168 Pac. 36.

Georgia. *Hardin v. Adair*, 140 Ga.

263, 47 L. R. A. (N.S.) 896, 78 S. E. 1073.

Illinois. *Walker v. Warner*, 179 Ill. 16, 53 N. E. 594; *Fisher v. Patterson*, 197 Ill. 414, 64 N. E. 353 [affirming, 99 Ill. App. 70].

Iowa. *Holman v. Winterboer*, 107 Ia. 279, 77 N. W. 1060; *Long v. Olson*, 115 Ia. 388, 88 N. W. 933.

Kansas. *Dunbar v. Green*, 66 Kan. 557, 72 Pac. 243.

Massachusetts. *Justice v. Soderlund*, 225 Mass. 320, 114 N. E. 623.

Michigan. *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22.

New Jersey. *Coyne v. Sayre*, 54 N. J. Eq. 702, 36 Atl. 96.

Pennsylvania. *Burr v. Kase*, 168 Pa. St. 81, 31 Atl. 954.

Rhode Island. *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804; *Gorham v. Sayles*, 23 R. I. 449, 50 Atl. 848.

Virginia. *Nelson v. Triplett*, 99 Va. 421, 39 S. E. 150.

West Virginia. *Shields v. Tarleton*, 48 W. Va. 343, 37 S. E. 589; *Depue v. Miller*, 65 W. Va. 120, 23 L. R. A. (N.S.) 775, 64 S. E. 740.

Wisconsin. *Likens v. Likens*, 136 Wis. 321, 117 N. W. 799; *Bur v. Bong*, 159 Wis. 498, 150 N. W. 431.

purchase,<sup>3</sup> or by taking a mortgage thereon as security for a loan,<sup>4</sup> has been held sufficient when coupled with unreasonable delay on the part of the plaintiff to prevent him from obtaining equitable relief. A city in alleged violation of its contract with a water company proceeded to issue bonds and with the proceeds to build its own waterworks, out of the revenues arising from which such bonds were to be paid. Such water company and its bondholders objected orally to such conduct, but took no steps to preserve their rights by litigation until the city had issued bonds and out of the proceeds had constructed a dam across the Colorado River and had laid pipe. It was held that whatever the original rights of the parties, they had, by their laches, lost the right to equitable relief by injunction against the completion of the waterworks.<sup>5</sup> An action to charge land with an invalid levee assessment, on the theory that the owner was estopped to deny the validity of such assessments, is barred where the property had changed hands repeatedly and the owners had spent large sums for repairing the levee and had become liable for large assessments under a new statute.<sup>6</sup>

**§ 3545. Change of position.** A delay for an unreasonable time during which the adversary party expends money or labor upon the property in dispute,<sup>1</sup> or pays, to third persons, obligations con-

<sup>3</sup> **United States.** *Abraham v. Ordway*, 158 U. S. 416, 39 L. ed. 1036 (delay of twenty years).

**Illinois.** *Fisher v. Patterson*, 197 Ill. 414, 64 N. E. 353 (delay of two and one-half years after knowledge of facts).

**Massachusetts.** *Justice v. Soderlund*, 225 Mass. 320, 114 N. E. 623.

**Rhode Island.** *Gorham v. Sayles*, 23 R. I. 449, 50 Atl. 848 (delay of twenty-two years).

**Virginia.** *Nelson v. Triplett*, 99 Va. 421, 39 S. E. 150 (delay of twenty-five years).

**West Virginia.** *Shields v. Tarleton*, 48 W. Va. 343, 37 S. E. 589 (delay of almost twenty-one years).

<sup>4</sup> *Johnson v. Atlantic, Gulf & West India Transit Co.*, 156 U. S. 618, 39 L. ed. 556 (delay of seven years).

<sup>5</sup> *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626.

<sup>6</sup> *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. ed. 636.

<sup>1</sup> **United States.** *Duke v. Turner*, 204 U. S. 623, 51 L. ed. 652.

**California.** *Stevenson v. Boyd*, 153 Cal. 630, 19 L. R. A. (N.S.) 525, 96 Pac. 284.

**Iowa.** *Long v. Olson*, 115 Ia. 388, 88 N. W. 933.

**Massachusetts.** *Stewart v. Finkelstone*, 206 Mass. 28, 28 L. R. A. (N.S.) 634, 92 N. E. 37.

**Montana.** *Elling v. Fine*, 53 Mont. 481, 164 Pac. 891.

**North Carolina.** *Spence v. Seaboard Air Line Ry. Co.*, 137 N. Car. 107, 1 L. R. A. (N.S.) 604, 49 S. E. 96.

**Vermont.** *Philbrick v. Johnson*, 91 Vt. 270, 100 Atl. 110.

nected with the transaction,<sup>2</sup> is laches. If the stockholders know of the facts with reference to transactions between the corporation and its directors, they can not wait until the success or failure of the venture is assured, before deciding whether to attack such transactions or not.<sup>3</sup>

However, allowing the sanitary district of Chicago to construct a drainage canal was held not to be laches.<sup>4</sup>

The fact that the defendant has incurred obligations is not regarded as a change of position to his prejudice, if he is secured collaterally against liability thereon.<sup>5</sup> If the defendant is informed promptly of plaintiff's claim, he ignores it at his peril and a delay on the part of the plaintiff may not amount to laches, although it would have such effect if the defendant had not been advised of such claim.<sup>6</sup>

While it has been suggested that neither the Statute of Limitations nor the doctrine of laches apply to proceedings to set aside an instrument which is void on its face,<sup>7</sup> an exception to this rule exists in cases in which the adversary party has changed his position, to his prejudice, in reliance on the validity of the instrument.<sup>8</sup> In the latter case, the doctrine of laches will apply, although the instrument itself is void.<sup>9</sup>

**§ 3546. Fluctuation in value of property.** The facts that the plaintiff has waited an unreasonable time, and that the value of the property whose recovery is sought has advanced greatly, will

**Wisconsin.** *State v. La Crosse*, 101 Wis. 208, 77 N. W. 167.

<sup>2</sup>*Greek Catholic Church v. Roizdestvensky*, 67 Colo. 217, 184 Pac. 295.

<sup>3</sup>*United States. Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328.

**Massachusetts.** *Almy v. Almy*, — Mass. —, 126 N. E. 419.

**Michigan.** *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 17 L. R. A. 412, 53 N. W. 218.

**Texas.** *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710.

**West Virginia.** *Tierney v. United Pocahontas Coal Co.*, 85 W. Va. 545, 102 S. E. 249.

<sup>4</sup>*Missouri v. Illinois*, 180 U. S. 208, 45 L. ed. 497.

<sup>5</sup>*Inge v. Inge*, 120 Va. 329, 91 S. E. 142.

<sup>6</sup>*Davis v. Louisville Trust Co.*, 181 Fed. 10, 30 L. R. A. (N.S.) 1011; *Southern Colonization Company v. Delfer*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790; *Consolidated Juchem Ditch & Reservoir Co. v. Old*, 62 Colo. 470, 163 Pac. 78; *Edison Illuminating Co. v. Eastern Pennsylvania Power Co.*, 253 Pa. St. 457, 98 Atl. 652.

<sup>7</sup>*Louisiana Sulphur Mining Co. v. Brimstone Ry. & Canal Co.*, 143 La. 743, 79 So. 324; *Burekhalter v. Vann*, 59 Okla. 114, 157 Pac. 1148.

<sup>8</sup>*Greek Catholic Church v. Roizdestvensky*, 67 Colo. 217, 184 Pac. 295.

<sup>9</sup>*Greek Catholic Church v. Roizdestvensky*, 67 Colo. 217, 184 Pac. 295.

prevent relief from being given.<sup>1</sup> Accordingly, in property the value of which is fluctuating and speculative,<sup>2</sup> such as oil<sup>3</sup> or mining<sup>4</sup> properties, a delay may be unreasonable, though in case of property of more stable value it would not be unreasonable.

**§ 3547. Loss of evidence.** A delay for so long a time that it has become difficult to procure evidence,<sup>1</sup> as of oral offers dealing with technicalities of a manufacture,<sup>2</sup> may amount to laches. A delay in enforcing a contract until the adversary party is broken down mentally,<sup>3</sup> or is dead,<sup>4</sup> may be laches.

**§ 3548. Presumption of prejudice.** In some cases, however, relief is refused on the ground of laches, although prejudice to the adversary party does not appear, and is, at most, presumed.<sup>1</sup> A delay in bringing suit to set aside preferences to creditors,<sup>2</sup> or in compelling the resale of property, beginning at the point at which the officer wrongfully refused to accept the plaintiff's bid,<sup>3</sup>

<sup>1</sup> *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329 (delay of four years); *Patterson v. Hewitt*, 195 U. S. 309, 49 L. ed. 214; *Hendry v. Benlisa*, 37 Fla. 609, 34 L. R. A. 283, 20 So. 800; *Dunbar v. Green*, 66 Kan. 557, 72 Pac. 243; *Campbell v. Bartlett*, 122 Tenn. 208, 25 L. R. A. (N.S.) 639, 122 S. W. 250.

<sup>2</sup> *Hayward v. Bank*, 96 U. S. 611, 24 L. ed. 855; *Royal Bank v. Grand Junction Ry. & Depot Co.*, 125 Mass. 490; *Shelton v. Horrell*, 232 Mo. 358, 134 S. W. 988, 137 S. W. 264; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899, 46 L. R. A. 478, 66 N. W. 518.

<sup>3</sup> *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329.

<sup>4</sup> *Johnston v. Mining Co.*, 148 U. S. 360, 37 L. ed. 480; *Gildersleeve v. New Mexico Mining Co.*, 161 U. S. 573, 40 L. ed. 812; *Patterson v. Hewitt*, 195 U. S. 309, 49 L. ed. 214; *Compo v. Jackson Iron Co.*, 50 Mich. 578, 16 N. W. 295; *Barnard v. Roane Iron Co.*, 85 Tenn. 139, 2 S. W. 21.

<sup>1</sup> *United States. Willard v. Wood*, 164 U. S. 502, 41 L. ed. 531; *Whitney v. Fox*, 166 U. S. 637, 41 L. ed. 1145.

*California. Bell v. Hudson*, 73 Cal. 285, 2 Am. St. Rep. 791, 14 Pac. 791.

*Illinois. Thomas v. Van Meter*, 164 Ill. 304, 45 N. E. 405.

*Kentucky. Harrod v. Flountleroy*, 26 Ky. (3 J. J. Mar.) 548.

*Massachusetts. Doane v. Preston*, 183 Mass. 569, 67 N. E. 867.

*Oregon. Wilson v. Wilson*, 41 Or. 459, 69 Pac. 923.

*Tennessee. Bolton v. Dickens*, 72 Tenn. (4 Lea) 569.

*Wisconsin. Cross v. Bowker*, 102 Wis. 407, 78 N. W. 564.

<sup>2</sup> *Doane v. Preston*, 183 Mass. 569, 67 N. E. 867.

<sup>3</sup> *Whitney v. Fox*, 166 U. S. 637.

<sup>4</sup> *Yeamans v. James*, 29 Kan. 373; *Dismal Swamp Land Co. v. Macauley's Admr.*, 85 Va. 16, 6 S. E. 697.

<sup>1</sup> *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. ed. 548 (delay of five years); *Hardin v. Adair*, 140 Ga. 263, 47 L. R. A. (N.S.) 896, 78 S. E. 1073.

<sup>2</sup> *Hardt v. Heidweyer*, 152 U. S. 547, 38 L. ed. 548.

<sup>3</sup> *Hardin v. Adair*, 140 Ga. 263, 47 L. R. A. (N.S.) 896, 78 S. E. 1073 (delay of two years).

has been said to be laches. This result has been reached, in part, on the theory that the plaintiff was speculating on the outcome of events.<sup>4</sup>

**§ 3549. Explanation and excuse for delay.** Delay for a long period of time, if unexplained, may amount to laches *prima facie*.<sup>1</sup> If properly explained, however, delay even for a long period does not amount to laches.<sup>2</sup> The fact that the plaintiff has given notice promptly to the adversary party,<sup>3</sup> or the fact that third persons know of his claims,<sup>4</sup> prevents delay from amounting to laches, although this is probably on the theory that the defendant is not prejudiced by the delay because of his knowledge of such claim. The fact that pending litigation must be determined before the plaintiff can ascertain his rights, and can determine whether or not to seek equitable relief, is an explanation of delay.<sup>5</sup> A long delay in ascertaining mineral rights may be excused by reason of the fact that mineral lands in that locality were not developed during the greater period of such delay.<sup>6</sup> If the contract provides

<sup>4</sup> *Hardin v. Adair*, 140 Ga. 263, 47 L. R. A. (N.S.) 896, 78 S. E. 1073.

<sup>1</sup> *United States. Willard v. Wood*, 164 U. S. 502, 41 L. ed. 531.

*California. Chapman v. Bank of California*, 97 Cal. 155, 31 Pac. 896.

*Georgia. Slay v. George*, 145 Ga. 771, 80 S. E. 830.

*Massachusetts. Snow v. Boston Blank Book Mfg. Co.*, 153 Mass. 456, 26 N. E. 1116.

*North Carolina. Wainwright v. Massenbush*, 129 N. Car. 46, 39 S. E. 725 (delay for fifty years).

*North Dakota. Slimmer v. Martin*, — N. D. —, 172 N. W. 829.

<sup>2</sup> *United States. Kentucky Block Cannel Coal Co. v. Sewell*, 249 Fed. 840, 1 A. L. R. 556 (forty years).

*Arkansas. Paynter v. Littlefield*, 132 Ark. 300, 200 S. W. 995; *Edwards v. Locke*, 134 Ark. 80, 203 S. W. 286.

*Florida. Southern Colonization Company v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790 (three years).

*Georgia. Louisville & Nashville Ry. Co. v. Nelson*, 145 Ga. 594, 89 S. E. 693.

*Maryland. McGaw v. Hoen*, 133 Md. 672, 106 Atl. 13.

*Michigan. Nickerson v. Nickerson*, 209 Mich. 134, 176 N. W. 456.

*Nebraska. Chamberlain v. Frank*, 103 Neb. 442, 172 N. W. 354.

*South Carolina. Fanning v. Bogacki*, 111 S. Car. 376, 98 S. E. 137.

*Virginia. Nelson v. Carrington*, 18 Va. (4 Munf.) 332, 6 Am. Dec. 519.

<sup>3</sup> *Consolidated Juchem Ditch & Reservoir Co. v. Old*, 62 Colo. 470, 163 Pac. 78; *Southern Colonization Co. v. Derfler*, 73 Fla. 924, L. R. A. 1917F, 744, 75 So. 790; *Edison Illuminating Co. v. Eastern Pennsylvania Power Co.*, 253 Pa. St. 457, 98 Atl. 652.

<sup>4</sup> *Davis v. Louisville Trust Co.*, 181 Fed. 10, 30 L. R. A. (N.S.) 1011; *Thomas v. Haly Coal Co.*, 189 Ky. 698, 225 S. W. 1053.

<sup>5</sup> *McGaw v. Hoen*, 133 Md. 672, 106 Atl. 13.

<sup>6</sup> *Kentucky Block Cannel Coal Co. v. Sewell*, 249 Fed. 840, 1 A. L. R. 556 (delay of forty years).

for performance over a long period of time, a corresponding delay in enforcing such contract is excused.<sup>1</sup> Delay while attempting to induce the adversary party to perform does not amount to laches.<sup>2</sup>

**§ 3550. Excuses for delay—Disability.** As has already been said,<sup>1</sup> delay is an element of laches only when unexcused. The existence of facts which excuse delay prevent it, therefore, from amounting to laches. Among the facts which amount in equity to an excuse for delay are infancy of the injured party,<sup>2</sup> even if a guardian might have been appointed,<sup>3</sup> except where the cause of action accrued during the lifetime of his ancestor, who was competent to sue;<sup>4</sup> coverture,<sup>5</sup> except where the injury concerns her separate estate with which she is empowered to deal as a feme sole,<sup>6</sup> or imbecility or insanity,<sup>7</sup> even if the next friend who sues for the imbecile is himself guilty of laches.<sup>8</sup> The fact that the injured party is an Indian in tribal relations, has been held not to prevent the doctrine of laches from applying.<sup>9</sup>

<sup>1</sup> *Fanning v. Bogacki*, 111 S. Car. 376, 98 S. E. 137 (delay of nineteen years).

<sup>2</sup> *Edwards v. Locke*, 134 Ark. 80, 203 S. W. 286 (contract for support).

<sup>3</sup> See §§ 3539, 3543.

<sup>4</sup> *Illinois. Miles v. Wheeler*, 43 Ill. 123.

*Iowa. Wachsmut v. Miller*, — Ia. —, 168 N. W. 344.

*Kentucky. Whaley v. Eliot*, 8 Ky. (1 A. K Mar.) 343, 10 Am. Dec. 737; *Gaines v. Hill*, 147 Ky. 445, 39 L. R. A. (N.S.) 990, 144 S. W. 92.

*Missouri. Kroenung v. Goehri*, 112 Mo. 641, 20 S. W. 661.

*New Jersey. Marr v. Marr*, 73 N. J. Eq. 643, 133 Am. St. Rep. 742, 70 Atl. 375.

*Tennessee. Gaugh v. Henderson*, 39 Tenn. (2 Head.) 628.

*Wisconsin. Israel v. Silsbee*, 57 Wis. 222, 15 N. W. 144.

<sup>5</sup> *Wachsmut v. Miller*, — Ia. —, 168 N. W. 344.

<sup>6</sup> *Gibson v. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17, 17 S. W. 589; *Wil-*

*liams v. Presbyterian Society*, 1 O. S. 478.

<sup>7</sup> *Blandford v. Marlborough*, 2 Atk. 542; *Hudson v. Wright*, 204 Mo. 412, 103 S. W. 8; *Black v. Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423; *Baker v. Morris*, 37 Va. (10 Leigh) 284.

<sup>8</sup> *Phillips v. Coal Co.*, 53 W. Va. 543, 44 S. E. 774.

<sup>9</sup> *Alabama. Bradley v. Singleterry*, 178 Ala. 106, 59 So. 58.

*Illinois. Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383.

*New Jersey. Kidder v. Houston* (N. J. Eq.), 47 Atl. 336.

*Tennessee. Craig v. Leiper*, 8 Tenn. (2 Yerg.) 193, 24 Am. Dec. 479.

*Wisconsin. Heyl v. Goelz*, 97 Wis. 327, 72 N. W. 626.

<sup>8</sup> *Kidder v. Houston* (N. J. Eq.), 47 Atl. 336; *Heyl v. Goelz*, 97 Wis. 327, 72 N. W. 626.

<sup>6</sup> *Dunbar v. Green*, 66 Kan. 557, 72 Pac. 243; *Pope v. Falk*, 66 Kan. 793, 72 Pac. 246.

*Contra, Felix v. Patrick*, 145 U. S. 317, 36 L. ed. 719.

§ 3551. **Ignorance of rights.** Knowledge of one's rights or a reasonable opportunity of acquiring it, is an essential element of unexcusable delay.<sup>1</sup> The fact, therefore, that one is ignorant of his rights, his ignorance not being due to his own negligence,<sup>2</sup> as where his ignorance of his rights is due to the fraud of the adversary party,<sup>3</sup> or where his right of action grows out of the fraud of the adversary party and his delay is due to the fact that he has not discovered such fraud,<sup>4</sup> prevents delay from amounting to laches.

<sup>1</sup> **United States.** *Halstead v. Grinnan*, 152 U. S. 412, 38 L. ed. 495.

**California.** *Tarke v. Bingham*, 123 Cal. 163, 55 Pac. 759.

**Connecticut.** *State v. Northrop*, 93 Conn. 558, 7 A. L. R. 1014, 106 Atl. 504; *Millard v. Green*, 94 Conn. 597, 9 A. L. R. 1610, 110 Atl. 177.

**District of Columbia.** *Bradley v. Davidson*, 47 D. C. App. 266.

**Georgia.** *Anderson v. Crawford*, 147 Ga. 455, L. R. A. 1918B, 894, 94 S. E. 574.

**Illinois.** *Farwell v. Pyle-National Electric Headlight Co.*, 289 Ill. 157, 10 A. L. R. 363, 124 N. E. 440.

**Iowa.** *Dice v. Brown*, 98 Ia. 297, 67 N. W. 253; *Pels v. Stevens*, 187 Ia. 443, 173 N. W. 56.

**Minnesota.** *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688.

**Utah.** *Weyant v. Utah Savings & Trust Co.*, 54 Utah 181, 9 A. L. R. 1119, 182 Pac. 189.

**Washington.** *Crodle v. Dodge*, 99 Wash. 121, 168 Pac. 986.

**West Virginia.** *Citizens' National Bank v. Blizzard*, 80 W. Va. 511, L. R. A. 1918A, 129, 93 S. E. 338.

**Wisconsin.** *Ellis v. Southwestern Land Co.*, 102 Wis. 400, 78 N. W. 747.

<sup>2</sup> **District of Columbia.** *Bradley v. Davidson*, 47 D. C. App. 266.

**Illinois.** *Lurton v. Rodgers*, 139 Ill. 554, 32 Am. St. Rep. 214, 29 N. E. 866.

**Iowa.** *Pels v. Stevens*, 187 Ia. 443, 173 N. W. 56.

**Kentucky.** *Whaley v. Eliot*, 8 Ky. (1 A. K. Mar.) 343, 10 Am. Dec. 737.

**Utah.** *Weyant v. Utah Savings & Trust Co.*, 54 Utah 181, 9 A. L. R. 1119, 182 Pac. 189.

**Virginia.** *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869.

**Washington.** *Crodle v. Dodge*, 99 Wash. 121, 168 Pac. 986.

<sup>3</sup> **United States.** *Reavis v. Reavis*, 103 Fed. 813.

**Connecticut.** *State v. Northrop*, 93 Conn. 558, 7 A. L. R. 1014, 106 Atl. 504; *Millard v. Green*, 94 Conn. 597, 9 A. L. R. 1610, 110 Atl. 177.

**District of Columbia.** *Bradley v. Davidson*, 47 D. C. App. 266.

**Illinois.** *Farwell v. Pyle-National Electric Headlight Co.*, 289 Ill. 157, 10 A. L. R. 363, 124 N. E. 449.

**Iowa.** *Pels v. Stevens*, 187 Ia. 443, 173 N. W. 56.

**Oregon.** *Hall v. Catherine Creek Development Co.*, 78 Or. 585, L. R. A. 1916C, 906, 153 Pac. 97.

**Utah.** *Weyant v. Utah Savings & Trust Co.*, 54 Utah 181, 9 A. L. R. 1119, 182 Pac. 189.

**Washington.** *Crodle v. Dodge*, 99 Wash. 121, 168 Pac. 986.

**West Virginia.** *Citizens' National Bank v. Blizzard*, 80 W. Va. 511, L. R. A. 1918A, 129, 93 S. E. 338.

<sup>4</sup> **United States.** *Rosenthal v. Walker*, 111 U. S. 185, 28 L. ed. 395; *Horner v. Perry*, 112 Fed. 906.

**Connecticut.** *Wilson v. Nichols*, 72 Conn. 173, 43 Atl. 1052; *State v. North-*

According to the weight of authority, persons are not bound to assume that those who represent them in a trust capacity are guilty of bad faith.<sup>5</sup> Accordingly, by the weight of authority, stockholders in a corporation may assume the honesty of their directors; and their failure to use reasonable diligence to discover whether their directors are honest or not is not laches.<sup>6</sup> In other jurisdictions it is held that the stockholders are bound to use diligence and to discover the misconduct of their directors.<sup>7</sup> This theory has been adopted where rights of third persons had intervened,<sup>8</sup> and in this case it seems to be justifiable. Where the only question which arises is between the directors themselves and the stockholders, it would appear that the directors should not invoke, as a defense to the breach of trust, the very trust and conveyance which made such trust possible.

Delay in discovering the bad faith of an agent is not laches.<sup>9</sup> If an unauthorized attorney has attempted to represent a party in court proceedings, such party is not guilty of laches if he acts in a reasonable time after he has notice that judgment has been rendered against him.<sup>10</sup> Suspicion of the bad faith of an agent with-

rop, 93 Conn. 558, 7 A. L. R. 1014, 106 Atl. 504; *Millard v. Green*, 94 Conn. 597, 9 A. L. R. 1610, 110 Atl. 177.

**District of Columbia.** *Bradley v. Davidson*, 47 D. C. App. 266.

**Illinois.** *Wilson v. Augur*, 176 Ill. 561, 52 N. E. 289; *Farwell v. Pyle-National Electric Headlight Co.*, 289 Ill. 157, 10 A. L. R. 363, 124 N. E. 449.

**New York.** *Butler v. Prentiss*, 158 N. Y. 49, 52 N. E. 652.

**Oregon.** *Hall v. Catherine Creek Development Co.*, 78 Or. 585, L. R. A. 1916C, 996, 153 Pac. 97.

**Tennessee.** *Reeves v. Dougherty*, 13 Tenn. (7 Yerg.) 222, 27 Am. Dec. 496.

**Utah.** *Weyant v. Utah Savings & Trust Co.*, 54 Utah 181, 9 A. L. R. 1119, 182 Pac. 189.

**Virginia.** *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 930, 19 S. E. 168.

**Washington.** *Crodle v. Dodge*, 99 Wash. 121, 168 Pac. 986.

<sup>5</sup> **Arkansas.** *Hughes Mfg. & Lumber Co. v. Culver*, 126 Ark. 72, 189 S. W. 850.

**Colorado.** *Morgan v. King*, 27 Colo. 539, 63 Pac. 416.

**Georgia.** *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426.

**Illinois.** *Farwell v. Pyle-National Electric Headlight Co.*, 289 Ill. 157, 10 A. L. R. 363, 124 N. E. 449.

**Oregon.** *Hall v. Catherine Creek Development Co.*, 78 Or. 585, L. R. A. 1916C, 996, 153 Pac. 97.

<sup>6</sup> *Hughes Mfg. & Lumber Co. v. Culver*, 126 Ark. 72, 189 S. W. 850; *Morgan v. King*, 27 Colo. 539, 63 Pac. 416; *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426; *Farwell v. Pyle-National Electric Headlight Co.*, 289 Ill. 157, 10 A. L. R. 363, 124 N. E. 449.

<sup>7</sup> *Kessler v. Ensley Co.*, 141 Fed. 130 [affirmed, 148 Fed. 1019].

<sup>8</sup> *Snow v. Boston Blank Book Co.*, 158 Mass. 325, 33 N. E. 588.

<sup>9</sup> *Hall v. Catherine Creek Development Co.*, 78 Or. 585, L. R. A. 1916C, 996, 153 Pac. 97.

<sup>10</sup> *Anderson v. Crawford*, 147 Ga. 455, L. R. A. 1918B, 894, 94 S. E. 574.

out proof thereof, is not sufficient to cause delay to amount to laches.<sup>11</sup> The fact that the plaintiff is a non-resident, that he does not know of the development of mineral lands in that locality, where such fact is material, has been held to be an excuse for delay.<sup>12</sup>

**§ 3552. Delay caused by defendant.** Delay on the part of the plaintiff which has been intentionally caused by the defendant,<sup>1</sup> as where the defendant induces delay by recognizing plaintiff's rights,<sup>2</sup> or by inducing plaintiff to believe that defendant will voluntarily perform the contract which is afterwards the subject of litigation,<sup>3</sup> or where defendant requests plaintiff to delay,<sup>4</sup> such delay is not laches. A delay caused by the confidence of the plaintiff in the defendant,<sup>5</sup> or the relationship of the parties,<sup>6</sup> or the

<sup>11</sup> *Hall v. Catherine Creek Development Co.*, 78 Or. 585, L. R. A. 1916C, 996, 153 Pac. 97.

<sup>12</sup> *Kentucky Block Cannel Coal Co. v. Sewell*, 249 Fed. 840, 1 A. L. R. 556 (delay of forty years).

<sup>1</sup> *United States. Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383.

*Illinois. Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27.

*Maryland. McGaw v. Hoen*, 133 Md. 672, 106 Atl. 13.

*Missouri. Chance v. Jennings*, 159 Mo. 544, 61 S. W. 177.

*Nebraska. Richards v. Hatfield*, 40 Neb. 879, 59 N. W. 777.

*New York. Johnston v. Trask*, 116 N. Y. 136, 15 Am. St. Rep. 394, 5 L. R. A. 630, 22 N. E. 377.

*South Carolina. Hellams v. Prior*, 64 S. Car. 296, 543, 42 S. E. 106, 43 S. E. 25.

*West Virginia. Citizens' National Bank v. Blizzard*, 80 W. Va. 511, L. R. A. 1918A, 120, 93 S. E. 338.

*Wisconsin. Armstrong v. Morrow*, 166 Wis. 1, 163 N. W. 179.

<sup>2</sup> *United States. Silsby v. Young*, 1 U. S. (3 Cranch) 249, 2 L. ed. 429.

*California. Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077.

*Illinois. Madison v. Madison*, 206 Ill. 534, 69 N. E. 625.

*Indiana. Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334.

*Missouri. Chance v. Jennings*, 159 Mo. 544, 61 S. W. 177.

*Washington. Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147.

<sup>3</sup> *Chance v. Jennings*, 159 Mo. 544, 61 S. W. 177.

<sup>4</sup> *Hellams v. Prior*, 64 S. Car. 296, 543, 42 S. E. 106, 43 S. E. 25; *Craig v. Leiper*, 8 Tenn. (2 Yerg.) 193, 24 Am. Dec. 479.

<sup>5</sup> *United States. Townsend v. Vanderwerker*, 160 U. S. 171, 40 L. ed. 383.

*Connecticut. Millard v. Green*, 94 Conn. 597, 9 A. L. R. 1610, 110 Atl. 177.

*District of Columbia. Bradley v. Davidson*, 47 D. C. App. 266.

*Illinois. Farwell v. Pyle-National Electric Headlight Co.*, 289 Ill. 157, 10 A. L. R. 363, 124 N. E. 449.

*Washington. Crodle v. Dodge*, 99 Wash. 121, 168 Pac. 986.

<sup>6</sup> *Paschall v. Hinderer*, 28 O. S. 568; *Prewitt v. Bunch*, 101 Tenn. 723, 50 S. W. 748; *Fawcett v. Fawcett*, 85 Wis. 332, 30 Am. St. Rep. 844, 55 N. W. 405.

fact that the undue influence by which the transaction was induced, continues to persist,<sup>7</sup> may be prevented, by such excuse, from amounting to laches. Laches of the agent is laches of the principal if the latter is under no disability.<sup>8</sup> Accordingly, laches of an attorney in whose hands the claim in litigation was placed does not excuse the plaintiff.<sup>9</sup>

**§ 3553. Laches as affecting specific performance.** The duty of one seeking equitable relief to refrain from unreasonable delay is especially clear where specific performance is the relief sought.<sup>1</sup> If application to the court for relief is delayed until circumstances so change as to produce special hardship to the adversary party if such relief is granted, specific performance may be denied in cases where it would have been granted had the relief been invoked promptly.<sup>2</sup> In addition to the change of circumstances of the par-

<sup>7</sup> *Armstrong v. Morrow*, 166 Wis. 1, 163 N. W. 179.

<sup>8</sup> *Ives v. Sargent*, 119 U. S. 652, 30 L. ed. 544; *Wilson v. Smith*, 117 Fed. 707.

<sup>9</sup> *Ives v. Sargent*, 119 U. S. 652, 30 L. ed. 544; *Wilson v. Smith*, 117 Fed. 707.

<sup>1</sup> *England*. *Levy v. Stogdon* [1899], 1 Ch. 5, same case [1898], 1 Ch. 478.

*United States*. *Watts v. Waddle*, 31 U. S. (6 Pet.) 389, 8 L. ed. 437; *Davison v. Davis*, 125 U. S. 90, 31 L. ed. 635.

*California*. *Seculovich v. Morton*, 101 Cal. 673, 40 Am. St. Rep. 106, 36 Pac. 387.

*Connecticut*. *Hurd v. Hotchkiss*, 72 Conn. 472, 45 Atl. 11.

*Florida*. *Tate v. Pensacola, Gulf, Land & Development Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 So. 542.

*Indiana*. *Bennett v. Welch*, 25 Ind. 140, 87 Am. Dec. 354.

*Massachusetts*. *Fuller v. Hovey*, 84 Mass. (2 All.) 324, 79 Am. Dec. 782.

*Michigan*. *Schoenfeld v. Kemter*, 211 Mich. 464, 170 N. W. 243.

*Missouri*. *Hobbs v. Henley*, — Mo. —, 186 S. W. 981.

*New Jersey*. *Gardner Valve Mfg. Co.*

*v. Halyburton*, 87 N. J. Eq. 689, 102 Atl. 893.

*New Mexico*. *Raton Waterworks Co. v. Raton*, 22 N. M. 464, 164 Pac. 826.

*North Dakota*. *Slimmer v. Martin*, — N. D. —, 172 N. W. 829.

*Ohio*. *Campbell v. Hicks*, 19 O. S. 433.

*Pennsylvania*. *In re Kutz's Estate*, 259 Pa. St. 548, 103 Atl. 293.

*Tennessee*. *Bracken v. Martin*, 9 Tenn. (3 Yerg.) 55.

*Virginia*. *Hoster's Committee v. Zollman*, 122 Va. 41, 94 S. E. 164; *Adams v. Hazen*, 123 Va. 304, 96 S. E. 741.

*West Virginia*. *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433; *Wellman v. Virginian Railway Co.*, 85 W. Va. 169, 101 S. E. 252.

<sup>2</sup> *United States*. *Holt v. Rogers*, 33 U. S. (8 Pet.) 420, 8 L. ed. 995; *Holgate v. Eaton*, 116 U. S. 33, 116 L. ed. 538.

*California*. *Mathews v. Davis*, 102 Cal. 202, 36 Pac. 358.

*Kentucky*. *Smith v. Cansler*, 83 Ky. 367.

*Maine*. *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635.

ties, the chance of loss of evidence by reason of unreasonable delay may be a reason for refusing specific performance.<sup>3</sup> There is no arbitrary rule, however, requiring the court to refuse specific performance because of negligence or delay on the part of plaintiff.<sup>4</sup> Such facts merely require the court to consider them in determining whether it will exercise its judicial discretion in granting specific performance.<sup>5</sup> Since the refusal of one of the parties to perform the precedent or concurrent covenants on his part to be performed, operates as a discharge of the contract,<sup>6</sup> such refusal, together with unreasonable delay, justifies the court in refusing specific performance.<sup>7</sup> The duty of acting promptly is especially clear in contracts for the sale of property of fluctuating value, such as corporate stock.<sup>8</sup> A delay of five and a half years,<sup>9</sup> three years,<sup>10</sup> and six months,<sup>11</sup> have each been held under the peculiar circumstances of each case to be for periods so long as to prevent this relief. If realty contracted for undergoes considerable change in value, a delay in seeking relief may prevent the injured party from obtaining specific performance.<sup>12</sup>

**Michigan.** Schoenfeld v. Kemter, 211 Mich. 464, 179 N. W. 243.

**Minnesota.** Anderson v. Luther Mining Co., 70 Minn. 23, 72 N. W. 820.

**Pennsylvania.** In re Kutz's Estate, 259 Pa. St. 548, 103 Atl. 293.

**Tennessee.** Smith v. Christmas, 13 Tenn. (7 Yeig.) 565.

**Virginia.** Newberry v. French, 98 Va. 479, 36 S. E. 519; Adams v. Hazen, 123 Va. 304, 96 S. E. 741.

**West Virginia.** Lowther Oil Co. v. Miller-Sibley Oil Co., 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433; Wellman v. Virginian Railway Co., 85 W. Va. 169, 101 S. E. 252.

<sup>3</sup> Wellman v. Virginian Railway Co., 85 W. Va. 169, 101 S. E. 252.

<sup>4</sup> Woldenberg v. Riphan, 166 Wis. 433, 166 N. W. 21.

<sup>5</sup> Woldenberg v. Riphan, 166 Wis. 433, 166 N. W. 21.

<sup>6</sup> See §§ 2881 et seq.

<sup>7</sup> Cooper v. Cooper, 201 Ala. 477, 78 So. 383; Swaim v. Beakley, 133 Ark. 406, 202 S. W. 476; Quarton v. American Law Book Co., 143 Ia. 517, 32 L. R. A.

(N.S.) 1, 121 N. W. 1009; Enkema v. McIntyre, 136 Minn. 293, 2 A. L. R. 411, 161 N. W. 587.

<sup>8</sup> Davison v. Davis, 125 U. S. 90, 31 L. ed. 635; Wonson v. Fenno, 129 Mass. 405; Rogers v. Van Nortwick, 87 Wis. 414, 58 N. W. 757.

<sup>9</sup> Davison v. Davis, 125 U. S. 90, 31 L. ed. 635 (the stock having almost doubled in value).

<sup>10</sup> Schimpff v. Dime Deposit & Discount Bank, 208 Pa. St. 380, 57 Atl. 767 (the stock having in the meanwhile become four times as valuable); Rogers v. Van Nortwick, 87 Wis. 414, 58 N. W. 757.

<sup>11</sup> Wonson v. Fenno, 129 Mass. 410.

<sup>12</sup> New Jersey. Johns v. Norris, 22 N. J. Eq. 102.

**Pennsylvania.** Ruff's Appeal, 117 Pa. St. 310, 11 Atl. 553.

**Tennessee.** Campbell v. Bartlett, 122 Tenn. 208, 25 L. R. A. (N.S.) 639, 122 S. W. 250.

**Virginia.** Chilhowie Iron Co. v. Gardiner, 79 Va. 305.

A delay which does not result in prejudice to the adversary party, does not prevent specific performance,<sup>13</sup> especially if the adversary party knows that the plaintiff intends to assert his claim.<sup>14</sup> In the absence of special facts, delay for a period less than the period of limitations will not amount to laches.<sup>15</sup> Delay in enforcing a continuing contract, does not prevent specific performance if relief is sought within a reasonable time after breach.<sup>16</sup>

**§ 3554. Specific illustrations of delay as affecting specific performance.** A delay of ten years in seeking to enforce a contract for the sale of timber is denied, if, in the meantime, the vendor has conveyed his property and if the evidence of the transaction has been lost or impaired.<sup>1</sup> A delay of eight years,<sup>2</sup> six years,<sup>3</sup> five years,<sup>4</sup> three years,<sup>5</sup> two years,<sup>6</sup> have each been held to be such delay as prevents the injured party from obtaining specific performance. A delay in seeking specific performance until after tests on adjoining realty for disclosing the existence of oil thereon, has been held to justify the court in refusing specific performance.<sup>7</sup>

If the circumstances indicate a continued recognition of the existence of the contract, a much greater latitude of delay is permitted. A delay of fourteen years,<sup>8</sup> nineteen years,<sup>9</sup> twenty years,<sup>10</sup>

Wisconsin. *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532.

Wyoming. *Merrill v. Rocky Mountain Cattle Co.*, 26 Wyom. 219, 181 Pac. 964.

<sup>13</sup> *Arnett v. Westcott*, 107 Kan. 693, 193 Pac. 377; *Thomas v. Haly Coal Co.*, 189 Ky. 698, 225 S. W. 1053.

<sup>14</sup> *Edison Illuminating Co. v. Eastern Pennsylvania Power Co.*, 253 Pa. 457, 98 Atl. 652.

<sup>15</sup> *Roche v. Madar*, 104 Wash. 21, 175 Pac. 314.

<sup>16</sup> *Steinberger v. Young*, 175 Cal. 81, 165 Pac. 432; *Harvey v. Hayes*, 71 Fla. 346, 71 So. 282; *Crawford v. Wilson*, 139 Ga. 654, 44 L. R. A. (N.S.) 773, 78 S. E. 30; *Nickerson v. Nickerson*, 209 Mich. 134, 176 N. W. 466.

<sup>1</sup> *Wellman v. Virginian Railway Co.*, 85 W. Va. 169, 101 S. E. 252.

<sup>2</sup> *Hobbs v. Henley*, — Mo. —, 186 S.

W. 981 (from breach of contract to devise realty).

<sup>3</sup> *Gardner Valve Mfg. Co. v. Halyburton*, 87 N. J. Eq. 689, 102 Atl. 893 (contract to transfer patent for shares of stock); *Combs v. Scott*, 76 Wis. 662, 45 N. W. 532 (the land having increased in value greatly).

<sup>4</sup> *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305; *Slimmer v. Martin*, — N. D. —, 172 N. W. 829.

<sup>5</sup> *Justice v. Soderlund*, 225 Mass. 320, 114 N. E. 623.

<sup>6</sup> *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Merritt v. Brown*, 21 N. J. Eq. 401.

<sup>7</sup> *Merrill v. Rocky Mountain Cattle Co.*, 26 Wyom. 219, 181 Pac. 964.

<sup>8</sup> *Parish v. Parish*, 32 Beav. 207.

<sup>9</sup> *Fanning v. Bogacki*, 111 S. Car. 376, 98 S. E. 137.

<sup>10</sup> *Brown v. Newson*, 24 Ga. 466.

or thirty years,<sup>11</sup> has been held not to be so great as to prevent specific performance.

Greater latitude of delay is allowed where the party seeking relief is a vendee in possession of the realty contracted for, since there is no need that he should assert his rights until they are attacked.<sup>12</sup> Specific performance has been given in such cases after four years,<sup>13</sup> eleven years,<sup>14</sup> seventeen years,<sup>15</sup> twenty-five years,<sup>16</sup> forty-five years,<sup>17</sup> and forty-eight years.<sup>18</sup>

<sup>11</sup> *Crawford v. Wilson*, 139 Ga. 654, 44 L. R. A. (N.S.) 773, 78 S. E. 30; *Craig v. Laiper*, 10 Tenn. (2 Yerg.) 193, 24 Am. Déc. 479.

<sup>12</sup> *United States. Ruckman v. Cory*, 129 U. S. 387, 32 L. ed. 728.

*Arkansas. Hanson v. Brown*, 139 Ark. 60, 213 S. W. 12.

*California. Scadden Flat Gold Mining Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440.

*Florida. Tate v. Pensacola, Gulf, Land & Development Co.*, 37 Fla. 439, 53 Am. St. Rep. 251, 20 So. 542.

*Illinois. Sheldon v. Dunbar*, 200 Ill. 490, 65 N. E. 1095.

*Massachusetts. Low v. Low*, 173 Mass. 580, 54 N. E. 257.

*Michigan. Rodgers v. Beckel*, 172 Mich. 544, 138 N. W. 202.

*Minnesota. Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Chisholm*, 55 Minn. 374, 57 N. W. 63.

*New Jersey. D'Elizza v. D'Amato*, 85 N. J. Eq. 466, 97 Atl. 41.

*Pennsylvania. Master v. Roberts*, 244 Pa. St. 342, 90 Atl. 735.

*Virginia. Williams v. Lewis*, 32 Va. (5 Leigh) 686.

*West Virginia. Mills v. McLanahan*, 70 W. Va. 288, 73 S. E. 927.

<sup>13</sup> *Master v. Roberts*, 244 Pa. St. 342, 90 Atl. 735.

<sup>14</sup> *Sheldon v. Dunbar*, 200 Ill. 490, 65 N. E. 1095.

<sup>15</sup> *Ruckman v. Cory*, 129 U. S. 387, 32 L. ed. 728; *Hanson v. Brown*, 139 Ark. 60, 213 S. W. 12.

<sup>16</sup> *Rodgers v. Beckel*, 172 Mich. 544, 138 N. W. 202.

<sup>17</sup> *Mills v. McLanahan*, 70 W. Va. 288, 73 S. E. 927 (exact length of time not shown).

<sup>18</sup> *Williams v. Lewis*, 32 Va. (5 Leigh) 686.

## CHAPTER XCIII

### NON-CLAIM

- § 3555. Statutes of non-claim—General scope.
- § 3556. Exceptions to statute of non-claim must be statutory.
- § 3557. When statute begins to run.
- § 3558. To what claims statute applies—General principles.
- § 3559. Actions pending at death of debtor.
- § 3560. Title and lien.
- § 3561. Future and contingent claims.

**§ 3555. Statutes of non-claim—General scope.** A group of statutes analogous in some respects to statutes of limitation may be briefly noted. These are the statutes which provide that in administering the estates of decedents, insolvents, and the like, claims against such estates must be presented within a certain time or be barred. In the absence of statute, failure to file a claim against an estate may give rise to an inference that no claims exist,<sup>1</sup> but such delay does not bar claims which are shown to exist.<sup>2</sup>

In most jurisdictions, however, it is expressly provided by statute that certain classes of claims against the estate of a decedent must be presented within a certain period of time, and that in default of such presentation they will be barred forever.<sup>3</sup> Stat-

<sup>1</sup> *Ogooshevitz v. Arnold*, 197 Mich. 203, 163 N. W. 946.

<sup>2</sup> *Ogooshevitz v. Arnold*, 197 Mich. 203, 163 N. W. 946.

<sup>3</sup> **Alabama.** *Traweek v. Hagler*, 199 Ala. 664, 75 So. 152; *Reed v. Bloodworth*, 200 Ala. 444, 76 So. 376; *Burgess v. Burgess*, 201 Ala. 631, 79 So. 193; *Chamblee v. Proctor*, 203 Ala. 61, 82 So. 21; *Smith v. Nixon*, — Ala. —, 87 So. 326.

**Arizona.** *In re Baxter's Estate*, — Ariz. —, 194 Pac. 333.

**Arkansas.** *Georgia State Savings Ass'n. v. Dearing*, 128 Ark. 149, 193 S.

W. 512; *Abbott v. Johnston*, 130 Ark. 1, 195 S. W. 676; *Davis v. Cramer*, 133 Ark. 224, 202 S. W. 239; *Pool v. Gordon*, — Ark. —, 221 S. W. 453; *Superior Oil & Gas Co. v. Sudbury*, — Ark. —, 225 S. W. 609.

**California.** *Estate of Hinceon*, 159 Cal. 755, 36 L. R. A. (N.S.) 303, 116 Pac. 47; *Geary St., P. & O. Ry. Co. v. Bradbury Estate Co.*, 179 Cal. 46, 175 Pac. 457.

**Idaho.** *Lundy v. Lemp*, 32 Ida. 162, 179 Pac. 738.

**Illinois.** *Gross v. Thornson*, 286 Ill. 185, 121 N. E. 600.

utes of this sort are said to be penal;<sup>4</sup> and, accordingly, they are construed strictly, so as to avoid forfeitures.<sup>5</sup> The provisions of such statute can not be modified by an agreement made between the creditor and the debtor, in his lifetime.<sup>6</sup> In the absence of statute, the creditor is not excused for delay in presenting his claim by reason of the fact that he did not know of the death of the debtor.<sup>7</sup> A modification of the statute shortening the time for presenting claims, is not retroactive unless the statute specifically

**Iowa.** *Jacob's Estate*, 119 Ia. 176, 93 N. W. 94.

**Kansas.** *McDaniel v. Putnam*, 100 Kan. 550, L. R. A. 1917E, 1100, 164 Pac. 1167.

**Massachusetts.** *Leach v. Leach*, — Mass. —, 130 N. E. 262.

**Michigan.** *First National Bank v. Sherman*, 117 Mich. 602, 76 N. W. 97.

**Minnesota.** *Clark v. Gates*, 84 Minn. 381, 87 N. W. 941; *Jorgenson v. Larson*, 85 Minn. 134, 88 N. W. 439; *State v. Probate Court*, 142 Minn. 499, 172 N. W. 210; *State v. Probate Court*, 145 Minn. 344, 177 N. W. 354.

**Mississippi.** *Ridgeway v. Jones*, — Miss. —, 87 So. 461.

**Missouri.** *Beekman v. Richardson*, 150 Mo. 430, 51 S. W. 689; *Home Insurance Co. v. Wickham*, — Mo. —, 219 S. W. 961.

**Nebraska.** *Fitzgerald v. First National Bank*, 64 Neb. 260, 89 N. W. 813.

**New Jersey.** *Ray Estate Corporation v. Steelman*, 90 N. J. L. 184, 100 Atl. 209.

**Oklahoma.** *Anderson v. Anderson*, — Okla. —, 165 Pac. 145; *In re Jameson's Estate*, — Okla. —, 182 Pac. 518; *O'Neill v. Lauderdale*, 80 Okla. 170, 195 Pac. 121.

**Pennsylvania.** *In re Gardner's Estate*, 228 Pa. St. 282, 29 L. R. A. (N.S.) 685, 77 Atl. 509.

**South Dakota.** *Thurber v. Miller*, 11 S. D. 124, 75 N. W. 900; *Printz-Biederman Co. v. Torgeson*, 41 S. D. 48, 169 N. W. 796.

**Utah.** *Fullerton v. Bailey*, 17 Utah 85, 53 Pac. 1020.

**Washington.** *First Security & Loan Co. v. Englehart*, 107 Wash. 86, 181 Pac. 13; *In re Thompson's Estate*, 110 Wash. 635, 188 Pac. 784; *Baumgartner v. Moffat*, — Wash. —, 194 Pac. 392.

**Wisconsin.** *Fields v. Mundy's Estate*, 106 Wis. 383, 80 Am. St. Rep. 39, 82 N. W. 343; *Butler v. Templeton*, 115 Wis. 382, 91 N. W. 969; *In re Hanlin*, 133 Wis. 140, 17 L. R. A. (N.S.) 1189, 113 N. W. 411; *In re Leu's Estate*, — Wis. —, 179 N. W. 796; *Merton v. Puffer*, 157 Wis. 576, L. R. A. 1917A, 443, 147 N. W. 993.

Under some statutes, claims must be presented within the time fixed by the notice. *Lundy v. Lemp*, 32 Ida. 162, 179 Pac. 738; *Union Savings Assn. v. Somers*, 40 S. D. 177, 166 N. W. 638; *Printz-Biederman Co. v. Torgeson*, 41 S. D. 48, 168 N. W. 796; *Merton v. Puffer*, 157 Wis. 576, L. R. A. 1917A, 443, 147 N. W. 993.

Notice must be upon order of the court. *Union Savings Assn. v. Somers*, 40 S. D. 177, 166 N. W. 638.

<sup>4</sup> *In re Jameson's Estate*, — Okla. —, 182 Pac. 518.

<sup>5</sup> *In re Jameson's Estate*, — Okla. —, 182 Pac. 518.

<sup>6</sup> *McDaniel v. Putnam*, 100 Kan. 550, L. R. A. 1917E, 1100, 164 Pac. 1167.

<sup>7</sup> *In re Gardner*, 228 Pa. St. 282, 29 L. R. A. (N.S.) 685, 77 Atl. 509.

so provides.<sup>8</sup> The repeal of the statute of non-claim before the time limited therein has expired leaves the claim subject to the ordinary Statute of Limitations.<sup>9</sup>

Under such statutes a creditor who has neglected to present his claim in time can not evade the bar of the statute by suing in another court than that administering the trust.<sup>10</sup> While a creditor who is a non-resident can not be prevented from suing in the federal courts, he can not, by suing in such courts, evade the bar of the statute.<sup>11</sup> The courts may, in its discretion, extend the time for presenting claims.<sup>12</sup>

Under some statutes, new assets received after the time limited may be subjected to claims which are barred as to the rest of the estate.<sup>13</sup> In some jurisdictions such statutes do not apply to estates administered as solvent estates when no time is fixed within which such claims must be presented.<sup>14</sup> In order to stop the operation of the statute the claim must be presented by the creditor or by his duly authorized agent.<sup>15</sup>

### § 3556. Exceptions to statute of non-claim must be statutory.

Unless a special exception is made by the terms of the statute, no exception thereto exists in favor of persons under disabilities.<sup>1</sup> Without specific statutory exception such a statute applies to non-resident creditors.<sup>2</sup> Allowance of a claim in another state does not excuse delay in presentation.<sup>3</sup> A creditor who has brought an action upon a claim and has voluntarily dismissed it, can not have any greater time than that allowed by statute.<sup>4</sup>

<sup>8</sup> *Morrissett v. Carr*, 127 Ala. 277, 27 So. 844.

<sup>9</sup> *Judgment. Ryans v. Boogher*, 169 Mo. 673, 69 S. W. 1048.

<sup>10</sup> *Security Trust Co. v. Black River Nat'l. Bank*, 187 U. S. 211, 47 L. ed. 147.

<sup>11</sup> *Security Trust Co. v. Black River National Bank*, 187 U. S. 211, 47 L. ed. 147.

<sup>12</sup> *State v. Probate Court*, 142 Minn. 499, 172 N. W. 210.

<sup>13</sup> *Waughop v. Bartlett*, 165 Ill. 124, 46 N. E. 197; *Copeland v. Fifield*, 180 Mass. 223, 62 N. E. 249.

<sup>14</sup> *Appeal of Mason*, 75 Conn. 406, 53 Atl. 895.

<sup>15</sup> *Rayburn v. Rayburn*, 130 Ala. 217, 30 So. 365.

<sup>1</sup> *United States. Morgan v. Hamlet*, 113 U. S. 449, 28 L. ed. 1043.

*Alabama. Reed v. Bloodworth*, 200 Ala. 444, 76 So. 376.

*Kansas. McDaniel v. Putnam*, 100 Kan. 550, 164 Pac. 1167.

*Massachusetts. Hall v. Bumstead*, 37 Mass. (20 Pick.) 2.

*Tennessee. Williams v. Conrad*, 30 Tenn. (11 Humph.) 412.

<sup>2</sup> *Security Trust Co. v. Black River National Bank*, 187 U. S. 211, 47 L. ed. 147; *Winter v. Winter*, 101 Wis. 494, 77 N. W. 883.

<sup>3</sup> *Reed v. Bloodworth*, 200 Ala. 444, 76 So. 376; *Fields v. Estate of Mundy*, 106 Wis. 383, 82 N. W. 343.

<sup>4</sup> *Home Insurance Co. v. Wickham*, — Mo. —, 219 S. W. 961.

In the absence of statutory provision therefor facts arising subsequently to the time that the statute begins to run do not prevent it from continuing to run. Thus if a means is provided for presenting the claim to the probate court, or otherwise complying with the statute, the death<sup>5</sup> or absence<sup>6</sup> of the executor, or the revocation of letters of administration when a will is subsequently discovered,<sup>7</sup> none of them start the statute of non-claim to running anew.

The administrator can not waive the operation of this statute.<sup>8</sup>

A fraudulent representation by the administrator which induces the creditor to delay presenting his claim, does not extend the statutory period.<sup>9</sup> The promise of an administrator to pay the debt does not excuse a failure to present it as required by the statute.<sup>10</sup> After the time fixed by statute has elapsed, the executor can not waive the omission to present the claim for payment, and pay the debt.<sup>11</sup> Knowledge of the existence of the claim which the personal representative may have does not dispense with presenting it.<sup>12</sup>

It is said that an administrator need not present his personal claim to himself in his official capacity.<sup>13</sup> If the statute is intended to protect all interests in the estate, and not merely that of the executor, he must present his own claim or be barred.<sup>14</sup> In some jurisdictions, property which is devoted by the will to the payment of debts may be applied to debts which have not been properly presented.<sup>15</sup> An oral agreement between the debtor and the credi-

<sup>5</sup> *Lowe v. Jones*, 15 Ala. 545.

<sup>6</sup> *Douglass v. Folsom*, 21 Nev. 441, 33 Pac. 660.

<sup>7</sup> *Shepard v. Rhodes*, 60 Ill. 301.

However, by statute granting new letters of administration may start the statute of non-claim to running anew. *Eddy v. Adams*, 145 Mass. 489, 14 N. E. 509.

<sup>8</sup> *Cockrell v. Seasongood*, — Miss. —, 33 So. 77; *Abbott v. Johnston*, 130 Ark. 1, 195 S. W. 676; *Baumgartner v. Moffat*, — Wash. —, 194 Pac. 392; *State v. Probate Court*, 145 Minn. 344, 11 A. L. R. 242, 177 N. W. 354.

<sup>9</sup> *State v. Probate Court*, 145 Minn. 344, 11 A. L. R. 242, 177 N. W. 354.

<sup>10</sup> *Lewis v. Champion*, 40 N. J. Eq. 59.

<sup>11</sup> *Gilman v. Maxwell*, 79 Minn. 377,

82 N. W. 669; *In re Thompson's Estate*, 110 Wash. 635, 188 Pac. 784.

<sup>12</sup> *Borum v. Bell*, 132 Ala. 85, 31 So. 454; *Brannan v. Sherry*, 195 Ala. 272, 71 So. 106; *Morse v. Pacific Ry.*, 191 Ill. 356, 61 N. E. 104 [affirming, 93 Ill. App. 31].

*Contra*, *In re Hoover's Estate*, 104 Kan. 635, 180 Pac. 275.

<sup>13</sup> *In re Hoover's Estate*, 104 Kan. 635, 180 Pac. 275.

<sup>14</sup> *Hildebrandt's Estate*, 92 Cal. 433, 28 Pac. 486; *Newell v. West*, 149 Mass. 520, 51 N. E. 954; *In re Hayes*, 90 Vt. 286, 98 Atl. 45; *In re Parkes*, 105 Wash. 586, 178 Pac. 830; *Bailey v. Hampton Grocery Co.*, — Ky. —, 224 S. W. 1067.

<sup>15</sup> *Rainey v. Rainey*, 124 Miss. 780, 87 So. 128.

tor can not extend the statutory period after the death of the debtor.<sup>16</sup> The fact that the devisee has assumed a claim for work on a building which is devised to him, does not prevent the operation of the statute, in favor of the estate.<sup>17</sup>

In Iowa, by statute, the existence of peculiar circumstances excuses presentation of claims.<sup>18</sup> False statements by the executor as to the solvency of the estate and the fact that it is still unsettled may in equity excuse a failure to file the claim in time.<sup>19</sup> False statements by the cashier of a bank with which holder of a note had deposited it that he had filed the claim, may excuse such failure.<sup>20</sup> The fact that the claimant has contended that she was the common-law wife of the decedent, excuses delay in presenting a claim for services, until within a reasonable time after an unfavorable adjudication of her claim as wife.<sup>21</sup>

**§ 3557. When statute begins to run.** Under such statutes time does not, by the terms thereof, begin to run until an executor is appointed,<sup>1</sup> or administration is granted,<sup>2</sup> or as most statutes provide, until notice of his appointment is given,<sup>3</sup> or until notice to present claims is published.<sup>4</sup> The fact that the creditor does not know of the death of the debtor, does not prevent the statute from running.<sup>5</sup>

<sup>16</sup> *McDaniel v. Putnam*, 100 Kan. 550, L. R. A. 1917E, 1100, 164 Pac. 1167.

<sup>17</sup> *In re Hincheon*, 159 Cal. 755, 36 L. R. A. (N.S.) 303, 116 Pac. 47.

<sup>18</sup> *Senat v. Findley*, 51 Ia. 20, 50 N. W. 575; *Lamm v. Sooy*, 79 Ia. 593, 44 N. W. 893; *Security Fire Insurance Co. v. Hansen*, 104 Ia. 264, 73 N. W. 596; *Easton v. Somerville*, 111 Ia. 164, 82 Am. St. Rep. 502, 82 N. W. 475; *Henry v. Day*, 114 Ia. 454, 87 N. W. 416; *Asher v. Pegg*, 146 Ia. 541, 30 L. R. A. (N.S.) 890, 123 N. W. 739.

<sup>19</sup> *Henry v. Day*, 114 Ia. 454, 87 N. W. 416.

<sup>20</sup> *Manatt v. Reynolds*, 114 Ia. 688, 87 N. W. 683.

<sup>21</sup> *Asher v. Pegg*, 146 Ia. 541, 30 L. R. A. (N.S.) 890, 123 N. W. 739.

<sup>1</sup> *Georgia State Savings Ass'n. v. Dearing*, 128 Ark. 149, 193 S. W. 512; *Davis v. Cramer*, 133 Ark. 224, 202 S.

W. 239; *Baker v. Halleck*, 128 Mich. 180 [sub nomine, *Baker v. Stapleton*, 87 N. W. 100].

<sup>2</sup> *Gross v. Thomson*, 296 Ill. 185, 121 N. E. 600.

<sup>3</sup> *Iowa. Easton v. Somerville*, 111 Ia. 164, 82 N. W. 475.

*Massachusetts. Moyer v. Bray*, 227 Mass. 303, 116 N. E. 511.

*Nevada. Pacific States Savings, Loan & Building Co. v. Fox*, 25 Nev. 229, 59 Pac. 4.

*North Carolina. Vallentine v. Britton*, 127 N. Car. 57, 37 S. E. 74.

*Wisconsin. Gardner v. Callaghan*, 61 Wis. 91, 20 N. W. 685.

<sup>4</sup> *Boutwell v. Farmers' & Traders' Bank*, 118 Miss. 50, 79 So. 1; *In re Stroup's Estate*, 40 S. D. 37, 166 N. W. 155.

<sup>5</sup> *In re Gardner's Estate*, 228 Pa. St. 282, 29 L. R. A. (N.S.) 685, 77 Atl. 509.

**§ 3558. To what claims statute applies—General principles.**

The question of what claims must be presented to the executor within the time limited, depends on the wording of the statute by which presentation is required. Frequently these statutes are so worded as not to include claims against the estate which have come into existence after the death of the decedent,<sup>1</sup> such as claims for funeral expenses,<sup>2</sup> and expenses of a pending administration.<sup>3</sup> The statute is generally broad enough to include at least such claims as are liquidated, or can be liquidated readily,<sup>4</sup> including liabilities arising out of breach of trust.<sup>5</sup> In some jurisdictions, the statute is so worded as to include only liquidated claims which arise *ex contractu*,<sup>6</sup> while in other jurisdictions it is broad enough to include all claims for money, even if they arise *ex delicto*.<sup>7</sup>

If a claim has been filed in time, and subsequently judgment has been obtained on such obligation, it is not necessary to file such judgment as a claim.<sup>8</sup>

Whether omission to present a claim against the estate of the principal debtor discharges a surety is a question on which there is a conflict of authority. In some states it is held that the surety is discharged in such cases;<sup>9</sup> while other states proceed on the theory that the right of the surety against his principal does not

<sup>1</sup> *Holland v. Doke*, 134 Ark. 372, 205 S. W. 648; *Gaulden v. Ramsey*, — Miss. —, 85 So. 109; *Ray Estate Corporation v. Steelman*, 90 N. J. L. 184, 100 Atl. 209; *Manning v. Leighton*, 65 Vt. 84, 24 L. R. A. 684, 26 Atl. 258.

<sup>2</sup> *Gaulden v. Ramsey*, 123 Miss. 1, 85 So. 109.

<sup>3</sup> *Holland v. Doke*, 134 Ark. 372, 205 S. W. 648.

<sup>4</sup> *Arkansas*. *Pool v. Gordon*, 144 Ark. 105, 221 S. W. 453.

*California*. *In re Hinchon*, 159 Cal. 755, 36 L. R. A. (N.S.) 303, 116 Pac. 47.

*Connecticut*. *State v. Northrop*, 93 Conn. 558, 7 A. L. R. 1014, 106 Atl. 504.

*New Jersey*. *Ray Estate Corp. v. Steelman*, 90 N. J. L. 184, 100 Atl. 209.

*Oklahoma*. *Anderson v. Anderson*, — Okla. —, 165 Pac. 145.

*Pennsylvania*. *In re Loughran's Estate*, 257 Pa. St. 534, 101 Atl. 817.

*Wisconsin*. *In re Estate of Ryan*, 157 Wis. 576, L. R. A. 1917A, 443, 147 N. W. 993.

<sup>5</sup> *State v. Northrop*, 93 Conn. 558, 7 A. L. R. 1014, 106 Atl. 504; *Anderson v. Anderson*, — Okla. —, 165 Pac. 145; *In re Loughran's Estate*, 257 Pa. St. 534, 101 Atl. 817.

<sup>6</sup> *Boyd v. Applewhite*, 121 Miss. 879, 84 So. 16.

It does not apply to damages for the detention of land. *Van Wagoner v. Whitmore*, — Utah —, 199 Pac. 670.

<sup>7</sup> *Hackensack Trust Co. v. Van Den Berg*, 92 N. J. L. 412, 105 Atl. 719.

<sup>8</sup> *In re Gillen's Estate*, 169 Wis. 58, 171 N. W. 758.

<sup>9</sup> *Waughop v. Bartlett*, 165 Ill. 124, 46 N. E. 197 [affirming, 61 Ill. App. 252]; *Siebert v. Quesnel*, 65 Minn. 107, 60 Am. St. Rep. 441, 67 N. W. 803.

come into existence until the surety is obliged to pay what the principal should have paid, and that the surety is therefore not prejudiced by such delay. Accordingly they hold that such failure to present does not discharge the surety.<sup>10</sup>

If an attorney has agreed with the decedent to collect a claim for a contingent fee, he need not present his claim for such fee to the decedent's estate.<sup>11</sup>

**§ 3559. Actions pending at death of debtor.** Under some statutes, the rule which requires presentation of claims applies only to claims upon which an action has not been brought during the life of the debtor.<sup>1</sup> If a pending action is revived, and the administrator is made a party thereto, further presentation is not necessary.<sup>2</sup> This includes cases in which the action is pending on error and the judgment is affirmed;<sup>3</sup> and in which the judgment is reversed and a new trial ordered;<sup>4</sup> and in which a judgment against the decedent had been set aside erroneously and was subsequently reinstated.<sup>5</sup> Such statute does not run against a claim on which a proceeding in appeal operating as a supersedeas was pending.<sup>6</sup>

**§ 3560. Title and lien.** Such statutes do not apply to claims to the title of specific property.<sup>1</sup> Failure to present a claim which is secured by mortgage or other lien,<sup>2</sup> or which is secured by other collateral security,<sup>3</sup> as by partnership property in the hands of

<sup>10</sup> Willis v. Chowning, 90 Tex. 617, 59 Am. St. Rep. 842, 40 S. W. 395.

<sup>11</sup> Hornish v. McConnell, — Ia. —, 182 N. W. 406.

<sup>1</sup> Dillard & Coffin Co. v. Woollard, 124 Miss. 677, 87 So. 148; The Home v. Selling, 91 Or. 428, 179 Pac. 261.

<sup>2</sup> Coleman v. Bowles, — Okla. —, 181 Pac. 304; Wynne v. Harvey, 109 Wash. 1, 186 Pac. 310; Mitchell Street State Bank v. Froedtert, 169 Wis. 120, 170 N. W. 822.

<sup>3</sup> Wynne v. Harvey, 109 Wash. 1, 186 Pac. 310.

<sup>4</sup> Megrath v. Gilmore, 15 Wash. 558, 46 Pac. 1032.

<sup>5</sup> Christerson v. French, 180 Cal. 523, 182 Pac. 27.

<sup>6</sup> Ryans v. Boogher, 169 Mo. 673, 69 S. W. 1048.

<sup>1</sup> Haven v. Haven, 181 Mass. 573, 64 N. E. 410; Rice v. Connelly, 71 N. H. 382, 52 Atl. 446.

<sup>2</sup> Traweck v. Hagler, — Ala. —, 75 So. 152; Chamblee v. Proctor, — Ala. —, 82 So. 21; In re Huntoon's Estate, 174 Cal. 282, 163 Pac. 52; Smith v. Kibbe, 104 Kan. 159, 5 A. L. R. 483, 178 Pac. 427; Linn County Bank v. Grisham, 105 Kan. 460, 185 Pac. 54.

See also, Commonwealth v. Beachly, 262 Pa. St. 545, 105 Atl. 820.

<sup>3</sup> Citizens' Bank v. Moore, 134 Ark. 554, 204 S. W. 619; Sharp v. Sharp, 54 Utah 262, 180 Pac. 580.

surviving partners who have paid partnership debts,<sup>4</sup> does not discharge such liens or other security, although it may discharge such claim as against the estate.<sup>5</sup>

**§ 3561. Future and contingent claims.** Some statutes apply to claims whether due or not,<sup>1</sup> at least as long as their present value can be determined.<sup>2</sup> Many of these statutes do not, by their terms, apply to claims which are contingent and unliquidated at the death of the debtor,<sup>3</sup> as a stockholder's liability on which no assessment has been made,<sup>4</sup> or which have not then accrued, as a stock subscription payable on call, before the call has been made.<sup>5</sup> But if a suit to enforce a stock liability is pending when the stockholder dies, delay in presenting such claim will bar it by the statute of non-claim.<sup>6</sup> By statute in some states, however, contingent claims, such as claims for a stock liability, must be presented.<sup>7</sup> The liability for rent due upon land which is held wrongfully is said to be a contingent claim which must be presented within the required period after adjudication of title.<sup>8</sup> Liability upon a covenant against incumbrances arise, for the purpose of this statute, when the grantee has suffered actual damage thereby;

<sup>4</sup> Sharp v. Sharp, 54 Utah 262, 180 Pac. 580.

<sup>5</sup> Traweek v. Hagler, — Ala. —, 75 So. 152; Chamblee v. Proctor, 203 Ala. 61, 82 So. 21; Citizens' Bank v. Moore, 134 Ark. 554, 204 S. W. 619; In re Huntoon's Estate, 174 Cal. 282, 163 Pac. 52; Linn County Bank v. Grisham, 105 Kan. 460, 185 Pac. 54.

<sup>1</sup> Gross v. Thomson, 286 Ill. 185, 121 N. E. 600; In re Kleinschmidt's Estate, 167 Wis. 450, 167 N. W. 827.

<sup>2</sup> In re Kleinschmidt's Estate, 167 Wis. 450, 167 N. W. 827.

<sup>3</sup> Alabama. Farris v. Stoutz, 78 Ala. 130.

California. Gleason v. White, 34 Cal. 258.

Connecticut. State v. Northrop, 93 Conn. 558, 7 A. L. R. 1014, 106 Atl. 504.

Illinois. Mackin v. Haven, 187 Ill. 480, 58 N. E. 448.

Minnesota. Berryhill v. Peabody, 72 Minn. 232, 75 N. W. 220.

Nevada. Pruett v. Caddigan, 42 Nev. 329, 176 Pac. 787.

Oklahoma. O'Neill v. Lauderdale, 80 Okla. 170, 195 Pac. 121.

Wisconsin. South Milwaukee Co. v. Murphy, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

<sup>4</sup> Douglass v. Loftus, 85 Kan. 720, L. R. A. 1915B, 797, 119 Pac. 74; In re Roberts' Estate, 41 S. D. 331, 170 N. W. 580; Macdonald's Estate, 29 Wash. 422, 69 Pac. 1111.

<sup>5</sup> Fitzgerald's Estate v. Union Savings Bank, 65 Neb. 97, 90 N. W. 994; South Milwaukee Co. v. Murphy, 112 Wis. 614, 58 L. R. A. 82, 88 N. W. 583.

<sup>6</sup> Morse v. Pacific Ry., 191 Ill. 356, 61 N. E. 104 [affirming, 93 Ill. App. 31].

<sup>7</sup> Geary Street Park & Ocean Ry. v. Bradbury Estate Co., 179 Cal. 46, 175 Pac. 457; Barto v. Stewart, 21 Wash. 605, 59 Pac. 480.

<sup>8</sup> O'Neill v. Lauderdale, 80 Okla. 170, 195 Pac. 121.

although a right of action for nominal damages arose when the deed was executed.<sup>9</sup> A covenant to pay a certain sum of money without interest, on the death of a third person, is not a contingent or unliquidated claim.<sup>10</sup>

<sup>9</sup>In re Hanlin, 133 Wis. 140, 17 L. R. A. (N.S.) 1189, 113 N. W. 411.

<sup>10</sup>In re Kleinschmidt's Estate, 167 Wis. 450, 167 N. W. 827.

## **PART IX**

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### **LAW CONTROLLING CONTRACT**



## CHAPTER XCIV

### THE LAW CONTROLLING THE CONTRACT

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## I

## CONFLICT BETWEEN DIFFERENT TERRITORIAL JURISDICTIONS

## A. GENERAL PRINCIPLES

**§ 3562. General nature of problem.** In discussing contracts up to this point, it has been assumed that the contract was governed by one system of law, and by one only; and the problem of the law which controls the contract has been ignored as though it were immaterial. This problem may, however, become very material.<sup>1</sup> It is perfectly possible, especially in a country like ours, whose business interests are not in the least bounded by the state lines that confine the jurisdictions of the courts, that parties domiciled in two different states may make a contract in a third, concerning property situated in a fourth which contract is to be performed in a fifth and on which an action is brought in a sixth. While it is comparatively rare that so many systems of law compete for the honor of controlling a contract, we must observe that the systems of law which must be regarded as having at least a claim for consideration are (1) the law of the state of which either of the parties is a subject or where either of the parties is domiciled; (2) the law of the place where the property contracted for is situated, either real or personal; (3) the law of the place where the contract is made or where it takes effect; (4) the law of the place where the contract is to be performed; and (5) the law of the place where the action is brought. With business transactions running over as wide a territorial range as is common today, and

<sup>1</sup> See, Development of Private International Law through Conventions, by H. Josephus Jitta, 29 Yale Law Journal, 497, and Private International Law of the Netherlands, by J. Afferhaus, 30 Yale Law Journal, 109, 250.

with as great diversity in common law and above all in statute law, as is often met with, some solution must be attempted.<sup>2</sup>

**§ 3563. General nature of solution.** The court before which a case of this sort comes may adopt one of three possible solutions:

(1) The court before which the action is brought may take the position that it will not recognize rights which arise in other jurisdictions, or, at least, that it will not enforce them. Under a system of procedure, like that of the king's courts, in the earlier period of their existence,<sup>1</sup> in which facts are determined by the jury from the personal knowledge of the jurymen, and not from evidence, there is no means for proving a foreign contract which is not evidenced by writing, or which is not under seal, even if the courts were willing otherwise, to enforce such rights.<sup>2</sup> The only thing to do with a foreign contract under such a system of administering law is to ignore it entirely, not so much for any theory of substantive law as for want of means of proof.

The difficulties in proving foreign contracts have vanished with the introduction of evidence in its modern sense, and with the adoption of the theory that the jury is to determine the issue from the evidence in the case and not from its personal knowledge. A refusal to enforce foreign contracts would be so disastrous to modern business, extending as it does through the different states of the Union, and through the different nations of the world, without regard to state lines or national boundaries, that no serious attempt is made to apply this theory except to contracts which are valid where made, but which are in opposition to the settled policy of the state whose courts are asked to enforce it.<sup>3</sup> While this theory would simplify the law on the subject, it is so impracticable that it may be dismissed as a matter which is now one of historical interest merely.

(2) The court before which the action is brought may ignore all other systems of law, and apply its own. It is possible that, in many cases, this theory would result in a closer approximation to

<sup>2</sup> See, *What Law Governs the Validity of a Contract*, by Joseph H. Beale, 23 *Harvard Law Review*, 1, 79, 194, 260, and, *Validity and Effects of Contracts in the Conflict of Laws*, by Ernest G. Lorenzen, 30 *Yale Law Journal*, 565.

<sup>1</sup> See § 3172.

<sup>2</sup> For a discussion of the right to maintain debt upon a sealed instrument executed in Paris, see *Y. B. 20, Hen. VI 28* (Paschal term, pl. 21). See *Statham's Abridgement* (Klinglesmith's translation), Barre (81).

<sup>3</sup> See §§ 3600 et seq.

justice than the theory which is actually adopted. If the law which governs the transaction is one with which the court is not familiar, a rigid application of the law of the forum may result in a closer approximation to justice, than an attempt to apply a law which the court does not understand. This is true even as between two highly developed systems of law, such as the common law, on the one hand, and the civil law, on the other; and it is even more true where the courts of either of these systems of advanced law attempt to apply law of a more primitive type. If, however, the foreign law is one with the outlines of which the court before the action is brought is familiar, in a general way, at least, and the difference between its rule on the particular subject and the rule of the law under which the right arose, is clear and easily understood, the adoption of this theory would result in utter confusion. It would be impossible to tell when the contract was made, what the rights of the parties would be. This would depend upon chance and accident. It would be impossible to determine in advance in what jurisdiction the action would be brought, in most cases; and unless this could be determined in advance, it would be impossible to know what rules of law would govern the rights of the parties and what those rights would be.

(3) The third possibility is that the courts will work out a system of rules which will determine in advance the rights of the parties in transactions which may fall within the laws of two or more jurisdictions. This general theory has been adopted, for most purposes, by the courts of all civilized nations; and an earnest effort has been made to work out a set of rules for determining the rights of the parties under transactions of this sort. Unfortunately the different civilized nations have not agreed upon the basic theory which underlies the solution of this problem.

(a) It has been suggested that transactions which extend across the boundaries of nations should be governed by a law of their own, which might differ from the law of any one nation. While this theory has been urged by prominent writers,<sup>4</sup> and while some of the countries of continental Europe have attempted to adopt it, it has never appealed to Anglo-American law. Until the nations can agree upon a written code, in which the rules which will govern

<sup>4</sup> For a discussion of this doctrine in English, see *Renovation of International Law*, by D. Josephus Jitta, §§ 39 et seq..

See also, Westlake on *Private International Law*, although the use of English cases prevents any systematic attempt to apply this theory.

transactions of this sort can be set forth, in such detail that the courts can apply them to the facts of life, this theory will not demand serious consideration, for no one can say what shall be the content of the rules which will govern these transactions. Even if this theory were adopted, there would still be the problem of the transaction which the parties intended to perform in the jurisdiction in which it is made, of which they are subjects, and in which they are domiciled, but upon which an action is brought in some other jurisdiction. In a case of this sort, the rights of the parties would be altered unless the law of the jurisdiction in which the contract was made, is to be applied by the courts of the jurisdiction in which the action is brought. (b) The other theory assumes that the law of one or more of the jurisdictions must be adopted and applied to the transaction, or to the different parties thereof. This theory in turn can be subdivided into at least three different theories, with reference to the principle which is to be adopted in determining which of the competing jurisdictions shall furnish the law which shall control the rights of the parties. (1) Some of the countries of continental Europe have adopted a combination of the jurisdiction of which the parties are subjects, with the law of the place where the contract is made, or where it is to be performed. The practical difficulty in using this theory is the inability of the courts to agree as to what part of the contract shall be controlled by the law of the nationality, and what part of the contract shall be controlled by the law of the place where the contract is made, or where it is to be performed. It has had but little effect on Anglo-American law, except in cases in which the capacity of a party to the contract is involved, especially if such party is a married woman.<sup>5</sup>

(2) A theory which has appealed to many of the Anglo-American courts, and which has found expression in a variety of forms, and in a number of cases, is that the law of some definite place is to be selected as the law which governs the contract. In determining what place shall be selected, a distinction will be made between the formation of the contract, the operation and the effect of the contract, the performance of the contract, and the remedies which will be given if an action is brought thereon. On the last question, the courts are in substantial accord as far as an abstract statement of the law is concerned. It is generally agreed that the law of the forum determines the remedies which will be

<sup>5</sup> See § 3604.

given, and the procedure by which they will be applied.<sup>6</sup> Even here the harmony is more apparent than real, since the courts do not all agree as to what is a matter of substantive right, on the one hand, or a matter of procedure and remedy on the other.<sup>7</sup> As to the law which should control the formation of the contract, its operation and its performance, we find a great confusion due to the inability of the courts to agree upon the question whether these matters are to be determined by the same system of law or by different systems, and whether the place at which the contract is made or the place at which it is to be performed is to control, if it is decided that the same system should control formation, operation, and performance. This confusion is worse confounded by the tendency of many of the courts to explain the entire subject of conflict of laws as if it were based on comity between the different nations or states, on the one hand,<sup>8</sup> and as if it were to be determined in accordance with the actual or presumed intent of the parties, on the other.<sup>9</sup>

#### § 3564. Name for body of rules as to law controlling contract.

For the rules which determine what system of law controls a contract or other transactions, there are two names in general use, neither of which is especially suitable to our common-law ideas. One of these names is "private international law," a name which is a misnomer at Anglo-American law, since these rules of law, as applied by Anglo-American courts, are not international in the modern sense of the term, and since they are no more private than any other rules of law outside of public law in the limited sense.<sup>1</sup> Some justification for this name may exist if we are to adopt the theory that transactions which extend across international boundary lines are to be governed by a set of rules which are applicable to such transaction, which are recognized throughout the civilized world, and which are not necessarily the rules of any one of the nations of the world. A system of law of this sort is not international law in the modern sense of the term, as used in Anglo-American law, since it does not regulate the dealings of

<sup>6</sup> See §§ 3617 et seq.

<sup>7</sup> See §§ 3617 et seq.

<sup>8</sup> See §§ 3619 et seq.

<sup>9</sup> *Newman v. Kershaw*, 10 Wis. 333.

<sup>1</sup> "International Law": *Embricos v. Anglo-Austrian Bank* [1905], 1 K. B.

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"International Jurisprudence": *Townsend v. Jemison*, 50 U. S. (9 How.) 407, 13 L. ed. 194; *Canada Southern Ry. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020 (also called "international comity").

one nation with another or of one nation with the subjects of another nation; but it is international in the whole sense of the term in that it would be a body of laws recognized by all of the nations.<sup>2</sup> The other name is "conflict of laws." The chief objection to the use of this term is that the rules which it includes are intended to avoid conflicts in law, but unless some inconvenient descriptive name is to be invented, this name is as good as any; and in view of the results which have actually been reached by the courts, it probably expresses the actual situation as well as a term which was better adapted to express the purpose which the courts had in mind.

**§ 3565. Distinction between *res adjudicata* and law controlling contract.** The effect of an adjudication of a foreign court which has jurisdiction to render such adjudication is to be distinguished from the doctrine of the law controlling a contract. Since an adjudication of a court of competent jurisdiction is binding until reversed, even if erroneous, it follows that even if the foreign court applied the wrong system of law its judgment is conclusive.<sup>1</sup> A bill of lading contained a provision exempting the carrier from liability for loss by fire, even if due to its own negligence. The cause of action arose in New Hampshire; New Hampshire law controlled, and by that law such provision was contrary to public policy. Loss by fire occurred through the carrier's negligence. The injured party voluntarily submitted the case to a Canadian court, which decided in favor of the carrier, failing to apply New Hampshire law. It was held in a subsequent suit in New Hampshire that the judgment of the Canadian court was a bar to a subsequent action.<sup>2</sup> A contract between an attorney and client, was held to be champertous in an action in a court of Virginia which had jurisdiction of the subject-matter and of the parties.<sup>3</sup> In an action which was brought at a later time in West Virginia between the same parties, involving the same subject-

<sup>2</sup> It was in this sense that Blackstone said that admiralty and the law merchant were international law. Admiralty was the law applicable to certain types of subject-matter. The law merchant was the law of a class or caste. Both were international in the sense that they were not limited by national boundaries, but were recognized and enforced by the nations of western Europe. IV Blackstone's Commentaries, 67.

<sup>1</sup> *MacDonald v. Grand Trunk Ry.*, 71 N. H. 448, 93 Am. St. Rep. 550, 59 L. R. A. 448, 52 Atl. 982; *Roller v. Murray*, 71 W. Va. 161, L. R. A. 1915F, 984, 76 S. E. 172.

<sup>2</sup> *MacDonald v. Grand Trunk Ry.*, 71 N. H. 448, 93 Am. St. Rep. 550, 59 L. R. A. 448, 52 Atl. 982.

<sup>3</sup> *Roller v. Murray*, 107 Va. 527, 59 S. E. 421.

matter, it was held that under the full faith and credit clause, the Virginia judgment was final, although such action might have been brought in West Virginia in the first instance in a proceeding to subject the land in West Virginia to the plaintiff's claim, and although the courts of West Virginia might then have held that such contract was not champertous.<sup>4</sup>

**§ 3566. Theory that a contract is governed by law of jurisdiction in which it is made.** The courts have frequently attempted to state, in simple form, the rules which determine what law shall control a contract, substituting broad generalization for detailed statement. In doing so they have encountered a number of difficulties, some of which are due to the fact that it is often impossible to select any one jurisdiction the law of which is to control the formation, validity, construction, performance and remedy; and others of which are due to the fact that there is a real conflict of authority upon these questions when reduced to their most narrow scope. A form of statement which is frequently repeated is that the law of the place of making the contract controls as to its validity and interpretation, and possibly as to its performance,<sup>1</sup>

<sup>4</sup> *Roller v. Murray*, 71 W. Va. 161, L. R. A. 1915F, 984, 76 S. E. 172.

<sup>1</sup> *England*. *Embiricos v. Anglo-Austrian Bank* [1905], 1 K. B. 677.

*United States*. *Cox v. United States*, 31 U. S. (6 Pet.) 172, 8 L. ed. 359; *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234, 38 L. R. A. (N. S.) 57, 56 L. ed. 419; *Sandberg v. McDonald*, 248 U. S. 185, 63 L. ed. 200; *Neilson v. Rhine Shipping Co.*, 248 U. S. 205, 63 L. ed. 208.

*Alabama*. *Western Union Telegraph Co. v. Favish*, 196 Ala. 4, 71 So. 183; *New York Life Ins. Co. v. Scheuer*, 198 Ala. 47, 73 So. 400.

*Arkansas*. *Lawler v. Lawler*, 107 Ark. 70, 153 S. W. 1113.

*California*. *Navajo County Bank v. Dolson*, 163 Cal. 485, 41 L. R. A. (N.S.) 787, 126 Pac. 153.

*Colorado*. *Wolf v. Burke*, 18 Colo. 264, 19 L. R. A. 792, 32 Pac. 427.

*Connecticut*. *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179; *White v. Holly*, 80 Conn. 438, 68 Atl. 997; *Love-*

*land v. Dinnan*, 81 Conn. 111, 17 L. R. A. (N.S.) 1119, 70 Atl. 634; *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372; *Douthwright v. Champlin*, 91 Conn. 524, 100 Atl. 97.

*District of Columbia*. *Croissant v. Empire State Realty Co.*, 29 D. C. App. 538.

*Georgia*. *Thomas v. Clarkson*, 125 Ga. 72, 6 L. R. A. (N.S.) 658, 54 S. E. 77.

*Illinois*. *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Burr v. Beckler*, 264 Ill. 230, 106 N. E. 206.

*Indiana*. *Jackson v. Greene*, 112 Ind. 341, 14 N. E. 89; *Garrigue v. Keller*, 164 Ind. 676, 108 Am. St. Rep. 324, 69 L. R. A. 870, 74 N. E. 523; *Worley v. Hineman*, 6 Ind. App. 240, 33 N. E. 260.

*Iowa*. *Hamilton v. Chicago, Burlington & Quincy Ry.*, 145 Ia. 431, 124 N. W. 363; *Jarl v. Pritchett*, — Ia. —, 179 N. W. 945; *Liljedahl v. Glasgow*, — Ia. —, 180 N. W. 870.

*Kentucky*. *Ford v. Buckeye State Ins. Co.*, 69 Ky. (6 Bush.) 133, 99 Am.

although, even in the most extreme form of this rule, no attempt is made to include remedies.<sup>2</sup>

**Dec. 663;** *Clarey v. Union Central Life Ins. Co.*, 143 Ky. 540, 136 S. W. 1014; *Barbee v. Bevins*, 176 Ky. 113, 195 S. W. 154.

**Maine.** *Emerson County v. Proctor*, 97 Me. 360, 54 Atl. 849.

**Maryland.** *Mandru v. Ashby*, 108 Md. 693, 71 Atl. 312.

**Massachusetts.** *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214; *Brandeis v. Atkins*, 204 Mass. 471, 26 L. R. A. (N.S.) 230, 90 N. E. 861.

**Michigan.** *Acme Food Co. v. Kirsch*, 166 Mich. 433, 38 L. R. A. (N.S.) 814, 131 N. W. 1123; *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629; *Millar v. Hilton*, 189 Mich. 635, 155 N. W. 574; *City Bank & Trust Co. v. Atwood*, 197 Mich. 116, 163 N. W. 941.

**Minnesota.** *Clement v. Willett*, 105 Minn. 267, 17 L. R. A. (N.S.) 1094, 117 N. W. 491; *Northwestern Fuel Co. v. Boston Ins. Co.*, 131 Minn. 19, 154 N. W. 515; *Halloran v. Jacob Schmidt Brewing Co.*, 137 Minn. 141, 162 N. W. 1082.

**Mississippi.** *Aetna Insurance Co. v. Mount*, 90 Miss. 642, 15 L. R. A. (N.S.) 471, 44 So. 162, 45 So. 835.

**Missouri.** *King of Prussia v. Kueper*, 22 Mo. 550; *Liebing v. Mutual Life Ins. Co.*, 276 Mo. 118, 207 S. W. 230; *Carey v. Schmeltz*, 221 Mo. 132, 119 S. W. 946.

**Nebraska.** *Antes v. State Ins. Co.*, 61 Neb. 55, 84 N. W. 412.

**New Hampshire.** *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617; *Lovell v. Boston & Maine Ry.*, 75 N. H. 568, 34 L. R. A. (N.S.) 67, 78 Atl. 621 (making of contract there forbidden).

**New Mexico.** *Atchison, Topeka & Santa Fe Ry. Co. v. Rodgers*, 16 N. M. 120, 113 Pac. 805.

**New York.** *Dyke v. Erie Ry.*, 45 N.

Y. 113, 6 Am. Rep. 43; *China Mutual Ins. Co. v. Force*, 142 N. Y. 90, 40 Am. St. Rep. 576, 36 N. E. 874; *Bath Gas-light Co. v. Rowland*, 178 N. Y. 631, 71 N. E. 1127; *Amsinck v. Rogers*, 189 N. Y. 252, 12 L. R. A. (N.S.) 875, 82 N. E. 134.

**North Carolina.** *Hall v. Western Union Telegraph Co.*, 139 N. Car. 369, 52 S. E. 50; *Cannaday v. Atlantic Coast Line Ry.*, 143 N. Car. 439, 118 Am. St. Rep. 821, 8 L. R. A. (N.S.) 939, 55 S. E. 836; *Keesler v. Mutual Benefit Life Insurance Co.*, 177 N. Car. 394, 99 S. E. 97.

**Ohio.** *Knowlton v. Erie Ry.*, 19 O. S. 260, 2 Am. Rep. 395.

**Oklahoma.** *Wagner v. Minnie Harvester Co.*, 25 Okla. 558, 106 Pac. 969; *Clark v. First National Bank*, — Okla. —, 157 Pac. 96; *Fist v. La Batte*, — Okla. —, 171 Pac. 1120.

**Oregon.** *Jamieson v. Potts*, 55 Or. 292, 25 L. R. A. (N.S.) 24, 105 Pac. 93.

**Rhode Island.** *Stone v. Postal Telegraph Co.*, 31 R. I. 174, 29 L. R. A. (N.S.) 795, 76 Atl. 762.

**South Dakota.** *Sibley First National Bank v. Doeden*, 21 S. D. 400, 113 N. W. 81.

**Tennessee.** *Snyder v. Yates*, 112 Tenn. 309, 105 Am. St. Rep. 941, 64 L. R. A. 353, 79 S. W. 796.

**Wisconsin.** *Richards v. Globe Bank*, 12 Wis. 692; *International Harvester Co. of America v. McAdam*, 142 Wis. 114, 124 N. W. 1042; *Badger Machinery Co. v. United States Bank & Trust Co.*, 166 Wis. 18 [sub nomine, *Badger Machinery Co. v. Columbia County Electric Light & Power Co.*, 163 N. W. 188]; *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381, 67 L. R. A. 33, 72 N. E. 456 (obiter, as no evidence of such law was offered).

<sup>2</sup> See §§ 3617 et seq.

The advantage of selecting the place of making the contract as the jurisdiction whose law shall control, is that it gives a definite rule which does not depend upon the idea of comity which the law of the forum may entertain, nor upon its theory of construction by which it determines the intention of the parties as to the law by which the contract shall be governed.<sup>3</sup> The disadvantage of selecting the place of making the contract as the jurisdiction by whose law it shall be governed, is that the place of making the contract is frequently a matter of mere accident. Furthermore, the rule in its simplest form pays no attention to the intention of the parties, and but little to comity, although these may be regarded as advantages rather than disadvantages. In many cases, therefore, the rule is qualified in various ways. It is said that the law of the place of making the contract controls, since it will be presumed that the parties enter into the contract with reference to its law;<sup>4</sup> and that the law of the place of making will control, unless it appears that the parties intended to adopt some other system of law.<sup>5</sup> The selection of the place of making as the juris-

<sup>3</sup> See § 3571.

<sup>4</sup> *Liljedahl v. Glasgow*, — Ia. —, 180 N. W. 870; *Mayer v. Roche*, 77 N. J. L. 681, — L. R. A. —, 75 Atl. 235; *Bath Gaslight Co. v. Rowland*, 178 N. Y. 631, 71 N. E. 1127.

<sup>5</sup> *England. Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589.

*United States. Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. ed. 788; *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181.

*Alabama. Western Union Telegraph Co. v. Favish*, 196 Ala. 4, 71 So. 183; *New York Life Ins. Co. v. Scheuer*, 198 Ala. 47, 73 So. 409.

*Connecticut. White v. Hally*, 80 Conn. 438, 68 Atl. 907.

*District of Columbia. Croissant v. Empire State Realty Co.*, 29 D. C. App. 538.

*Illinois. Walker v. Lovitt*, 250 Ill. 543, 95 N. E. 631.

*Indiana. Garrigue v. Kellar*, 164 Ind. 676, 69 L. R. A. 870, 70 N. E. 523.

*Iowa. Born v. Home Ins. Co.*, 120 Ia. 299, 94 N. W. 849.

*Massachusetts. American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942.

*Michigan. Douglass v. Paine*, 141 Mich. 485, 104 N. W. 781.

*Missouri. Liebing v. Mutual Life Ins. Co.*, 276 Mo. 118, 207 S. W. 230.

*New Jersey. Hinkly v. Freick*, 86 N. J. L. 231, L. R. A. 1916B, 1041, 90 Atl. 1108.

*Oklahoma. Marx v. Hefner*, 46 Okla. 453, 149 Pac. 207; *Clark v. Marseilles First National Bank*, — Okla. —, 157 Pac. 96.

*Pennsylvania. Forepaugh v. Delaware & Lackawanna Ry.*, 128 Pa. St. 217, 5 L. R. A. 508, 18 Atl. 503.

*Washington. Crawford v. Seattle, Renton & Southern Ry.*, 86 Wash. 628, L. R. A. 1916D, 732, 150 Pac. 1155.

*West Virginia. Davidson v. Browning*, 73 W. Va. 276, L. R. A. 1915C, 976, 80 S. E. 363.

*Wisconsin. Fisher v. Otis*, 3 Pinney 78; *International Harvester Co. v. Mc-*

diction whose law is to govern the contract, is explained on the theory of comity.<sup>6</sup> The rule that the law of the place of making controls the contract, is frequently stated with the qualification that such law will be applied if it is not contrary to the policy of the forum.<sup>7</sup> This is merely a particular application of the general rule that the forum will exercise its power to refuse to recognize rights created under another system of law, if such rights are so contrary to its own policy that it is unwilling to enforce them.<sup>8</sup> The rule is sometimes stated as though it were applicable to contracts entered into in a given jurisdiction by parties who were there domiciled.<sup>9</sup> The rule has been restricted to contracts which deal with personal property,<sup>10</sup> but on the other hand it has been extended to contracts which involve realty.<sup>11</sup> The rule that the place of making controls has been said, on the other hand, to apply to personal obligations;<sup>12</sup> and a contract to assume a debt secured by a mortgage on realty in another jurisdiction, as consideration for a conveyance of such realty, is held to be a personal obligation, governed by the law of the place where the contract is made, and not by the law of the place where the land is situated.<sup>13</sup> It has been applied to contracts made outside of the United States.<sup>14</sup>

The rule, in its simplest form, is not supported by all the cases in which it is laid down. In some cases the place at which the contract is made and in which it is to be performed are the same.<sup>15</sup> In others, no place of performance was specified, and accordingly the presumption arose that the place of performance was the same

Adam, 142 Wis. 114, 26 L. R. A. (N.S.) 774, 124 N. W. 1042.

<sup>6</sup> Hamilton v. Chicago, Burlington & Quincy Ry., 145 Ia. 431, 124 N. W. 363.

<sup>7</sup> Cannaday v. Atlantic Coast Line Ry., 143 N. Car. 439, 118 Am. St. Rep. 821, 8 L. R. A. (N.S.) 939, 55 S. E. 836; Klein v. Keller, 42 Okla. 592, 141 Pac. 1117; Fist v. La Batte, — Okla. —, 171 Pac. 1120.

<sup>8</sup> See §§ 3600 et seq.

<sup>9</sup> Bell v. New York Safety Steam Power Co., 183 Fed. 274; City Bank & Trust Co. v. Atwood, 197 Mich. 116, 163 N. W. 941.

<sup>10</sup> Liebing v. Mutual Life Ins. Co., 276 Mo. 118, 207 S. W. 230.

<sup>11</sup> Jackson v. Greene, 112 Ind. 341, 14 N. E. 89; Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260.

<sup>12</sup> Connor v. Elliott, — Fla. —, 85 So. 164.

<sup>13</sup> Clement v. Willett, 105 Minn. 267, 17 L. R. A. (N.S.) 1094, 117 N. W. 491.

<sup>14</sup> Sandberg v. McDonald, 248 U. S. 185, 63 L. ed. 200; Neilson v. Rhine Shipping Co., 248 U. S. 205, 63 L. ed. 208.

<sup>15</sup> Bond v. Hume, 243 U. S. 15, 61 L. ed. 565; Phinney v. Phinney, 81 Me. 450, 10 Am. St. Rep. 266, 4 L. R. A. 348, 17 Atl. 405; Kulp v. Fleming, 65 O. S. 321, 87 Am. St. Rep. 611, 62 N. E. 334.

place as that at which the contract was entered into.<sup>16</sup> If the contract is to be performed where made, the law of that jurisdiction is said to control,<sup>17</sup> at least if the contract is not made with reference to any other system of law;<sup>18</sup> but in cases of this sort, the competing systems are usually the jurisdiction in which the contract is made and is to be performed on the one hand, and the forum on the other. In cases of this sort, the law of the jurisdiction in which the contract was made and was to be performed, control.<sup>19</sup> The fact that it is necessary to resort to the forum to enforce a mortgage or other lien on land, does not make the law

<sup>16</sup> **United States.** Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104.

**Illinois.** Lewis v. Headley, 36 Ill. 433, 87 Am. Dec. 227.

**Kentucky.** Young v. Harris, 53 Ky. (14 B. Mon.) 556; New Domain Oil & Gas Co. v. McKinney, 188 Ky. 183, 221 S. W. 245.

**New York.** Toledo First National Bank v. Shaw, 61 N. Y. 294.

**Minnesota.** Clement v. Willett, 105 Minn. 267, 17 L. R. A. (N.S.) 1094, 117 N. W. 491.

<sup>17</sup> **United States.** N. Y. Life Insurance Co. v. Head, 234 U. S. 140, 58 L. ed. 1259; Bond v. Hume, 243 U. S. 15, 61 L. ed. 565.

**Florida.** Connor v. Elliott, — Fla. —, 85 So. 164.

**Kentucky.** Arnett v. Pinson, 108 S. W. 852, 33 Ky. Law Rep. 36.

**Massachusetts.** Daniell v. Boston & Maine Ry., 184 Mass. 337, 68 N. E. 337.

**Michigan.** Douglass v. Paine, 141 Mich. 485, 104 N. W. 781; Stack v. Detour Lumber & Cedar Co., 151 Mich. 21, 16 L. R. A. (N.S.) 616, 114 N. W. 876.

**Minnesota.** Halloran v. Jacob Schmidt Brewing Co., 137 Minn. 141, L. R. A. 1917E, 777, 162 N. W. 1082.

**Mississippi.** Couret v. Conner, 118 Miss. 374, 79 So. 230.

**New York.** Manhattan Life Insurance Co. v. Johnson, 188 N. Y. 108, 9 L. R. A. (N.S.) 1142, 80 N. E. 658.

**North Carolina.** Cannaday v. Atlantic Coast Line Ry., 143 N. Car. 439, 118 Am. St. Rep. 821, 8 L. R. A. (N. S.) 939, 55 S. E. 836.

**Oklahoma.** American National Insurance Co. v. Donahue, — Okla. —, 153 Pac. 819.

**Texas.** Chicago, Rock Island & Pacific Ry. v. Thompson, 100 Tex. 185, 97 S. W. 450, 123 Am. St. Rep. 798.

**Washington.** Bank v. Doherty, 42 Wash. 317, 4 L. R. A. (N.S.) 1191, 84 Pac. 872.

<sup>18</sup> **Illustrated Post Card & Novelty Co. v. Holt**, 85 Conn. 140, 81 Atl. 1061.

<sup>19</sup> **Florida.** Connor v. Elliott, — Fla. —, 85 So. 164.

**Michigan.** Stack v. Detour Lumber & Cedar Co., 151 Mich. 21, 16 L. R. A. (N.S.) 616, 114 N. W. 876.

**New York.** Manhattan Life Insurance Co. v. Johnson, 88 N. Y. 108, 9 L. R. A. (N.S.) 1142, 80 N. E. 658.

**Oklahoma.** Security Trust & Savings Bank v. Gleichmann, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908.

**Washington.** Bank v. Doherty, 42 Wash. 317, 4 L. R. A. (N.S.) 1191, 84 Pac. 872.

**Wisconsin.** Drovers' Deposit National Bank v. Tichenor, 156 Wis. 251, 145 N. W. 777; McKnelly v. Brotherhood of American Yeomen, 160 Wis. 514, 152 N. W. 169.

of the forum control.<sup>20</sup> Still less can the law of the forum control when the action is brought there merely because it is a convenient place of getting jurisdiction over the defendant.<sup>21</sup>

In some cases in which the real question was between the law of the place at which the contract was made, and the law of the place at which it was performed, it is held that the law of the place of making controls.<sup>22</sup> If the law of the place at which a contract of insurance is made, and the law of the place in which the insured is domiciled when such contract is made, are the same, effect will be given to such law, although the insured may remove to another jurisdiction in which he subsequently dies and in which action is brought against the insurance company.<sup>23</sup>

The rule that a contract is governed by the law of the place where it is made is sometimes invoked to uphold a contract which is entered into for the purpose of discharging a prior contract, and which is valid where it is made, although it would not have been valid where the original contract was made.<sup>24</sup>

Whatever may be the advantages of selecting the law of the place at which the contract is made, it is unduly optimistic, in view of the inconsistent theories that have been advanced,<sup>25</sup> to say that all common-law tribunals assent to this rule.<sup>26</sup>

**§ 3567. Theory that contract is governed by law of jurisdiction in which it is to be performed.** If a contract is made in one jurisdiction and is to be performed in another, many of the courts have felt that a blind adherence to the rule that the contract is to be controlled by the law of the place in which it is made would result in injustice. This is especially true if the court either holds expressly or assumes subconsciously that the intention of the parties in selecting the law by which the contract is to be governed

<sup>20</sup> *Manhattan Life Insurance Co. v. Johnson*, 188 N. Y. 108, 9 L. R. A. (N. S.) 1142, 80 N. E. 658; *Bank v. Doherty*, 42 Wash. 317, 4 L. R. A. (N.S.) 1191, 84 Pac. 872.

<sup>21</sup> *McKnelly v. Brotherhood of American Yeomen*, 160 Wis. 514, 152 N. W. 169.

<sup>22</sup> *Scudder v. Union National Bank*, 91 U. S. 406, 23 L. ed. 245; *Acme Food Co. v. Kirsch*, 166 Mich. 433, 38 L. R. A. (N.S.) 814, 131 N. W. 1123 (place of making same as forum); *Amsinck*

*v. Rogers*, 189 N. Y. 252, 12 L. R. A. (N.S.) 875, 82 N. E. 134; *Gilliland v. Southern Ry.*, 85 S. Car. 26, 27 L. R. A. (N.S.) 1106, 67 S. E. 20 (obiter).

<sup>23</sup> *Clarey v. Union Central Life Insurance Co.*, 143 Ky. 540, 33 L. R. A. (N.S.) 881, 136 S. W. 1014.

<sup>24</sup> *New York Life Insurance Co. v. Head*, 234 U. S. 149, 58 L. ed. 1259; *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.

<sup>25</sup> See §§ 3567 et seq.

<sup>26</sup> *Evans v. Anderson*, 78 Ill. 558.

should control. The place at which the contract is entered into is often accidental. The place of performance is deliberately selected by the parties. Accordingly it has repeatedly been said that the law of the place of performance controlled as to the validity, nature, obligation and intention,<sup>1</sup> although, in jurisdictions in which the intent of the parties is paramount, this rule is restricted to cases in which there is nothing to indicate that the parties wished a different system of law to control.<sup>2</sup> The law of the place at which the contract is to be performed is accordingly held to control, as against the law of the place at which the contract is made;<sup>3</sup> and it is said that the law of the place of performance will

<sup>1</sup>*Bank of United States v. Daniel*, 37 U. S. (12 Pet.) 32, 9 L. ed. 989; *Andrews v. Pond*, 38 U. S. (13 Pet.) 65, 10 L. ed. 61; *Bell v. Bruen*, 42 U. S. (1 How.) 169, 11 L. ed. 89; *Story on Conflict of Law*, § 280.

*England. Moulis v. Owen* [1907], 1 K. B. 746.

*Alabama. Southern Express Co. v. Gibbs*, 155 Ala. 303, 18 L. R. A. (N.S.) 874, 46 So. 465; *New York Life Insurance Co. v. Scheuer*, 198 Ala. 47, 73 So. 409.

*Arkansas. N. P. Sloan Co. v. Barham*, 138 Ark. 350, 211 S. W. 381.

*Iowa. Inman Manufacturing Co. v. American Cereal Co.*, 133 Ia. 71, 8 L. R. A. (N.S.) 1140, 110 N. W. 287.

*Kentucky. New Domain Oil & Gas Co. v. McKinney*, 188 Ky. 183, 221 S. W. 245.

*Louisiana. De La Vergne v. New Orleans & Western Ry.*, 51 La. Ann. 1733, 26 So. 455.

*Massachusetts. Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193; *Commonwealth v. Griffith*, 204 Mass. 18, 25 L. R. A. (N.S.) 957, 90 N. E. 394 (performance of act unlawful where to be performed).

*Michigan. Douglass v. Paine*, 141 Mich. 485, 104 N. W. 781.

*Missouri. Smoot v. Judd*, 161 Mo. 673, 84 Am. St. Rep. 738, 61 S. W. 854.

*New York. Hasbrouck v. New York Central & Hudson River Ry.*, 202 N. Y. 363, 35 L. R. A. (N.S.) 537, 95 N. E. 808; *International Text-book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722.

*Ohio. Kanaga v. Taylor*, 7 O. S. 134; *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Sheppard* [also styled *Ry. v. Sheppard*], 56 O. S. 68, 60 Am. St. Rep. 732, 46 N. E. 61; *Heaton v. Eldridge*, 56 O. S. 87, 60 Am. St. Rep. 737, 36 L. R. A. 817, 46 N. E. 638; *Montana Coal & Coke Co. v. Cincinnati Coal & Coke Co.*, 69 O. S. 351, 69 N. E. 613; *Boyer v. Knowlton Co.*, 85 O. S. 104, 97 N. E. 137.

*Virginia. General Ry. Signal Co. v. Commonwealth*, 118 Va. 301, 87 S. E. 598; *Poole v. Perkins*, 126 Va. 331, 101 S. E. 240.

*Wyoming. J. W. Denio Milling Co. v. Malin*, 25 Wyom. 143, 165 Pac. 1113.

<sup>2</sup>*Hamlyn v. Talisker Distillery* [1894], A. C. 202; *Sykes v. Citizens' National Bank*, 78 Kan. 688, 19 L. R. A. (N.S.) 665, 98 Pac. 206; *Newman v. Kershaw*, 10 Wis. 333; *Brown v. Gates*, 120 Wis. 349, 97 N. W. 221; *J. W. Denio Milling Co. v. Malin*, 25 Wyom. 143, 165 Pac. 1113.

<sup>3</sup>*Moulis v. Owen* [1907], 1 K. B. 746; *International Text-book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722; *Carstens Packing*

control unless it appears clearly that the parties intended to be governed by the law of the place where the contract was made.<sup>4</sup> If the place at which the contract was made is not shown, the law of the place of performance is assumed to govern.<sup>5</sup> If the law of the place of performance is the same as the law of the forum, the settled policy of that system of law may cause the court to refuse to recognize contracts which were made in other jurisdictions and which were valid where they were made.<sup>6</sup> It is also said that the law of the place of performance controls, unless such place is selected in order to evade the system of law which would otherwise control.<sup>7</sup>

An attempt is made to combine the rule that the law of the place of making controls, with the rule of the law that the place of performance controls; and it is said that the contract is governed by the law of the place where it is made, unless it is to be performed elsewhere, in which case it is governed by the law of the place of performance.<sup>8</sup> But this, of course, means that the contract is governed by the law of the place of performance if the place of making and the breach of performance are different.<sup>9</sup>

If the contract is to be performed, part in one state and part in another, it has been held that the law of each place of partial performance governs such part of the performance as is to be had in that state.<sup>10</sup>

If a contract calls for the doing of a number of acts, more or less continuous, in a number of jurisdictions, the law of the place where performance is to be completed is said to be the law that

Co. v. Southern Pacific Ry., 58 Wash. 239, 27 L. R. A. (N.S.) 975, 108 Pac. 613.

<sup>4</sup> Brown v. Gates, 120 Wis. 349, 97 N. W. 221.

<sup>5</sup> Borne v. Alexander Hardwood Co., 140 La. 315, 72 So. 979 (the contract provided for performance in several different jurisdictions, but in all of them the law was the same as to the question involved, and it was different from the law of the forum); Mayer v. Roche, 77 N. J. L. 681, 26 L. R. A. (N.S.) 763, 75 Atl. 235.

<sup>6</sup> Packing Co. v. Southern Pacific Ry., 58 Wash. 239, 27 L. R. A. (N.S.) 975, 108 Pac. 613.

<sup>7</sup> International Harvester Co. v. McAdam, 142 Wis. 114, 26 L. R. A. (N.S.) 774, 124 N. W. 1042.

<sup>8</sup> New York Life Ins. Co. v. Scheuer, 198 Ala. 47, 73 So. 409; Couret v. Connor, 118 Miss. 374, 79 So. 230; Poole v. Perkins, 126 Va. 331, 101 S. E. 240; J. W. Denio Milling Co. v. Malin, 25 Wyom. 143, 165 Pac. 1113.

<sup>9</sup> See § 3566.

<sup>10</sup> Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 32 L. ed. 788; Midland Valley Ry. Co. v. Moran Bolt & Nut Mfg. Co., 80 Ark. 399, 97 S. W. 679.

controls.<sup>11</sup> On the other hand, it has been said that if the contract is to be performed in part where made and in part elsewhere, the law of the place where it is to be made and performed in part will control unless the intention of the parties clearly appears to be otherwise.<sup>12</sup> A contract which was made in one state and under which payment was to be made in the same state, has been held to be governed by the law of that state, although it provided for the cultivation of land in another state, and although the action was brought in such latter state.<sup>13</sup> If a contract of sale is made in one state and to be performed there, an action is brought there, the law of that state controls although the notes for the purchase price which were payable in the same state were delivered in another state, and took effect there.<sup>14</sup>

If the place where the contract is to be performed is optional it is said that the law of the place where the contract was made controls.<sup>15</sup> This is true especially where the contract is in fact performed there.<sup>16</sup> An insurance company in one state issued a policy which was delivered in another state. By the terms of the policy the premium was due where the company was domiciled, but there was a provision that "at the pleasure of the company" it would appoint suitable persons to collect premiums elsewhere. Premiums were in fact paid where the policy was delivered. The contract was held to be governed by the law of the state where it was delivered and the premiums were paid.<sup>17</sup> If the contract is payable at the main office of the lender unless another place is

<sup>11</sup> *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Sheppard*, 56 O. S. 68, 46 N. E. 61; *Packing Co. v. Southern Pacific Ry.*, 58 Wash. 239, 27 L. R. A. (N.S.) 975, 108 Pac. 613.

<sup>12</sup> *Arkansas. Wilson v. Todhunter*, 137 Ark. 80, 207 S. W. 221.

*Illinois. Nonotuck Silk Co. v. Adams Express Co.*, 256 Ill. 66, 99 N. E. 897.

*Massachusetts. American Malting Co. v. Southern Brewing Co.*, 194 Mass. 89, 80 N. E. 526.

*North Carolina. Johnson v. Western Union Telegraph Co.*, 144 N. Car. 410, 119 Am. St. Rep. 410, 10 L. R. A. (N. S.) 256, 57 S. E. 122.

*Wisconsin. Bartlett v. Collins*, 109

Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703.

<sup>13</sup> *Wilson v. Todhunter*, 137 Ark. 80, 207 S. W. 221.

<sup>14</sup> *American Malting Co. v. Southern Brewing Co.*, 194 Mass. 89, 80 N. E. 526.

<sup>15</sup> *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 35 L. ed. 497; *Hale v. New Jersey Steam Navigation Co.*, 15 Conn. 539, 39 Am. Dec. 398.

<sup>16</sup> *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 35 L. ed. 497.

<sup>17</sup> *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 35 L. ed. 497.

designated, and a place in the state of the borrower's domicile is designated, the law of such state controls as to usury.<sup>10</sup>

If no place of performance is designated it has been said that the law of the place where the contract is made controls.<sup>11</sup>

**§ 3568. Theory that contract is governed by law of place where breach occurs.** If the contract is made in one jurisdiction and is to be performed in part in that and in part in another jurisdiction, the place where the breach takes place is said by some courts to be the jurisdiction whose law controls.<sup>1</sup> The law of the place of performance has been said to control in cases in which the performance was to take place in two or more jurisdictions, and the breach took place in the jurisdiction in which ultimate performance was to take place.<sup>2</sup>

**§ 3569. Law of domicile as law controlling contract.** It has occasionally been suggested that the law of the domicile of one of the parties to the contract is the law by which it should be controlled; but, in its simplest form, and as to private persons, this suggestion is rejected,<sup>1</sup> except, in some jurisdictions, as to questions of capacity.<sup>2</sup> In jurisdictions in which a contract is controlled by the law by which the parties intend it to be governed,<sup>3</sup> the domicile of one or both of the parties is considered as an element in determining the law by which they wish the contract to be governed; and sometimes the law of the domicile is adopted in accordance with such presumed intent.

If the party is a corporation, the law of the state which created it is said to control as to discharge of its debts by reorganization proceedings.<sup>4</sup>

<sup>10</sup> *National Mutual Building & Loan Association v. Farnham*, 81 Miss. 364, 33 So. 2; *National Mutual Building & Loan Association v. Hulett* (Miss.), 33 So. 3.

<sup>11</sup> Note. *Barrett v. Dodge*, 16 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530.

Note and mortgage. *New York Security & Trust Co. v. Davis*, 96 Md. 81, 53 Atl. 660.

<sup>1</sup> *Lake Shore & Michigan Southern Ry. v. Teeters*, 166 Ind. 335, 5 L. R. A. (N.S.) 425, 77 N. E. 599; *Western*

*Union Telegraph Co. v. Lacer*, 122 Ky. 839, 5 L. R. A. (N.S.) 751, 93 S. W. 34.

<sup>2</sup> *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Sheppard*, 56 O. S. 68, 46 N. E. 61.

<sup>3</sup> *Conklin v. Conklin*, 54 Ind. 289; *Meuer v. Chicago, Milwaukee & St. Paul Ry.*, 11 S. D. 94, 74 Am. St. Rep. 774, 75 N. W. 823.

<sup>2</sup> See §§ 3602 et seq.

<sup>3</sup> See § 3571.

<sup>4</sup> *Canada Southern Ry. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020.

A contract made by a sovereign state in its public capacity,<sup>5</sup> such as a contract by which it incurs indebtedness and agrees to apply its revenues to the payment thereof,<sup>6</sup> is said to be governed by the law of such state.

**§ 3570. Comity.** In many cases the recognition of the law of another state as creating rights which the courts of the forum will recognize and protect, is based upon the theory of comity.<sup>1</sup> Comity is something intermediate between legal obligation and courtesy.<sup>2</sup>

<sup>5</sup> *Hewitt v. Speyer*, 248 Fed. 590.

<sup>6</sup> *Hewitt v. Speyer*, 248 Fed. 590.

<sup>1</sup> *United States. Bond v. Hume*, 243 U. S. 15, 61 L. ed. 585; *Union Trust Co. v. Grosman*, 245 U. S. 412, 62 L. ed. 368.

**Arkansas.** *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

**Connecticut.** *Vanbuskirk v. Hartford Fire Ins. Co.*, 14 Conn. 583.

**Illinois.** *Collins v. Metropolitan Life Insurance Co.*, 232 Ill. 37, 14 L. R. A. (N.S.) 356, 83 N. E. 542.

**Indiana.** *Vandalia Ry. Co. v. Kelley*, 187 Ind. 323, 119 N. E. 257.

**Iowa.** *Hamilton v. Chicago, Burlington & Quincy Ry.*, 145 Ia, 431, 124 N. W. 363.

**Kentucky.** *Barbee v. Bevin*, 176 Ky. 113, 195 S. W. 154.

**Massachusetts.** *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241.

**New York.** *Edgerly v. Bush*, 81 N. Y. 199.

**Oklahoma.** *Union Savings Association v. Cummins*, 78 Okla. 265, 190 Pac. 869.

**Texas.** *Chicago, Rock Island & Pacific Ry. v. Thompson*, 100 Tex. 185, 123 Am. St. Rep. 798, 7 L. R. A. (N.S.) 191, 97 S. W. 459.

For a discussion of the source of this doctrine, see Huber's *de Conflictu Legum*, 13 Illinois Law Review, 375.

<sup>2</sup> "The enforcement of such a contract by the *lex fori* is because of comity between the different states

and countries. It can not be claimed as a right, since under it the recognition by the forum of foreign laws is by virtue of a species of favor or courtesy toward the other sovereignty; hence it will be denied when to do so would violate some established rule of public policy prevailing in the jurisdiction of the forum. In all cases the rules with reference to procedure and matters pertaining exclusively to the remedy are governed by the *lex fori*." *Moody v. Barker*, 188 Ky. 401, 222 S. W. 89.

"No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' Although the phrase has been often criticised, no satisfactory substitute has been suggested.

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its

That comity is the basis of our rules on conflict of laws is said to be elementary.<sup>3</sup>

Comity is a very vague idea but its very vagueness seems to have been regarded as its great advantage in that it saves the courts from the difficulty of defining and fixing ideas which, from their very nature, can not be defined or fixed.<sup>4</sup> Since comity is a term of uncertain meaning, it seems to have a wider application and a stronger obligation between the states of the union than between nations which are foreign to one another, in the widest sense of the term.<sup>5</sup>

own citizens or other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U. S. 113, 40 L. ed. 95.

"That enlightened sentiment of international comity, based upon the principles of right and justice, as well as good policy, generally causes the courts of one state to enforce, as far as practicable, the laws of another as to contracts and other transactions therein between private individuals." *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

<sup>3</sup> "It is elementary that the right to enforce a foreign contract in another foreign country could alone rest upon the general principles of comity." *Bond v. Hume*, 243 U. S. 15, 61 L. ed. 565.

<sup>4</sup> "If the subject has been susceptible of clear and positive rules, we may safely believe this illustrious man (*D'Aguasseau*) would not have left it in doubt, for if anything be more remarkable in him than his genius and his knowledge, it is the extraordinary fullness and clearness with which he expresses himself on all questions of jurisprudence. When he, therefore, and so many other men of great talents and learning, are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They

have attempted to go too far, to define and fix that which can not, in the nature of things, be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that that comity is and ever must be uncertain. That it must necessarily depend on a variety of circumstances, which can not be reduced within any certain rule. That no nation will suffer the laws of another to interfere with her own, to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced—the particular nature of her legislation, her policy and the character of her institutions. That in the conflict of laws it must be often a matter of doubt which should prevail, and that whenever that doubt does exist, the court which decides will prefer the law of its own country to that of the stranger." *Saul v. His Creditors*, 5 Martin (N.S.) (La.) 569.

<sup>5</sup> "The principles of comity which govern as between countries foreign to each other apply with greater force to the relation of the several states to each other, since the obligations of the constitution which bind them all in a common orbit of national unity impose of necessity restrictions which otherwise would not obtain and exact a greater degree of respect for each

The doctrine of comity is frequently used as an explanation of results which may be reached from a different theory. It is invoked to justify the rule that the law of the place of making governs the contract,<sup>6</sup> or that a court will not enforce a right which is opposed to its own fundamental ideas of public policy.<sup>7</sup> Negatively, it is used to demonstrate that the law of the jurisdiction where land is located is not bound to recognize an attempted charge thereon, although good by the law of the jurisdiction where such charge was made,<sup>8</sup> or that the law of the forum may refuse to apply any remedies but its own.<sup>9</sup>

The use of the term "comity" is unfortunate. It suggests that there are no definite rules of law on the subject. The very element of vagueness which makes it so attractive and so easy to use, prevents it from being of any real value as a means of determining rights in advance. If there are no definite rules upon the subject, the court before which the action is brought will apply its own notions of comity, and if it is impossible to determine in advance where the action will be brought, it is impossible to determine in advance to what extent the rights of the parties will be determined by the rules of each of the competing systems of law.

### § 3571. Intention of parties as to law controlling contract.

The question of the law which controls a contract is further complicated by the assumption which many courts have made, to the effect that the law which the parties have intended to adopt and with reference to which they have made the contract, is the law by which the contract is to be controlled.<sup>1</sup> If the parties to a con-

other than otherwise by the principles of comity would be expected. It is unnecessary to cite authority for these several doctrines, since, as we have said, they are indisputable, but they nowhere find a more lucid exposition than that long ago made by Mr. Chief Justice Taney in *Bank of Augusta v. Earle*, 13 Pet. 519." *Bond v. Hume*, 243 U. S. 15, 61 L. ed. 565.

<sup>6</sup> *Hamilton v. Chicago, Burlington & Quincy Ry. Co.*, 145 Ia. 431, 124 N. W. 363.

See § 3566.

<sup>7</sup> *Union Trust Co. v. Grosman*, 245 U. S. 412, 62 L. ed. 368; *Union Savings Association v. Cummins*, 78 Okla. 265,

190 Pac. 869; *Hudson v. Sheafe*, 41 S. D. 475, 171 N. W. 320.

See §§ 3600 et seq.

<sup>8</sup> *Frierson v. Williams*, 57 Miss. 451 (obiter, as the charge was good by the law of the place where the land was situated, and no personal obligation was incurred by the law of the place where the contract was made).

<sup>9</sup> *Millar v. Hilton*, 189 Mich. 635, 155 N. W. 574.

<sup>1</sup> *England. Lloyd v. Guibert*, L. R. 1 Q. B. 115; *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589.

*United States. Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104.

tract have expressly agreed upon the system of law whereby their contract is to be controlled, it is generally held that such provision is obligatory, and that no room remains for the application of those rules by which this problem is solved in the absence of such express stipulation.<sup>2</sup> An express reference to the law of another jurisdiction is not, however, necessary. If the court can ascertain the intention of the parties as to the law which shall control the

**Alabama.** *New York Life Insurance Co. v. Scheuer*, 198 Ala. 47, 73 So. 409.

**Connecticut.** *New Haven Trust Co. v. Camp*, 81 Conn. 539, 71 Atl. 788; *Illustrated Post Card & Novelty Co. v. Holt*, 85 Conn. 140, 81 Atl. 1061.

**District of Columbia.** *Croissant v. Empire State Realty Co.*, 20 D. C. App. 538.

**Indiana.** *Garrigue v. Keller*, 164 Ind. 676, 108 Am. St. Rep. 324, 69 L. R. A. 870, 74 N. E. 523.

**Iowa.** *Moran v. Moran*, 144 Ia. 451, 30 L. R. A. (N.S.) 898, 123 N. W. 202.

**Missouri.** *Fidelity Loan Securities Co. v. Moore*, 218 Mo. 315, 217 S. W. 286.

**New Jersey.** *Mayer v. Roche*, 77 N. J. L. 681, 26 L. R. A. (N.S.) 763, 75 Atl. 235.

**New York.** *Bath Gaslight Co. v. Rowland*, 178 N. Y. 631, 71 N. E. 1127.

**South Carolina.** *Gilliland v. Southern Ry.*, 85 S. Car. 26, 27 L. R. A. (N. S.) 1108, 67 S. E. 20.

**Washington.** *Crawford v. Seattle, Renton & Southern Ry.*, 86 Wash. 628, L. R. A. 1916D, 732, 150 Pac. 1155.

**Wisconsin.** *Fisher v. Otis*, 3 Pinney (Wis.) 78; *Newman v. Kershaw*, 10 Wis. 333; *International Harvester Co. of America v. McAdam*, 142 Wis. 114, 26 L. R. A. (N.S.) 774, 124 N. W. 1042; *D. Canale & Co. v. Pauly & Pauly Cheese Co.*, 155 Wis. 541, 145 N. W. 372.

**Wyoming.** *J. W. Denio Milling Co. v. Malin*, 25 Wyom. 143, 165 Pac. 1113.

<sup>2</sup>**England.** *Hamlyn v. Talisker Distillery* [1894], A. C. 208; *Royal Ex-*

*change Assurance Corporation v. Sjöforsakings Atkiebolaget Vega* [1902], 2 K. B. 384; *Spurrier v. La Cloche* [1902], App. Cas. 446.

**United States.** *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. ed. 800; *London Assurance v. Companhia de Moagens*, 187 U. S. 149, 42 L. ed. 113; *Mutual Life Ins. Co. v. Hill*, 118 Fed. 708, 55 C. C. A. 536 [affirming, 113 Fed. 44].

**Alabama.** *Allen v. Riddle*, 141 Ala. 621, 37 So. 680.

**Kansas.** *Steinman v. Midland Savings & Loan Co.*, 78 Kan. 479, 96 Pac. 860.

**Massachusetts.** *Mitenthal v. Mascagni*, 183 Mass. 19, 97 Am. St. Rep. 404, 60 L. R. A. 812, 66 N. E. 425.

**Michigan.** *Russell v. Pierce*, 121 Mich. 208, 80 N. W. 118.

**Minnesota.** *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311.

**Missouri.** *Fidelity Loan Securities Co. v. Moore*, 280 Mo. 315, 217 S. W. 286.

**North Dakota.** *Hale v. Cairns*, 8 N. D. 145, 73 Am. St. Rep. 746, 44 L. R. A. 261, 77 N. W. 1010.

**Oklahoma.** *Bell v. Riggs*, 34 Okla. 834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427; *Midland Savings & Loan Co. v. Henderson*, 47 Okla. 693, 150 Pac. 868 [sub nomine, *Midland Savings & Loan Co. v. Beats*, L. R. A. 1916D, 745]; *Midland Savings & Loan Co. v. Evans*, — Okla. —, 171 Pac. 726.

**South Dakota.** *Jones v. Fidelity Loan & Trust Co.*, 7 S. D. 122, 63 N. W. 553.

contract, they will give effect thereto, although it may be necessary to construe the contract as a whole in order to ascertain such intent.<sup>3</sup>

**Texas.** *Dugan v. Lewis*, 79 Tex. 246, 23 Am. St. Rep. 332, 14 S. W. 1024.

**Washington.** *Griesemer v. Mutual Life Insurance Co.*, 10 Wash. 202, 38 Pac. 1031.

"It is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own." *London Assurance v. Companhia de Moagens*, 167 U. S. 149, 161, 42 L. ed. 113.

<sup>3</sup>**England.** *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589.

**Massachusetts.** *Codman v. Krell*, 152 Mass. 214, 25 N. E. 90.

**New Jersey.** *Mayer v. Roche*, 77 N. J. L. 681, 26 L. R. A. (N.S.) 763, 75 Atl. 235.

**Oklahoma.** *Atchison, Topeka & Santa Fe Ry. Co. v. Smith*, 38 Okla. 157, 132 Pac. 494; *Lonsdale Grain Co. v. Johnston*, 78 Okla. 174, 189 Pac. 359.

**Washington.** *Crawford v. Seattle, Renton & Southern Ry.*, 86 Wash. 628, L. R. A. 1916D, 732, 150 Pac. 1155.

**Wisconsin.** *D. Canale & Co. v. Pauly & Pauly Cheese Co.*, 155 Wis. 541, 145 N. W. 372.

"The expression 'place of contract' is in itself ambiguous, since it may mean either the place where the contract is entered into, or the place where it is to be performed. *Dicey*, *Conf. L.* 726; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102. In the English and American cases, however, it has come to be used generally as signifying the place where the contract is entered into, and, since the law of that place does not always control, the cases seem sometimes to be more at variance than they really

are. In the English courts it has finally been held that the proper law of the contract is the law or laws by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed. *Hamlyn v. Talisker Distillery* [1894], A. C. 202, a careful and learned review of which by Judge Schofield is to be found in 9 *Harvard L. Rev.*, 371. This rule is substantially that expressed by Lord Mansfield in *Robinson v. Bland*, 2 Burr. 1077, and more exactly by Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 48, 6 L. ed. 264, where he said that in every forum a contract is governed by the law with a view to which it was made. The same rule seems to have been in the mind of Lord Denman in *Rothschild v. Currie*, 1 Q. B. 43, and was distinctly stated by Mr. Justice Willes in *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 5 Eng. Rul. Cas. 870, and by Lord Bowen in *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589, 53 L. J. Q. B. N. S. 156, 1 Eng. Rul. Cas. 338. The same rule has been adopted by the United States Supreme Court. *Pritchard v. Norton*, supra; *Coghlan v. South Carolina R. Co.*, 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 950. Mr. Justice Gray, in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* (The *Montana*), 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469, used a form of statement which treated the place where the contract was made as the general rule, but allowed an exception where the parties had a different jurisdiction in view. The later form of statement, which treats the proper law of the contract as that which the parties intended, or may fairly be presumed to have intended, is the more accurate. It harmonizes

In the form in which this rule is generally stated, it would seem that the parties might adopt any system of law which they chose, although it was neither the law of the domicile nor of the place of making the contract, nor of the place of performance, nor of the place where the action is brought. The adjudications, however, do not go to this extent, no matter how general the terms in which the rule is stated. In actual practice, the principle is invoked as a means of determining which of these different systems shall control. A reference to the law of the state where a contract is made,<sup>4</sup> or where it is made and to be performed in part,<sup>5</sup> or where it is to be performed,<sup>6</sup> or to the domicile of the promisee,<sup>7</sup> makes the law of such jurisdiction control. If this principle is to be used at all, it is therefore better to state it with the qualification that the law by which the parties elect to be

with the general rule, which leads the courts to give effect to the intentions of the parties as far as they are embodied in words; and it does away with the apparent discrepancy between cases like the one last cited, which adopts the law of the place where the contract is made, and cases like *London Assur. Co. v. Companhia de Moagens*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785, where the court said: 'Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation.' The place where the contract is made and the place where the contract is to be performed are both important indicia of the law by which the parties may fairly be presumed to have intended that the contract should be governed, but neither is necessarily conclusive, as appears by the decision in *Lloyd v. Guibert*, already cited, where the law which governed was the law of the flag under which the ship sailed, and not the law of the place where the contract was made, nor the law of the place where it was to be performed. The rule of following the intention of the parties has also the merit of flexibility and will cover all cases which

can arise. No less general rule can do so. As Lord Bowen said in *Jacobs v. Credit Lyonnais*, 'Stereotyped rules laid down by juridical writers can not therefore be accepted as infallible canons of interpretation in these days when commercial transactions have altered in character and increased in complexity; and there can be no hard and fast rule by which to construe the multifarious commercial agreements with which in modern times we have to deal.'" *Mayer v. Roche*, 77 N. J. L. 681, 26 L. R. A. (N.S.) 763, 75 Atl. 235.

<sup>4</sup> *Dugan v. Lewis*, 79 Tex. 246, 23 Am. St. Rep. 332, 14 S. W. 1024.

<sup>5</sup> *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589; *Mittenthal v. Mascagni*, 183 Mass. 19, 97 Am. St. Rep. 404, 60 L. R. A. 812, 66 N. E. 425.

<sup>6</sup> *Mayer v. Roche*, 77 N. J. L. 681, 26 L. R. A. (N.S.) 763, 75 Atl. 235.

<sup>7</sup> *Allen v. Riddle*, 141 Ala. 621, 37 So. 680; *Steinman v. Midland Savings & Loan Co.*, 78 Kan. 479, 96 Pac. 860; *Jenkins v. Union Savings Association*, 132 Minn. 19, 155 N. W. 765; *Midland Savings & Loan Co. v. Henderson*, 47 Okla. 693, 150 Pac. 868 [sub nomine, *Midland Savings & Loan Co. v. Beats*, L. R. A. 1916D, 745].

bound must be the law of a jurisdiction which has some connection with the contract,<sup>8</sup> by which form of expression is probably meant that the parties may elect between the different systems of law, which the court would consider as competing systems; but they can not elect the law of any other jurisdiction.

To the general rule that the parties may elect the law which shall control the contract, there is, however, at least one well recognized exception. If the parties fix the system of law that is to control in order to evade a restriction or prohibition of that system of law which would otherwise control, and this prohibition or restriction has been established for reasons of public policy, the agreement of the parties will be ignored, and that system of law applied which would otherwise control. This rule is generally insisted on when suit is brought in the same jurisdiction as that whose law it is thus sought to evade.<sup>9</sup>

If the parties may elect the law which is to control the contract, it will be presumed conclusively that they know the law of the jurisdiction which they thus adopt.<sup>10</sup>

The wisdom of the broad rule which allows the parties to select the law by which their contract is to be governed may be questioned. While the common law frequently lacks the precision and neat qualification and terminology of the Roman law, its general ideas are much the same; and our law recognizes a distinction between the rules of law which, on the one hand, apply in the absence of an actual intention, which fill in the gaps which the parties have left in the contract, and which may, therefore, be superseded by the express provisions of the contract; and the rules of law which, on the other hand, limit the freedom of the will of the parties, and which they can not set aside by their express agreement. If the rules of law are of the first class, and can be set aside by the parties, if such is the actual intention, no reason appears which would prevent them from expressing this intention by adopting the law of any country, whether connected with the

<sup>8</sup> *Crawford v. Seattle, Renton & Southern Ry.*, 86 Wash. 628, L. R. A. 1916D, 732, 150 Pac. 1155.

<sup>9</sup> *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 53 L. R. A. 305, 50 S. W. 519 [affirmed, *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116]; *Washington Investment Association v. Stanley*, 38

Or. 319, 84 Am. St. Rep. 793, 63 Pac. 489.

See also, as to marriage, *Peerless Pacific Co. v. Burckhard*, 90 Wash. 221, L. R. A. 1917C, 353, 155 Pac. 1037.

<sup>10</sup> *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. ed. 1088 [reversing, 76 Fed. 617, 22 C. C. A. 425].

contract or not. Whether they show their intention in express words, or whether they adopt a system of law in which such intention is embodied, the results would seem to be the same. If the rules of law are of the second class, and the parties can not set them aside by the express terms of the contract, no reason appears for permitting them to evade such rules by adopting a system of law which the court would have held not to control the contract but for such agreement of the parties, even though the system which they adopt may have some connection with the contract. Accordingly, it would seem that the intention of the parties might be given effect as to questions of construction, since the rules of construction yield to the express intention of the parties, and some of the cases in which this rule is laid down are explained as cases involving construction.<sup>11</sup>

Questions which go to the formation of the contract, and which involve its validity, such as the capacity of the parties, the relation between offer and acceptance, form, or consideration, and the legality of the subject-matter, are governed by rules of law which the parties can not alter by their express agreement as a rule; and if they can not alter them by their express agreement, they should not be permitted to alter them by electing to be governed by another system of law, even if it bears some relation to the contract. The rule that the parties may elect the law by which they will be bound, has been applied, however, to questions which the parties could not have altered by their express agreement, such as capacity,<sup>12</sup> and the legality of the subject-matter.<sup>13</sup>

Such a provision may prevent a contract from being subject to the usury laws which would otherwise apply.<sup>14</sup> Since the parties may agree what shall be regarded as a performance or what shall discharge the obligation, it is probably proper to permit them to select the law by which performance or discharge shall be gov-

<sup>11</sup> "The first matter we have to determine is, whether this contract is to be construed according to English law or according to French. To decide this point we must turn to the contract itself, for it is open in all cases for parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts." *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589 (really a question of discharge).

<sup>12</sup> *Mayer v. Roche*, 77 N. J. L. 681, 26 L. R. A. (N.S.) 763, 75 Atl. 235.

See §§ 3602 et seq.

<sup>13</sup> See §§ 3590 et seq.

<sup>14</sup> *Hale v. Cairns*, 8 N. D. 145, 73 Am. St. Rep. 746, 44 L. R. A. 261, 77 N. W. 1010; *Crawford v. Seattle, Renton & Southern Ry.*, 86 Wash. 628, L. R. A. 1916D, 732, 150 Pac. 1155.

See § 3598.

erned.<sup>15</sup> Remedies are fixed by the law of the forum, and the parties can not, by the contract, compel the court to give remedies other than those which are afforded by the system of jurisprudence which the court administers.<sup>16</sup> It would seem, therefore, that the parties could not change the rule that remedies are to be determined by the law of the forum by adopting a system of foreign law.<sup>17</sup> It seems, however, that an express reference to a system of foreign law, which is not common law, and in which there is no separate administration of equity, may prevent a court of equity powers from granting the remedy of specific performance.<sup>18</sup> This may, however, be merely an application of the principle that equity will not decree specific performance of a contract for the sale of land in another jurisdiction, if the law of such jurisdiction does not recognize specific performance and if there is no available way of forcing its decree by compelling the vendor to execute and deliver a deed.<sup>19</sup> The rule that the parties may select the law by which the contract shall be governed seems, therefore, to be proper as to matters which the parties might have altered by the terms of their agreement; improper as to matters which the parties could not have altered by the terms of their agreement; and ridiculous when applied to the remedies which the court will grant.

**§ 3572. Vacillation in judicial opinion—United States supreme court rule.** The same court has changed the general form of expression of this rule repeatedly. Thus the supreme court of the United States has said that the law controlling a contract is the law of the place where it is made;<sup>1</sup> that it is the law of the place of performance;<sup>2</sup> that it is the law which the parties contemplate;<sup>3</sup> that the law of the place of performance of the contract

<sup>15</sup> *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589.

<sup>16</sup> See § 726.

<sup>17</sup> See §§ 3617 et seq.

<sup>18</sup> *Fidelity Loan Securities Co. v. Moore*, 280 Mo. 315, 217 S. W. 286.

<sup>19</sup> See § 3618.

<sup>1</sup> *Cox v. United States*, 31 U. S. (6 Pet.) 172, 8 L. ed. 359; *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181; *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234, 38 L. R.

A. (N.S.) 57, 56 L. ed. 419; *Sandberg v. McDonald*, 248 U. S. 185, 63 L. ed. 200; *Neilson v. Rhine Shipping Co.*, 248 U. S. 205, 63 L. ed. 208.

<sup>2</sup> *Bank of United States v. Daniel*, U. S. (12 Pet.) 32, 9 L. ed. 618; *Andrews v. Pond*, 38 U. S. (13 Pet.) 65, 10 L. ed. 61; *Hall v. Cordell*, 142 U. S. 116, 35 L. ed. 956.

<sup>3</sup> *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104.

regulates matters connected with its performance; while matters bearing upon the execution, interpretation and validity of the contract are determined by the law of the place where it is made;<sup>4</sup> and this view has in turn been qualified and the law of the place of performance has been held to govern as to validity<sup>5</sup> or construction.<sup>6</sup> Almost any of the states of the Union, to say nothing of the English courts, will furnish examples of the successive use of various inconsistent theories.<sup>7</sup> The truth is that the attempt to express the principles involved in a discussion of this subject in the form of a broad, sweeping generalization is an attempt to reconcile a mass of irreconcilable authority. It can not be done except by the arbitrary process of ignoring most of the cases which have been decided, and selecting arbitrarily that limited line which will support the desired general statement. To state the law fairly and accurately requires a much greater detail of statement than any of the rules thus far suggested involve. The different elements in the formation of a contract, offer and acceptance, consideration, subject-matter, and capacity of the parties, must be considered first, then the separate topics under operation, construction and discharge.

**§ 3573. What constitutes place of making contract—General principles.** In the absence of evidence, it will not be presumed that the given contract was made or to be performed in another jurisdiction; and if it is sought to subject a given contract to the operation of some system of foreign law, the facts which bring such contracts within the operation of such system must be proved.<sup>1</sup>

In determining what system of law controls, it may become necessary to determine in what jurisdiction a contract is entered into. If the contract is an oral one, made by the parties at a personal interview, in person, no difficulty is found ordinarily, as soon as the facts are established, in determining as a matter of law where the contract was made. Difficulties might arise in cases in which an oral contract was made between parties who stood on different sides of a state or national boundary line. In analogy to

<sup>4</sup> *Scudder v. Bank*, 91 U. S. 406, 23 L. ed. 245.

<sup>5</sup> *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 45 L. ed. 834.

<sup>6</sup> *London Assurance v. Companhia de Moagens*, 167 U. S. 149, 42 L. ed. 113.

<sup>7</sup> See §§ 3582 et seq.

<sup>1</sup> *Hare v. Young*, 26 Ida. 682, 146 Pac. 104.

the rule which governs contracts made by telephone, it would seem that the law of the place where the offeree stood when he accepted the offer would control. If an oral contract is made over the telephone, it is made at the place where the offeree is when he accepts such offer.<sup>2</sup> The propriety of this rule is clear enough if the offeror knows where the offeree is when the contract is accepted; or if he does not know where the offeree is, and carries on the conversation over the telephone without attempting to ascertain that fact. It is possible that a different question might be presented if the offeror were misinformed as to the location of the offeree, especially if the offeree were guilty of fraud in making such representation. There is so little authority on this question, however, that the courts have not been called upon to determine the materiality of the belief of the offeror in cases of this sort.

If the contract in writing is executed by the parties in person,<sup>\*</sup> is not intended to take effect until it is delivered, and if it is delivered at a personal interview between the parties, no difficulty exists in determining, as a question of law, where the contract was made; and it is held that it is made at the place at which it is delivered.<sup>3</sup> The fact that preliminary negotiations were conducted elsewhere, does not alter the rule as to the place at which the contract is made, if the parties intended that the contract should not take effect until it was reduced to writing and delivered.<sup>4</sup> Difficulties might arise in cases in which the parties stood on different sides of a state or national boundary line when the contract was delivered; but difficulties of this sort have not yet been presented for adjudication.

<sup>2</sup> *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629.

For an application of the same principle in a case involving venue and not conflict of laws, see *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 65 L. R. A. 90, 74 Pac. 855.

For an application of this principle in criminal law, see *State v. Davis*, 62 W. Va. 500, 14 L. R. A. (N.S.) 1142, 60 S. E. 584.

<sup>3</sup> *England*. *Baring v. Inland Revenue Commissioners* [1898], 1 Q. B. 78.

*United States*. *Equitable Life Assurance Society v. Clements*, 140 U. S. 226, 35 L. ed. 497.

*California*. *Navajo County Bank v.*

*Dolson*, 163 Cal. 485, 41 L. R. A. (N.S.) 787, 126 Pac. 153.

*Georgia*. *First Nat. Bank v. Rambo*, 143 Ga. 665, 85 S. E. 840.

*Illinois*. *Walker v. Lovitt*, 250 Ill. 543, 95 N. E. 631; *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.

*New Jersey*. *Knoup v. Carver*, 74 N. J. Eq. 449, 70 Atl. 660.

*Washington*. *Gerrick & Gerrick Co. v. Llewellyn Iron Works*, 105 Wash. 98, 177 Pac. 692.

<sup>4</sup> *First Nat. Bank v. Rambo*, 143 Ga. 665, 85 S. E. 840; *Knoup v. Carver*, 74 N. J. Eq. 449, 70 Atl. 660; *Gerrick & Gerrick Co. v. Llewellyn Iron Works*, 105 Wash. 98, 177 Pac. 692.

The difficulties presented by this branch of the subject are generally found in one of two classes of cases: (1) where the parties are in different jurisdictions and enter into the contract by correspondence; and (2) where one party to the contract deals with the agent of the adversary party, and the latter party is in another jurisdiction. In many cases both these facts exist in combination. The general rule is the place where the last act is done which is necessary to give the contract validity, is the place of the execution of the contract.<sup>5</sup> If an offer is to be accepted by doing an act, the contract is made at the place at which such act is done, in accordance with the terms of the offer.<sup>6</sup> Accordingly, both at private law and criminal law, an order for the sale of intoxicating liquor which is to be accepted by forwarding such liquor, as by common carrier, is made where the offer is accepted by sending such liquor.<sup>7</sup>

**United States.** *Burton v. United States*, 196 U. S. 283, 49 L. ed. 482 (criminal case); *Supreme Lodge Knights of Pythias v. Meyer*, 198 U. S. 508, 49 L. ed. 1146; *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057 (criminal case); *Northwestern Mutual Life Insurance Co. v. McCue*, 223 U. S. 234, 38 L. R. A. (N.S.) 57, 56 L. ed. 419; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357, 62 L. ed. 772; *Clark v. Belt*, 223 Fed. 573, 138 C. C. A. 1.

**California.** *Ivey v. Kern County Land Co.*, 115 Cal. 196, 46 Pac. 926.

**Florida.** *Peters v. Painter Fertilizer Co.*, 73 Fla. 1001, 75 So. 749.

**Iowa.** *Tuttle v. Iowa State Traveling Men's Association*, 132 Ia. 652, 7 L. R. A. (N.S.) 223, 104 N. W. 1131.

**Louisiana.** *Grevenig v. Washington Life Ins. Co.*, 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790.

**Massachusetts.** *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214; *Davis v. New York Life Insurance Co.*, 212 Mass. 310, 41 L. R. A. (N.S.) 250, 98 N. E. 1043.

**Michigan.** *Dolan v. Supreme Council of Catholic Mutual Benefit Association*, 152 Mich. 266, 13 L. R. A. (N.S.) 424, 113 N. W. 10.

**Minnesota.** *Kolliner v. Western Union Telegraph Co.*, 126 Minn. 122, 52 L. R. A. (N.S.) 122, 147 N. W. 961.

**Missouri.** *Peak v. International Harvester Co.*, 194 Mo. App. 128, 186 S. W. 574.

**Nebraska.** *McElroy v. Metropolitan Life Insurance Co.*, 84 Neb. 866, 23 L. R. A. (N.S.) 968, 122 N. W. 27.

**New York.** *New York Architectural Terra Cotta Co. v. Williams*, 184 N. Y. 579, 77 N. E. 1192; *Klotz v. Angle*, 220 N. Y. 347, 116 N. E. 24.

**South Carolina.** *Monumental Brewing Co. v. Whitlock*, 111 S. Car. 196, 97 S. E. 56.

**Utah.** *Lawson v. Tripp*, 34 Utah 28, 95 Pac. 520.

**Wisconsin.** *In re Estate of Breitung*, 78 Wis. 33, 46 N. W. 891; *Seamans v. Knapp-Stout & Co.*, 89 Wis. 171, 61 N. W. 757.

<sup>5</sup> *Hill v. Chase*, 143 Mass. 129; *Mack v. Lee*, 13 R. I. 293; *Monumental Brewing Co. v. Whitlock*, 111 S. Car. 196, 97 S. E. 56.

<sup>7</sup> *United States. Jones v. United States*, 170 Fed. 1, 24 L. R. A. (N.S.) 143, 95 C. C. A. 213.

**§ 3574. Contract made by agent.** If the contract is made through an agent, and the principal is in another jurisdiction, the question where the contract is made depends upon the authority of the agent, and the manner in which he attempts to bind his principal. If he has authority to bind his principal, and he does so as a finality, the place where he enters into the contract is the place where the contract is made,<sup>1</sup> even if the principal approves such contract thereafter.<sup>2</sup> If, on the other hand, the agent merely transmits orders to his principal which are in effect offers, and the principal accepts them in another state, the contract is considered as made where the principal accepts the offer.<sup>3</sup> If A signs a contract and delivers it to B's agent C, who sends it to B in another place, and B signs it and returns it to C, who delivers it to A, the place where C delivers it to A is the place where such contract

**Arkansas.** *Harper v. State*, 91 Ark. 422, 25 L. R. A. (N.S.) 669, 121 S. W. 737.

**Indiana.** *Merrill v. State*, 175 Ind. 139, 44 L. R. A. (N.S.) 439, 93 N. E. 857.

**Kentucky.** *Fisher v. Commonwealth*, 147 Ky. 821, 44 L. R. A. (N.S.) 435, 145 S. W. 737.

**Michigan.** *People v. C. Kern Brewing Co.*, 166 Mich. 292, 44 L. R. A. (N. S.) 447, 131 N. W. 557.

**New Hampshire.** *State v. Leary*, 75 N. H. 459, 44 L. R. A. (N.S.) 457, 76 Atl. 102.

**Ohio.** *State v. Mullin*, 78 O. S. 358, 18 L. R. A. (N.S.) 609, 85 N. E. 556.

**South Carolina.** *Monumental Brewing Co. v. Whitlock*, 111 S. Car. 196, 97 S. E. 56.

**Texas.** *Keller v. State* (Tex. Crim. Rep.), 1 L. R. A. (N.S.) 489, 87 S. W. 669; *Golightly v. State*, 49 Tex. Crim. Rep. 44, 2 L. R. A. (N.S.) 383, 90 S. W. 26.

**West Virginia.** *State v. Davis*, 62 W. Va. 500, 14 L. R. A. (N.S.) 1142, 60 S. E. 584.

<sup>1</sup> **Iowa.** *Taylor v. Pickett*, 52 Ia. 467, 3 N. W. 514; *Jarl v. Pritchett*, — Ia. —, 179 N. W. 945.

**Louisiana.** *Erman v. Lehman*, 47 La. Ann. 1651, 18 So. 650.

**Michigan.** *Ericason Mfg. Co. v. Caille Bros. Co.*, 195 Mich. 545, 162 N. W. 81.

**New York.** *Klotz v. Angle*, 220 N. Y. 347, 116 N. E. 24.

**Oklahoma.** *Lonsdale Grain Co. v. Johnston*, 78 Okla. 174, 189 Pac. 359.

**Wisconsin.** *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 29 L. R. A. (N.S.) 92, 120 N. W. 408.

<sup>2</sup> *Lonsdale Grain Co. v. Johnston*, 78 Okla. 174, 189 Pac. 359.

<sup>3</sup> **United States.** *Supreme Lodge of Knights of Pythias v. Meyer*, 198 U. S. 508, 49 L. ed. 1146.

**Connecticut.** *Loveland v. Dinnan*, 81 Conn. 111, 17 L. R. A. (N.S.) 1119, 70 Atl. 634.

**Iowa.** *Engs v. Priest*, 65 Ia. 232, 21 N. W. 580; *Sachs v. Garner*, 111 Ia. 424, 82 N. W. 1007; *Brown v. Wieland*, 116 Ia. 711, 61 L. R. A. 417, 89 N. W. 17.

**Michigan.** *Douglass v. Paine*, 141 Mich. 485, 104 N. W. 781 (without regard to place of payment of consideration).

**Rhode Island.** *Mack v. Lee*, 13 R. I. 293.

**Wisconsin.** *Seamans v. Knapp-Stout & Co.*, 89 Wis. 171, 61 N. W. 757.

is made.<sup>4</sup> This is true even if the adversary party does not know of the limitation on the agent's authority, as long as he is not actively misled.<sup>5</sup> Even if the agent has authority to make a binding contract, but in fact holds the order and has the party who gives the order transmit it directly to his principal in another state, and it is accepted there, it is in legal effect made in such other state.<sup>6</sup> If the application for a loan is sent to the lender's domicile and there accepted, the law of such state controls as to usury.<sup>7</sup> If a note is delivered by the maker to the payee's agent, in one jurisdiction, and it is transmitted by such agent to the payee who is domiciled in another jurisdiction, the note is made where it is delivered to such agent.<sup>8</sup>

It has been held that a contract which an agent attempts to make in one jurisdiction, in excess of his authority, and which is ratified by his principal in another jurisdiction, is made in such latter jurisdiction,<sup>9</sup> on the theory that a contract of this sort is analogous to an offer,<sup>10</sup> and that, as in case of an acceptance of an offer, the contract is not made until the last act is done which is necessary to give it effect.<sup>11</sup>

<sup>4</sup> **United States.** *Northwestern Mutual Life Insurance Co. v. McCue*, 223 U. S. 234, 38 L. R. A. (N.S.) 57, 56 L. ed. 419.

**California.** *Ivey v. Kern County Land Co.*, 115 Cal. 106, 46 Pac. 926.

**Illinois.** *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.

**Louisiana.** *Grevenig v. Washington Life Ins. Co.*, 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790.

**Wisconsin.** *In re Estate of Breitung*, 78 Wis. 33, 46 N. W. 891.

<sup>5</sup> *Sachs v. Garner*, 111 Ia. 424, 82 N. W. 1007.

<sup>6</sup> *Bacon v. Hunt*, 72 Vt. 98, 47 Atl. 394.

<sup>7</sup> Even if the land mortgaged to secure such debt is in the state of the borrower's domicile and suit is there brought. *United States Savings & Loan Co. v. Beckley*, 137 Ala. 119, 97 Am. St. Rep. 19, 33 So. 934.

<sup>8</sup> *Jarl v. Pritchett*, — Ia. —, 179 N. W. 945.

<sup>9</sup> *Shuenfeldt v. Junkermann*, 20 Fed. 357; *Lawson v. Tripp*, 34 Utah 28, 95 Pac. 520 (ratification by mailed letter).

<sup>10</sup> *Lawson v. Tripp*, 34 Utah 28, 95 Pac. 520.

<sup>11</sup> *Lawson v. Tripp*, 34 Utah 28, 95 Pac. 520.

"A contract is written in Utah and is signed on behalf of the vendor, who resides in South Dakota, by one who is wholly unauthorized to make or sign the contract. Until the vendor signed the instrument purporting to be a contract, or assented to it, there was no contract. Until then the minds of the vendee and vendor did not meet, and the writing was but a mere offer or proposal. It matters not where the writing was drafted, whether in Utah or elsewhere. The question is not where was the contract drafted or written, but where was it made. It is an elementary principle of the law of contracts that the place where the last act is done which is necessary to give validity to a contract is the place where the

In other cases it has been held that a contract of this sort is made at the place in which the agent made such contract in excess of his authority.<sup>12</sup> Little discussion of the reasons which lead to this result is to be found. It has been explained as though the original contract was valid, but conditioned on the ratification by the principal.<sup>13</sup> In a case in which money was borrowed by an agent of the borrower from a person other than that designated by the borrower when the authority of the agent was given, and the lender delivered to the agent, along with the money, a receipt which was to be signed and returned by the borrower, it was said that "the paper became operative as evidence of the contract when it was delivered to the plaintiff."<sup>14</sup> There is no other discussion of the place of making the contract. It would seem that acceptance by the borrower would have made a valid contract even if the borrower had refused to sign and return such receipt, although subject to the right of the lender to avoid the contract for such breach and to recover the loan at once.

The place at which a contract of this sort is made, depends upon its true nature. The act of the principal in electing to become bound by the contract is spoken of as ratification.<sup>15</sup> If this is a case of true ratification, and if the contract is binding on both parties when it is made, subject to the right of the principal, to avoid it, his election to be bound by it ends his right to avoid it; but it is not the source of the obligation. If this is the true nature of this kind of a transaction, the contract is made at the place in which the agent attempts to make it.

In some states, a contract of this sort is not binding upon either party until the principal ratifies it; and until this is done, the adversary party may disaffirm it.<sup>16</sup> If this is the true view of such a transaction, the ratification by the principal is the act which gives legal effect to the transaction, and accordingly such contract is made where the principal ratifies it. In other jurisdictions a

contract is made. In this case the last act necessary to make the writing in question a valid contract was done by R. B. Tripp in South Dakota when he assented to it. Had he withheld assent, there would not have been any valid contract between him and plaintiff's assignor." *Lawson v. Tripp*, 34 Utah 28, 95 Pac. 520.

<sup>12</sup> *In re Insurance Co.*, 22 Fed. 109; *Dord v. Bonnafée*, 6 La. Ann. 563; *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30 (ratification by mailed letter).

<sup>13</sup> *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30.

<sup>14</sup> *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30.

<sup>15</sup> See § 1764 et seq.

<sup>16</sup> See § 1769.

contract of this sort has no legal validity until it is assented to, both by the principal and by the adversary party; and even if the principal has elected to affirm it, the adversary party may avoid liability.<sup>17</sup> Where this theory is adopted, it would seem that the contract was made at the place at which the adversary party assented to the contract after the principal had ratified it.

**§ 3575. Contract by correspondence.** If an offer is made in such a way that it may be accepted by mail or telegram, the place at which the contract is made is the place at which the letter or telegram of acceptance is delivered for transmission.<sup>1</sup> The rule as to the place of the contract is thus analogous to the rule as to the time at which such contract is made.<sup>2</sup> The fact that the place at which the acceptance was transmitted was selected by mere accident,<sup>3</sup> as where it was sent from a convenient station by one who happened to be traveling through the state, does not alter the rule that the contract is made where the acceptance is delivered for transmission.<sup>4</sup> In criminal law, a contract is made where the acceptance is mailed.<sup>5</sup>

**§ 3576. What constitutes place of making—Specific illustrations.** Illustrations of this principle are often found in insurance contracts. If the parties to the insurance contract are in different jurisdictions the place where the last act is done which is necessary to give validity to the contract is the place where the contract is entered into.<sup>1</sup> If the policy is signed by the insurer in one state

<sup>17</sup> See § 1769.

<sup>1</sup> England. *Cowan v. O'Connor*, 20 Q. B. D. 640.

**United States.** *New York Life Insurance Co. v. Dodge*, 246 U. S. 357, 62 L. ed. 772.

**Maine.** *Emerson Co. v. Proctor*, 97 Me. 300, 54 Atl. 849.

**Minnesota.** *Kolliner v. Western Union Telegraph Co.*, 126 Minn. 122, 52 L. R. A. (N.S.) 122, 147 N. W. 961.

**Mississippi.** *Couret v. Connor*, 118 Miss. 508, 79 So. 230.

**Rhode Island.** *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632.

**Utah.** *Lawson v. Tripp*, 34 Utah 28, 95 Pac. 520.

For the effect of payment by mail, see § 2826.

<sup>2</sup> See §§ 199 et seq.

<sup>3</sup> *Kolliner v. Western Union Telegraph Co.*, 126 Minn. 122, 52 L. R. A. (N.S.) 122, 147 N. W. 961.

<sup>4</sup> *Kolliner v. Western Union Telegraph Co.*, 126 Minn. 122, 52 L. R. A. (N.S.) 122, 147 N. W. 961.

<sup>5</sup> *Burton v. United States*, 202 U. S. 344, 50 L. ed. 1057.

<sup>1</sup> **United States.** *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181; *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234, 38 L. R. A. (N.S.) 57, 56 L. ed. 419.

and the policy is delivered and the premium paid in another, the policy first takes effect in the latter state and the law of such latter state controls in the absence of a provision in the policy showing a contrary intent.<sup>2</sup> Under such circumstances the law of the domicile of the insurer where such policy was signed does not control as to forfeiture and lapse,<sup>3</sup> while the law of the state where such policy is delivered and the premium is paid, does control.<sup>4</sup> On the other hand, if the offer of the insured is accepted,<sup>5</sup> and the policy is mailed to the agent of the insurance company under unconditional orders to him to deliver it to the insured, the agent

**Iowa.** Tuttle v. Traveling Men's Association, 132 Ia. 652, 7 L. R. A. (N.S.) 223, 104 N. W. 1131.

**Kentucky.** Ford v. Ins. Co., 69 Ky. (6 Bush.) 133, 99 Am. Dec. 663.

**Louisiana.** Grevenig v. Washington Life Ins. Co., 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790.

**Massachusetts.** Davis v. New York Life Insurance Co., 212 Mass. 310, 41 L. R. A. (N.S.) 250, 98 N. E. 1043.

**Michigan.** Dolan v. Supreme Council of Catholic Mutual Benefit Association, 152 Mich. 266, 13 L. R. A. (N.S.) 424, 113 N. W. 10.

**Nebraska.** McElroy v. Metropolitan Life Insurance Co., 84 Neb. 866, 23 L. R. A. (N.S.) 968, 122 N. W. 27.

**West Virginia.** Galloway v. Standard Fire Ins. Co., 45 W. Va. 237, 31 S. E. 969.

**Wisconsin.** In re Estate of Breitung, 78 Wis. 33, 46 N. W. 891.

<sup>2</sup> **United States.** Equitable Life Assurance Society v. Clements, 140 U. S. 226, 35 L. ed. 497; Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, 45 L. ed. 181; Northwestern Mutual Life Insurance Co. v. McCue, 223 U. S. 234, 38 L. R. A. (N.S.) 57, 56 L. ed. 419; Albro v. Manhattan Life Ins. Co., 119 Fed. 629; Carrollton Furniture Co. v. American Credit Indemnity Co., 124 Fed. 25 [affirming on rehearing, 115 Fed. 77].

**Louisiana.** Grevenig v. Washington

Life Ins. Co., 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790.

**Massachusetts.** Reliance Mutual Ins. Co. v. Sawyer, 160 Mass. 413, 36 N. E. 59; Davis v. New York Life Insurance Co., 212 Mass. 310, 41 L. R. A. (N.S.) 250, 98 N. E. 1043.

**Michigan.** Dolan v. Supreme Council of Catholic Mutual Benefit Association, — Mich. —, 13 L. R. A. (N.S.) 424, 113 N. W. 10.

**Nebraska.** McElroy v. Metropolitan Life Insurance Co., 84 Neb. 866, 23 L. R. A. (N.S.) 968, 122 N. W. 27.

**New Hampshire.** Perry v. Dwelling-House Ins. Co., 67 N. H. 291, 68 Am. St. Rep. 668, 33 Atl. 731.

**Washington.** Wood v. Cascade Fire & Marine Ins. Co., 8 Wash. 427, 40 Am. St. Rep. 917, 36 Pac. 267.

<sup>3</sup> **Mutual Life Ins. Co. v. Cohen**, 179 U. S. 262, 45 L. ed. 181; **McElroy v. Metropolitan Life Insurance Co.**, 84 Neb. 866, 23 L. R. A. (N.S.) 968, 122 N. W. 27.

<sup>4</sup> **Equitable Life Assurance Society v. Clements**, 140 U. S. 226, 35 L. ed. 497; **McElroy v. Metropolitan Life Insurance Co.**, 84 Neb. 866, 23 L. R. A. (N.S.) 968, 122 N. W. 27.

<sup>5</sup> **Seamans v. Knapp-Stout & Co.**, 89 Wis. 171, 46 Am. St. Rep. 825, 27 L. R. A. 362, 61 N. W. 757; **Tuttle v. Iowa State Traveling Men's Association**, 132 Ia. 652, 7 L. R. A. (N.S.) 223, 104 N. W. 1131.

having no discretion,<sup>6</sup> or is mailed directly to the insured,<sup>7</sup> the place of the chief office of the insurer where such offer is thus accepted is the place where such contract is made. A specific provision that premiums were to be paid and losses adjusted at the domicile of the insurer is held to show the intention of the parties to make such domicile the place of performance and hence to make such law control.<sup>8</sup>

An application for a loan which is made in one jurisdiction and accepted in another, results in a contract which is made in the jurisdiction in which it is accepted.<sup>9</sup> If a note is executed in one jurisdiction and mailed to the payee in another jurisdiction, under circumstances which prevent it from taking effect until it is accepted by the payee,<sup>10</sup> or if such note is first delivered in another state,<sup>11</sup> or first negotiated in another state,<sup>12</sup> if accommodation paper,<sup>13</sup> such note is made at the jurisdiction to which it is sent.

<sup>6</sup> *Fidelity Mutual Life Association v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635.

<sup>7</sup> *Arkansas. State Mutual Fire Ins. Association v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 54 Am. St. Rep. 191, 29 L. R. A. 712, 31 S. W. 157.

*Iowa. Tuttle v. Iowa State Traveling Men's Association*, 132 Ia. 652, 7 L. R. A. (N.S.) 223, 104 N. W. 1131.

*Massachusetts. Commonwealth Mutual Fire Ins. Co. v. William Knabe Mfg. Co.*, 171 Mass. 265, 50 N. E. 516.

*New Hampshire. Davis v. Aetna Mutual Fire Ins. Co.*, 67 N. H. 218, 34 Atl. 464.

*New Jersey. Northampton Mutual Live Stock Insurance Co. v. Tuttle*, 40 N. J. L. 476.

*West Virginia. Galloway v. Standard Fire Ins. Co.*, 45 W. Va. 237, 31 S. E. 969.

<sup>8</sup> *Franklin Life Ins. Co. v. Galligan*, 71 Ark. 295, 73 S. W. 102; *Fidelity Mutual Life Association v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635.

<sup>9</sup> *New York Life Insurance Co. v. Dodge*, 246 U. S. 357, 62 L. ed. 772.

<sup>10</sup> *California. Navajo County Bank v. Dolson*, 163 Cal. 485, 41 L. R. A. (N.S.) 787, 126 Pac. 153 (money not advanced till acceptance).

*Maine. Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251.

*Massachusetts. Nashua Savings Bank v. Sayles*, 184 Mass. 520, 100 Am. St. Rep. 573, 69 N. E. 309; *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381, 67 L. R. A. 33, 72 N. E. 456; *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214 (renewal note).

*Nebraska. Hewitt v. Bank of Indian Territory*, 64 Neb. 463, 90 N. W. 250 [reversed on rehearing on another point, 64 Neb. 468, 92 N. W. 741].

*New York. Staples v. Nott*, 128 N. Y. 403, 28 N. E. 515 (renewal note).

<sup>11</sup> *Hart v. Wills*, 52 Ia. 56, 35 Am. Rep. 255, 2 N. W. 619; *Lawrence v. Bassett*, 87 Mass. (5 All.) 140; *First National Bank v. Mann*, 94 Tenn. 17, 27 L. R. A. 565, 27 S. W. 1015.

<sup>12</sup> See §§ 1185 et seq.

<sup>13</sup> *Thompson v. Taylor*, 66 N. J. L. 253, 88 Am. St. Rep. 485, 54 L. R. A. 585, 49 Atl. 544 [reversing, 65 N. J. L. 107, 46 Atl. 567].

In criminal law bribery is committed at the place at which the person who is bribed receives and cashes the check which constitutes such bribe.<sup>14</sup> If the circumstances are such that the note, or other negotiable instrument, takes effect as soon as it is deposited in the mails for transmission, it is mailed where it is thus deposited.<sup>15</sup>

A contract for the sale of intoxicating liquors is made where the order of the vendee is accepted as a finality,<sup>16</sup> even if a prior conditional arrangement to take effect when the vendee should make an order has been made elsewhere.<sup>17</sup>

**§ 3577. What constitutes place of performance.** In determining what system of law controls, it may become necessary to determine in what jurisdiction a contract is to be performed. If no place of performance is fixed by the contract it is said that there is a presumption that the contract is to be performed where entered into.<sup>1</sup> It is also said that, if both parties are domiciled in the same jurisdiction, it will be presumed that the contract is to be performed there.<sup>2</sup> In most of the cases in question, the parties are domiciled where the contract is made, and accordingly the same result is reached under either presumption. It is said that a loan which is made at the domicile of the debtor is presumptively payable there.<sup>3</sup>

<sup>14</sup> *Burton v. United States*, 106 U. S. 283, 49 L. ed. 482; *Benson v. Henkel*, 198 U. S. 1, 49 L. ed. 919.

<sup>15</sup> *Illinois. Burr v. Beckler*, 264 Ill. 230, L. R. A. 1916A, 1049, 106 N. E. 206.

*Indiana. Garrigue v. Kellar*, 164 Ind. 676, 108 Am. St. Rep. 324, 69 L. R. A. 870, 74 N. E. 523.

*Kentucky. Wm. Glenny Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711.

*Massachusetts. Shoe & Leather Nat'l Bank v. Wood*, 142 Mass. 563, 8 N. E. 753.

*New York. Wayne County Savings Bank v. Law*, 81 N. Y. 566, 37 Am. Rep. 533.

*Rhode Island. Barrett v. Dodge*, 16 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530.

<sup>16</sup> *Bacon v. Hunt*, 72 Vt. 98, 47 Atl. 394.

<sup>17</sup> *Fred Miller Brewing Co. v. De France*, 90 Ia. 395, 57 N. W. 959.

<sup>1</sup> *Kentucky. New Domain Oil & Gas Co. v. McKinney*, 188 Ky. 183, 221 S. W. 245.

*Maryland. New York Security & Trust Co. v. Davis*, 96 Md. 81, 53 Atl. 669.

See § 3566.

*Minnesota. Clement v. Willett*, 105 Minn. 267, 17 L. R. A. (N.S.) 1094, 117 N. W. 491.

*South Carolina. All v. British & American Mortgage Co.*, 104 S. Car. 239, 88 S. E. 529.

*Utah. Lawson v. Tripp*, 34 Utah 28, 95 Pac. 520.

<sup>2</sup> *Bliss v. Haighton*, 16 N. H. 90.

<sup>3</sup> *All v. British & American Mortgage Co.*, 104 S. Car. 239, 88 S. E. 529.

The nature of the subject-matter may rebut the foregoing presumptions, and it may show that the parties had a specific place in mind, which may be different from the place where the contract is made or the place where the parties are domiciled.<sup>4</sup> If the contract provides for the delivery of goods on the part of one who is a dealer therein, or a manufacturer thereof, such contract will be construed as providing for delivery at his place of business, in the absence of a provision in the contract showing a contrary intent.<sup>5</sup> A contract to do work with reference to realty will be construed as giving to the owner of the realty, the option to decide on what specific part of such realty such performance shall be had.<sup>6</sup> While the principles which control these cases would probably be extended to cases in which the question of the law which controls a contract is involved, the cases are not restricted to those in which the law controlling the contract is to be determined; but they are governed by the general rules of construction which are equally applicable to cases in which the contract is made and performed in one jurisdiction, by parties domiciled therein and in which the action is brought in the same jurisdiction.

If but one place of performance is fixed by the contract, and that is fixed absolutely and in good faith, that place is the place of performance.<sup>7</sup> If a contract of sale is made and to be performed in the same jurisdiction, the fact that the notes which were given for the consideration did not become binding obligations until they were accepted by the seller in another jurisdiction, does not alter the place of performance.<sup>8</sup> A contract by a carrier to deliver goods is said to be performed where such ultimate delivery is to take place.<sup>9</sup> A contract for the sale of goods is to be performed where title is to pass.<sup>10</sup>

However, if the real intention of the parties is to perform the contract in one place, and another place of performance is fixed in

<sup>4</sup> *Patterson v. Jones*, 13 Ark. 69, 56 Am. Dec. 296; *Mountjoy v. Adair*, 1 Ind. 254; *Trabue v. Kay*, 7 Ky. (4 Bibb) 226.

<sup>5</sup> *Patterson v. Jones*, 13 Ark. 69, 56 Am. Dec. 296; *Mountjoy v. Adair*, 1 Ind. 254.

<sup>6</sup> *Trabue v. Kay*, 7 Ky. (4 Bibb) 226 (contract to make brick and to build a house).

<sup>7</sup> *N. P. Sloan Co. v. Barham*, 138 Ark.

350, 211 S. W. 381; *American Malting Co. v. Southern Brewing Co.*, 194 Mass. 89, 80 N. E. 526.

<sup>8</sup> *American Malting Co. v. Southern Brewing Co.*, 194 Mass. 89, 80 N. E. 526.

<sup>9</sup> *Southern Express Co. v. Gibbs*, 155 Ala. 303, 18 L. R. A. (N.S.) 874, 46 So. 465.

<sup>10</sup> *N. P. Sloan Co. v. Barham*, 138 Ark. 350, 211 S. W. 381.

the contract in order to evade a rule of law of the former jurisdiction, the real intention of the parties determines what the place of performance is.<sup>11</sup> This principle is applied most frequently in contracts for usurious interest.<sup>12</sup> Even if the contract is in writing the real intention of the parties to perform an illegal act can be shown, although in contradiction of the written terms of the contract, and although the written contract is so drawn as to conceal such intent.<sup>13</sup> The use of oral evidence to contradict the terms of the written contract as to the place of performance does not, therefore, violate the parole evidence rule if the contract is drawn, contrary to the real agreement of the parties, for the purpose of concealing their illegal intention.

**§ 3578. What constitutes place of breach.** If a contract is broken by renunciation thereof, the place at which it is broken is the place at which such renunciation takes effect.<sup>1</sup> If a contract is renounced by telegraph or by cable, the place of breach is said to be the place at which such telegram or cablegram is delivered for transmission.<sup>2</sup>

If a contract is broken by non-performance, it is broken at the place at which such performance is to be made.<sup>3</sup> If performance is to take place in more than one jurisdiction, the contract is broken where the first vital breach takes place.<sup>4</sup> A contract to sell goods under a cost insurance and freight contract is broken by the failure to ship such goods, and not by failure to deliver them or to deliver shipping documents for them; and under an order which authorizes service out of the jurisdiction if the breach takes place within the jurisdiction, service can not be had out of the jurisdiction in which such goods and shipping documents were eventually to be delivered.<sup>5</sup>

**§ 3579. Judicial notice of foreign law.** Except as modified by local statute, the common law regards foreign laws as facts which must be pleaded and proved like other facts whenever it is sought

<sup>11</sup> *National Mutual Building & Loan Association v. Burch*, 124 Mich. 57, 83 Am. St. Rep. 311, 82 N. W. 837.

<sup>12</sup> *Shannon v. Georgia State Building & Loan Association*, 78 Miss. 955, 84 Am. St. Rep. 657, 57 L. R. A. 800, 30 So. 51; *Washington Investment Association v. Stanley*, 38 Or. 319, 84 Am. St. Rep. 793, 58 L. R. A. 816, 63 Pac.

489; *Building & Loan Association v. Griffin*, 90 Tex. 480, 39 S. W. 656.

<sup>13</sup> See § 2183.

<sup>1</sup> *Wester v. Casein Co. of America*, 206 N. Y. 506, 100 N. E. 488.

<sup>2</sup> *Wester v. Casein Co. of America*, 206 N. Y. 506, 100 N. E. 488.

<sup>3</sup> *Johnson v. Taylor* [1920], A. C. 144.

<sup>4</sup> *Johnson v. Taylor* [1920], A. C. 144.

<sup>5</sup> *Johnson v. Taylor* [1920], A. C. 144.

to assert rights which have arisen under them, since the common-law courts will not take judicial notice of the detailed rules of foreign law;<sup>1</sup> and without judicial notice of such detailed rules, rights which have arisen thereunder can not be enforced without proper averments in the pleading and proper evidence. This rule applies to the unwritten law of other states of the Union,<sup>2</sup> and it applies with still greater force to the written law of other states of the Union.<sup>3</sup> Still less will the courts take judicial notice of the unwritten law of foreign countries, even if the general principles of the common law are there in force,<sup>4</sup> and even less if the foreign country is one in which the common law is not in force.<sup>5</sup> A court will not take judicial notice of rules of foreign law which are

<sup>1</sup> **Alabama.** *Southern Express Co. v. Owens*, 146 Ala. 412, 8 L. R. A. (N.S.) 369, 41 So. 752.

**Kansas.** *U. S. Banking Co. v. Veale*, 84 Kan. 385, 37 L. R. A. (N.S.) 540, 114 Pac. 229 (Mexican law).

**Kentucky.** *Wettlaufer v. Baxter*, 137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741; *U. S. Cast Iron Pipe & Foundry Co. v. Henry Vogt Machine Co.*, 182 Ky. 473, 206 S. W. 806.

**Missouri.** *Coleman v. Lucksinger*, 224 Mo. 1, 26 L. R. A. (N.S.) 634, 123 S. W. 441 (Texas); *Fidelity Loan Securities Co. v. Moore*, 280 Mo. 315, 217 S. W. 286 (Texas law).

**Oklahoma.** *Western Union Telegraph Co. v. Crawford*, 29 Okla. 143, 35 L. R. A. (N.S.) 930, 116 Pac. 925.

<sup>2</sup> **Alabama.** *Southern Express Co. v. Owens*, 146 Ala. 412, 8 L. R. A. (N.S.) 369, 41 So. 752.

**Kentucky.** *U. S. Cast Iron Pipe Co. v. Henry Vogt Machine Co.*, 182 Ky. 473, 206 S. W. 806.

**Massachusetts.** *Kline v. Baker*, 99 Mass. 253.

**Ohio.** *Smith v. Bartram*, 11 O. S. 690.

**Vermont.** *Ward v. Morrison*, 25 Vt. 293.

**Wisconsin.** *Hamley v. Till*, 162 Wis. 533, 156 N. W. 968.

<sup>3</sup> **California.** *Norman v. Norman*, 121 Cal. 620, 42 L. R. A. 343, 54 Pac. 143.

**Massachusetts.** *Witters v. Globe Savings Bank*, 171 Mass. 425, 50 N. E. 932.

**Missouri.** *Southern Illinois & Missouri Bridge Co. v. Stone*, 174 Mo. 1, 63 L. R. A. 301, 73 S. W. 453.

**New York.** *Harris v. White*, 81 N. Y. 532.

**Ohio.** *Lewis v. Kentucky Bank*, 12 Ohio 132, 40 Am. Dec. 469.

**Oklahoma.** *Sewell v. Setterman*, — Okla. —, 175 Pac. 111.

**Vermont.** *Wellman v. Mead*, — Vt. —, 107 Atl. 396.

**Washington.** *Lagomarsino v. Pacific Alaska Navigation Co.*, 100 Wash. 105, 170 Pac. 368.

**Wisconsin.** *Osborn v. Blackburn*, 78 Wis. 209, 23 Am. St. Rep. 400, 10 L. R. A. 367, 47 N. W. 175.

<sup>4</sup> *Wickersham v. Johnaton*, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89 (England); *Gordon v. Knott*, 199 Mass. 173, 19 L. R. A. (N.S.) 762, 85 N. E. 184 (England); *Watson v. Walker*, 23 N. H. 471 (England).

<sup>5</sup> *Banco de Sonora v. Bankers' Mutual Casualty Co.*, 124 Ia. 576, 104 Am. St. Rep. 367, 100 N. W. 532; *U. S. Banking Co. v. Veale*, 84 Kan. 385, 37 L. R. A. (N.S.) 540, 114 Pac. 229 (Mexican law).

illustrated by decisions which are cited in the opinions of the court of the forum.<sup>6</sup>

The rules of law which are actually in force in the jurisdiction in which the transaction took place can not be regarded if such rules are pleaded as to a transaction of one sort, while the evidence shows a transaction of a different sort,<sup>7</sup> as where the negotiable instrument law is pleaded, and the evidence shows that the instrument on which the action is brought is non-negotiable.<sup>8</sup>

These rules, it may be added, do not apply to the courts of the United States, in which it is sought to enforce rights which have arisen under the laws of the various states of the Union, if the cases are tried in the courts of the United States; nor do they apply to the courts of the different states which deal with rights which are affected by federal law.

No attempt will be made here to discuss the extent to which foreign law may be proved by transcripts of official records, by official reports and session laws, and by the knowledge of experts.

It may be added that the practical operation of this rule does not seem to be satisfactory. The sight of a court which refuses to recognize as a fact the existence of judicial decisions, which it may quote in the same opinion, to establish or to illustrate principles of law, is not edifying, although it can be justified by strict logic. Only technical logic can justify the readiness with which reviewing courts reverse trial courts, for errors or omissions, in a charge to the jury on domestic law, while at the same time they require the trial court to leave questions of foreign law to the jury as questions of fact. The actual dissatisfaction with the operation of this rule is shown, in part, by legislation, in force in some states which permits or requires the courts to take judicial notice of foreign laws, and in part by the tendency of some of the courts to consider and apply the foreign law after its existence has once been established as a fact.<sup>9</sup>

### § 3580. Presumption as to foreign law—General principles.

In the absence of competent evidence, as to the detailed rules of the law of the jurisdiction whose law controls the contract, the

<sup>6</sup> *Gordon v. Knott*, 190 Mass. 173, 19 L. R. A. (N.S.) 762, 8 N. E. 184.

<sup>7</sup> *Wettlaufer v. Baxter*, 137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741.

<sup>8</sup> *Wettlaufer v. Baxter*, 137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741.

<sup>9</sup> *Fourth National Bank v. Bragg*, 127 Va. 47, 11 A. L. R. 1034, 102 S. E. 649.

question is presented as to whether there would be any presumption as to what this law is, and if so, what this law will be presumed to be; and, on some phases of this question, there is a decided conflict of authority, which is complicated by the fact that some courts will take judicial notice of the fact that the common law is in force in the jurisdiction in question,<sup>1</sup> or that it is not in force.<sup>2</sup>

It is said that it will be presumed that the law of the jurisdiction which controls the contract is the same as the law of the forum, in the absence of evidence to the contrary.<sup>3</sup> This presumption, if this is the proper term to use, applies to the common law of a sister state of the Union, in which the common law prevails.<sup>4</sup>

<sup>1</sup> *Vanderpool v. Gorman*, 140 N. Y. 563, 37 Am. St. Rep. 601, 35 N. E. 932.

<sup>2</sup> *United States. Cuba Railroad Co. v. Crosby*, 222 U. S. 473, 38 L. R. A. (N.S.) 40, 56 L. ed. 274 (Cuba).

*Alabama. Allen v. Caldwell*, 149 Ala. 293, 42 So. 855 (Louisiana).

*Iowa. Banco de Sonora v. Bankers' Mutual Casualty Co.*, 124 Ia. 576, 104 Am. St. Rep. 367, 100 N. W. 532 (Texas).

*Kansas. United States Banking Co. v. Veale*, 84 Kan. 385, 37 L. R. A. (N.S.) 540, 114 Pac. 229 (Mexico).

*Missouri. Fidelity Loan Securities Co. v. Moore*, 280 Mo. 315, 217 S. W. 286 (Texas).

*New York. Savage v. O'Neil*, 44 N. Y. 298 (Russia).

<sup>3</sup> *Alabama. Corinth Bank & Trust Co. v. King*, 182 Ala. 403, 62 So. 704.

*California. Bovard v. Dickinson*, 131 Cal. 162, 63 Pac. 162.

*Georgia. Thomas v. Clarkson*, 125 Ga. 72, 6 L. R. A. (N.S.) 658, 54 S. E. 77.

*Illinois. Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028.

*Kansas. Sykes v. Citizens' National Bank*, 78 Kan. 688, 19 L. R. A. (N.S.) 665, 98 Pac. 206.

*Massachusetts. Gordon v. Knott*, 199 Mass. 173, 19 L. R. A. (N.S.) 762, 85 N. E. 184; *Parrott v. Mexican Central*

*Ry.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590 (Mexican law); *Arnold v. North American Chemical Co.*, 232 Mass. 196, 122 N. E. 283.

*Minnesota. Beard v. Chicago, Milwaukee & St. Paul Ry.*, 134 Minn. 162, L. R. A. 1916F, 866, 158 N. W. 815.

*Missouri. Coleman v. Lucksinger*, 224 Mo. 1, 26 L. R. A. (N.S.) 934, 123 S. W. 441.

*New Hampshire. Stavrelis v. Zacharias*, — N. H. —, 106 Atl. 306.

*New York. Mount v. Tuttle*, 183 N. Y. 358, 2 L. R. A. (N.S.) 428, 76 N. E. 873 (as to charitable trusts).

*Oklahoma. Western Union Telegraph Co. v. Crawford*, 29 Okla. 143, 35 L. R. A. (N.S.) 930, 116 Pac. 925.

*Wisconsin. Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836.

<sup>4</sup> *Alabama. Corinth Bank & Trust Co. v. King*, 182 Ala. 403, 62 So. 704.

*Georgia. Thomas v. Clarkson*, 125 Ga. 72, 6 L. R. A. (N.S.) 658, 54 S. E. 77.

*Idaho. Maloney v. Winston Brothers Co.*, 18 Ida. 740, 47 L. R. A. (N.S.) 634, 111 Pac. 1080.

*Illinois. Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028.

*Kansas. Sykes v. Citizens' National Bank*, 78 Kan. 688, 19 L. R. A. (N.S.) 665, 98 Pac. 206.

*Kentucky. Wettlaufer v. Baxter*,

Whether the same presumption applies to a written law is a question upon which there is a conflict of authority. In some jurisdictions it is said that the written law of a sister state will be presumed to be the same as the statute law of the forum.<sup>5</sup> In other jurisdictions, it is said that it can not be presumed that the written law of a sister state is the same as the written law of the forum,<sup>6</sup> and that it will be presumed that the law of such state is the common law, which means, of course, the common law as the courts of the forum interpret it.<sup>7</sup>

137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741.

**Massachusetts.** *Cherry v. Sprague*, 187 Mass. 113, 105 Am. St. Rep. 381, 67 L. R. A. 33, 72 N. E. 456; *Cogliano v. Ferguson*, 228 Mass. 147, 117 N. E. 45; *Coleman v. Lucksinger*, 224 Mo. 1, 26 L. R. A. (N.S.) 934, 123 S. W. 441.

**New York.** *Southworth v. Morgan*, 205 N. Y. 203, 51 L. R. A. (N.S.) 56, 98 N. E. 400.

**Wisconsin.** *Elmergreen v. Weimer*, 138 Wis. 112, 119 N. W. 836.

<sup>5</sup> **California.** *Hobbs v. Tom Reed Mining Co.*, 164 Cal. 497, 43 L. R. A. (N.S.) 1112, 129 Pac. 781.

**Kansas.** *Perry v. Robertson*, 93 Kan. 703, 150 Pac. 223 (statute of limitations).

**Nebraska.** *Fisher v. Donovan*, 57 Neb. 361, 44 L. R. A. 383, 77 N. W. 778.

**Oklahoma.** *Wagner v. Minnie Harvester Co.*, 25 Okla. 558, 106 Pac. 969 (Anti-trust statute).

**Rhode Island.** *Taber v. Talcott*, 40 R. I. 338, 101 Atl. 2.

**Tennessee.** *North Memphis Savings Bank v. Union Bridge & Construction Co.*, 138 Tenn. 161, 196 S. W. 492.

**Utah.** *In re Campbell*, 53 Utah 487, 173 Pac. 688.

**Washington.** *Sheppard v. Coeur d'Alene Lumber Co.*, 62 Wash. 12, 44 L. R. A. (N.S.) 267, 112 Pac. 932.

**Wisconsin.** *Hamley v. Till*, 162 Wis. 533, 156 N. W. 988.

<sup>6</sup> **Kentucky.** *Wettlaufer v. Baxter*,

137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741.

**Maine.** *Holbrook v. Libby*, 113 Me. 389, L. R. A. 1916A, 1167, 94 Atl. 482.

**Maryland.** *National Bank v. Baltimore & Ohio Ry.*, 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134.

**Minnesota.** *Wilcox v. Bergman*, 96 Minn. 219, 5 L. R. A. (N.S.) 938, 104 N. W. 955; *Beard v. Chicago, Milwaukee & St. Paul Ry.*, 134 Minn. 162, L. R. A. 1916F, 866, 158 N. W. 815.

**New Jersey.** *Bodine v. Berg*, 82 N. J. L. 662, 40 L. R. A. (N.S.) 65, 82 Atl. 901.

**New York.** *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N.S.) 56, 98 N. E. 490.

**North Carolina.** *Gooch v. Faucett*, 122 N. Car. 270, 39 L. R. A. 835, 29 S. E. 362.

<sup>7</sup> **Alabama.** *Southern Express Co. v. Owens*, 146 Ala. 412, 8 L. R. A. (N.S.) 369, 41 So. 752.

**Georgia.** *Thomas v. Clarkson*, 125 Ga. 72, 6 L. R. A. (N.S.) 658, 54 S. E. 77.

**Kentucky.** *Wettlaufer v. Baxter*, 137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741.

**Maryland.** *National Bank v. Baltimore & Ohio Ry.*, 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134.

**Minnesota.** *Beard v. Chicago, Milwaukee & St. Paul Ry.*, 134 Minn. 162, L. R. A. 1916F, 866, 158 N. W. 815.

**New Jersey.** *Bodine v. Berg*, 82 N.

If the law which controls is that of a foreign nation, in which the common law is in force, it will be presumed that such common law is the same as the law of the forum.<sup>8</sup> The same presumption has been extended to written law.<sup>9</sup>

Whether it will be presumed that the law of a sister state or of a foreign country, in which the common law is not in force, is substantially the same as that of the law of the forum, if the common law is there in force, is a question upon which there is a conflict of authority. In some jurisdictions it is held that there can be no presumption in cases of this sort, that the foreign law is the same as the law of the forum.<sup>10</sup> This may result in refusing to recognize or to enforce the right, in the absence of pleading or proof of the foreign law.<sup>11</sup> In a common-law jurisdiction, it will not be presumed that specific performance can be granted if the contract is for the sale of land in a jurisdiction in which the civil law is in force.<sup>12</sup> A common-law court will not apply the common-law theory of the effect of ratification by a husband of his wife's contract, to which he did not assent.<sup>13</sup> In other jurisdictions it is said that it will be presumed that the law of a sister state or of a foreign country in which the common law is not in force, is nevertheless the same as the law of the forum.<sup>14</sup> While this last pre-

J. L. 662, 40 L. R. A. (N.S.) 65, 82 Atl. 901.

**New York.** *Casola v. Vasquez*, 164 N. Y. 608, 58 N. E. 53; *Mount v. Tuttle*, 183 N. Y. 358, 2 L. R. A. (N.S.) 428, 76 N. E. 873; *Southworth v. Morgan*, 205 N. Y. 203, 51 L. R. A. (N.S.) 56, 98 N. E. 490; *International Text Book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722.

**North Carolina.** *Terry v. Robbins*, 128 N. Car. 140, 83 Am. St. Rep. 663, 38 S. E. 470.

<sup>8</sup> *Gordon v. Knott*, 199 Mass. 173, 19 L. R. A. (N.S.) 762, 85 N. E. 184 (England).

<sup>9</sup> *Arnold v. North American Chemical Co.*, 232 Mass. 196, 122 N. E. 283 (England).

<sup>10</sup> *Cuba Railroad Co. v. Crosby*, 222 U. S. 473, 38 L. R. A. (N.S.) 40, 56 L. ed. 274 (Cuba); *Allen v. Caldwell*, 149 Ala. 293, 42 So. 855 (Louisiana); *Banco de Sonora v. Bankers' Mutual Casualty*

*Co.*, 124 Ia. 576, 104 Am. St. Rep. 367, 100 N. W. 532 (Mexico); *United States Banking Co. v. Veale*, 84 Kan. 385, 37 L. R. A. (N.S.) 540, 114 Pac. 229 (Mexico); *Fidelity Loan Securities Co. v. Moore*, 280 Mo. 315, 217 S. W. 286.

<sup>11</sup> *United States Banking Co. v. Veale*, 84 Kan. 385, 37 L. R. A. (N.S.) 540, 114 Pac. 229; *Fidelity Loan Securities Co. v. Moore*, 280 Mo. 315, 217 S. W. 286 (Texas).

<sup>12</sup> *Fidelity Loan Securities Co. v. Moore*, 280 Mo. 315, 217 S. W. 286 (Texas).

<sup>13</sup> *United States Banking Co. v. Veale*, 84 Kan. 385, 37 L. R. A. (N.S.) 540, 114 Pac. 229.

<sup>14</sup> *Allen v. Caldwell & Co.*, 149 Ala. 293, 42 So. 855 (Louisiana presumed to be the same as Alabama statute); *Mittenthal v. Mascagni*, 183 Mass. 19, 97 Am. St. Rep. 404, 60 L. R. A. 812, 66 N. E. 425 (Italian law); *Parrott v. Mexican Central Ry.*, 207 Mass. 184,

sumption has no basis in fact, the results which are reached by the use of such presumption in the absence of pleading and proof of the foreign law, are probably as accurate as would be reached if the court were to attempt to construct and to apply a system of law with which it was not familiar.

It has been suggested, occasionally, that the word "presumption" is not the proper term to use as an explanation of the fact that the court frequently applies the law of the forum in the absence of evidence as to the content of the rules of foreign law. In most cases the result which is reached can be explained on the theory that the court of the forum applies its own law in cases of this sort, without regard to the foreign law. The court of the forum will apply its own law although it can be shown from its own opinions as a matter of law that the rule of the foreign law is different from that of the forum.<sup>15</sup> In jurisdictions in which the court applies the law of the forum, to transactions which arose in a country in which the common law is not in force, it may be proper to say that the court is really applying the law of the forum without any presumption as to what the foreign law really is. In common-law jurisdictions in which the court applies the law of the forum, transactions which arise in other common-law countries, but in which it will not apply the law of the forum to transactions which arose in countries which are not governed by the common law, there is probably a real presumption as to the content of the foreign law.

Another theory that has been advanced is that if some positive provision of statute law, like usury, is involved, it will be presumed in the absence of proof that the law is such that the contract is valid.<sup>16</sup>

**§ 3581. Presumption as to foreign law—Specific applications.** The presumption that the law of the jurisdiction by which the transaction is controlled is the same as that of the law of the forum, has been applied to the notice necessary to hold an

34 L. R. A. (N.S.) 261, 93 N. E. 590 (Mexican law); *Arnold v. North American Chemical Co.*, 232 Mass. 196, 122 N. E. 283 (German law); *Coleman v. Lucksinger*, 224 Mo. 1, 26 L. R. A. (N. S.) 934, 123 S. W. 441 (Texas); *Stavrelis v. Zacharias*, — N. H. —, 106 Atl. 306

(Greek law as to rate of interest on judgment).

<sup>15</sup> *Gordon v. Knott*, 199 Mass. 173, 19 L. R. A. (N.S.) 762, 85 N. E. 184.

<sup>16</sup> *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736.

indorser,<sup>1</sup> or as to the rate of interest,<sup>2</sup> or as to the law which regulates patents,<sup>3</sup> or as to the validity of a promise on consideration,<sup>4</sup> or to statutes defining usury.<sup>5</sup> The presumption that the common law which is in force in the forum is identical with the law by which the contract is controlled, applies to the validity of contracts of infants,<sup>6</sup> or married women,<sup>7</sup> or as to the right to interest,<sup>8</sup> or as to the validity of a contract limiting the liability of a common carrier,<sup>9</sup> or as to the negotiability of a bill of lading,<sup>10</sup> or as to the rights of the parties under a non-negotiable instrument,<sup>11</sup> or as to the effect of alteration.<sup>12</sup>

#### B. FORMATION OF CONTRACT

**§ 3582. Offer and acceptance.** Questions of offer and acceptance rarely are involved in the conflict of laws. Possibly this is so because the laws of the different states are more in accord upon this subject than on most. Questions of the validity of a contract as far as concerns the form thereof and the method of making it, are controlled by the law of the place where the contract is made.<sup>1</sup> In jurisdictions in which the law of the place of performance con-

<sup>1</sup> *Second National Bank v. Smith*, 118 Wis. 18, 94 N. W. 664.

<sup>2</sup> *Stavrelis v. Zacharias*, — N. H. —, 106 Atl. 306.

<sup>3</sup> *Arnold v. North American Chemical Co.*, 232 Mass. 196, 122 N. E. 283 (law of England and Germany).

<sup>4</sup> *Parrott v. Mexican Central Ry.*, 207 Mass. 184, 34 L. R. A. (N.S.) 261, 93 N. E. 590 (Mexican law).

<sup>5</sup> *Mutual Building & Loan Association v. Worz*, 67 Kan. 506, 73 Pac. 116.

<sup>6</sup> *International Text Book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722.

<sup>7</sup> *Terry v. Robbins*, 128 N. Car. 140, 83 Am. St. Rep. 663, 38 S. E. 470.

<sup>8</sup> *Thomas v. Clarkson*, 125 Ga. 72, 6 L. R. A. (N.S.) 658, 54 S. E. 77.

<sup>9</sup> *Southern Express Co. v. Owens*, 146 Ala. 412, 8 L. R. A. (N.S.) 369, 41 So. 752.

<sup>10</sup> *National Bank v. Baltimore & Ohio Ry.*, 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134.

<sup>11</sup> *Wettlaufer v. Baxter*, 137 Ky. 362, 26 L. R. A. (N.S.) 804, 125 S. W. 741.

<sup>12</sup> *Bodine v. Berg*, 82 N. J. L. 662, 49 L. R. A. (N.S.) 65, 82 Atl. 901.

<sup>1</sup> *United States. Scudder v. Union National Bank*, 91 U. S. 406, 23 L. ed. 245; *Pritchard v. Norton*, 106 U. S. 124; 27 L. ed. 104.

**Massachusetts.** *Vrancx v. Ross*, 98 Mass. 591.

**Michigan.** *Millar v. Hilton*, 189 Mich. 635, 155 N. W. 574.

**New York.** *Reilly v. Steinhart*, 217 N. Y. 549, 112 N. E. 468.

**Oklahoma.** *Clark v. First Nat. Bank* (Okla.), 157 Pac. 96.

**Tennessee.** *Galt v. Dibrell*, 16 Tenn. (10 Yerg.) 146.

Whether the statute of frauds is to be regarded as affecting the formation of the contract, its form, or the evidence by which it is to be proved, is considered elsewhere.

See § 3587.

trols, it is said to control the nature of the contract which is entered into by an irregular indorsement.<sup>2</sup> Whether an implied contract exists on the part of a corporation to pay its officers is determined by the law of the place where the services are to be rendered.<sup>3</sup>

The only serious difficulties which can arise in this connection involve a question of what is to be regarded as a part of the offer, and of what is to be regarded as acceptance. A rule of law,<sup>4</sup> or an administrative rule,<sup>5</sup> is not regarded as a part of the offer, although such rule might override the express terms of the contract; and accordingly such provision is not treated as a part of the contract as to rights which arise, or as to actions which are brought, in a different jurisdiction. A rule of law which fixes the property rights of husband and wife who marry without an express contract, adjusting the property rights, is not an implied term of the contract of marriage, and it will not be given effect as to property acquired after they have removed the domicile to some other jurisdiction.<sup>6</sup> Whether the act of the offeree in accepting a written contract, such as a bill of lading, amounts to an assent thereto, is a question upon which there is an apparent conflict of authority, which is possibly due to the different views which the courts entertain as to the effect of such acceptance. If the acceptance of the bill of lading is regarded by the court of the forum as in itself the assent to the offer, the law of the place of making controls, since this involves the contract itself;<sup>7</sup> while if the acceptance is to be treated as evidence, from which presumption of acceptance is drawn, the law of the forum controls, since this is a matter of evidence.<sup>8</sup>

<sup>2</sup> *Montana Coal & Coke Co. v. Cincinnati Coal & Coke Co.*, 69 O. S. 351, 69 N. E. 613.

<sup>3</sup> *Crumlish v. Central Improvement Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456.

<sup>4</sup> *In re Majot*, 199 N. Y. 29, 29 L. R. A. (N.S.) 780, 92 N. E. 402.

<sup>5</sup> *Hasbrouck v. New York Central & Hudson River Ry.*, 202 N. Y. 363, 35 L. R. A. (N.S.) 537, 95 N. E. 808 (rule of public service commission fixing amount of liability for loss of baggage: not intended to apply to loss outside of state).

<sup>6</sup> *Saul v. His Creditors*, 5 Mart. (N.S.) (La.) 569; *In re Majot*, 199 N. Y. 29, 29 L. R. A. (N.S.) 780, 92 N. E. 402.

Contra, *De Nichols v. Curlier* [1900], App. Cas. 21 (as to personalty); *De Nichols v. Curlier* [1900], 2 Ch. 410 (realty).

<sup>7</sup> *Hartmann v. Louisville & Nashville Ry.*, 39 Mo. App. 88 (the contract was made in Illinois; and that law was held to apply. Additional evidence of assent was therefore necessary).

<sup>8</sup> *Hoadly v. Northern Transportation Co.*, 115 Mass. 304, 15 Am. Rep. 106 (the contract was made in Illinois).

**§ 3583. Fraud and misrepresentation.** Whether misrepresentation which does not amount to fraud avoids a contract, is to be determined by the law of the place at which the contract was made,<sup>1</sup> at least if the contract was made and is to be performed in one jurisdiction, and the action is brought in another.<sup>2</sup> Questions of fraud are said to be governed by the law of the place of making the contract.<sup>3</sup> If the law of the place of performance is held to govern the contract, it is said that the question whether the statements made in an application are such that their falsity gives to the insurance company the right to avoid the contract and refund the premiums is determined by the law of the place where the premiums are payable and adjustment is to be made.<sup>4</sup> If there is an express provision to the effect that the law of the domicile of the promisor is to control, such law will govern as to fraud.<sup>5</sup> Questions of constructive fraud are determined by the law of the place where made and to be performed, and not by the law of the forum.<sup>6</sup> Officers of a railroad made a contract in New York to share profits arising from the construction of a local road. The contract was valid at New York law. Subsequently the railroad was consolidated with a Pennsylvania railroad and suit was brought in Pennsylvania. It was held that New York law controlled.<sup>7</sup>

**§ 3584. Consideration.** If a contract is made in a jurisdiction in which consideration is not necessary, the law of that jurisdiction seems to control as to the validity of the obligation.<sup>1</sup> The law of the forum will not prevent the obligation from being enforceable, although such law requires a consideration, and the promise was made without consideration in a jurisdiction in which consideration is not necessary.<sup>2</sup> On the other hand, the necessity of con-

The law of Massachusetts, which permitted an inference of assent from the mere receipt of the bill of lading was held to control as to such inference).

<sup>1</sup> *McKnelly v. Brotherhood of American Yeoman*, 160 Wis. 514, 152 N. W. 169.

<sup>2</sup> *McKnelly v. Brotherhood of American Yeoman*, 160 Wis. 514, 152 N. W. 169.

<sup>3</sup> *Royal Union Mutual Life Ins. Co. v. Wynn*, 177 Fed. 289.

<sup>4</sup> *Fidelity Mutual Life Association v.*

*Harris*, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635.

<sup>5</sup> *Grand Fraternity v. Keatley*, 27 Del. (4 Boyce) 308, 88 Atl. 553.

<sup>6</sup> *Rumsey v. New York & Pennsylvania Ry.*, 203 Pa. St. 579, 53 Atl. 495.

<sup>7</sup> *Rumsey v. New York & Pennsylvania Ry.*, 203 Pa. St. 579, 53 Atl. 495.

<sup>1</sup> *Ringgold v. Newkirk*, 3 Ark. 96 (place of performance not specified; probably presumed to be in Louisiana where contract made).

<sup>2</sup> *Ringgold v. Newkirk*, 3 Ark. 96.

sideration has been said to be governed by the law of the place at which the contract is to be performed.<sup>3</sup>

The validity of the consideration is said to be governed by the law of the place where the promise is to be performed;<sup>4</sup> but this result was reached in a jurisdiction which assumes to pay attention to the intention of the parties, but which is very likely to find that the intention is to be governed by the law of the place of performance, if that is the forum. Questions of this sort really involve the validity of the subject-matter, and they are discussed elsewhere.<sup>5</sup>

**§ 3585. Form of contract not relating to realty.** The form in which a contract must be executed in order to be valid is controlled by the law of the place where it is made if the contract does not relate to realty.<sup>1</sup> The validity of a seal as affecting the obligation is determined by the law of the place where the contract is made.<sup>2</sup> A statute requiring every insurance policy which refers to the application to have a correct copy thereof annexed, is held not to apply to policies issued by insurance companies in other states on the lives of persons domiciled in the state in which such statute is in force.<sup>3</sup> Stamp acts are generally so worded as to affect merely the admissibility in evidence of instruments which do not conform to such statute.<sup>4</sup> Where this view is taken a contract which does not comply with the stamp acts of the place where made, may be enforced in another jurisdiction.<sup>5</sup> If, how-

<sup>3</sup> *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104 (bond given in New York without consideration, and subject to inquiry as to consideration in spite of seal: payable in Louisiana where consideration not necessary; action in Louisiana).

<sup>4</sup> *Moulis v. Owen* [1907], 1 K. B. 746.  
<sup>5</sup> See §§ 3588 et seq.

<sup>1</sup> *Illinois*. *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.  
*Louisiana*. *Tickner v. Roberts*, 11 La. 14, 30 Am. Dec. 706.

*Massachusetts*. *Vranex v. Ross*, 98 Mass. 591.

*New Jersey*. *Roubicek v. Haddad*, 67 N. J. L. 522, 51 Atl. 938.

*Tennessee*. *Galt v. Dibrell*, 16 Tenn. (10 Yerg.) 146; *Pritchard v. Norton*,

106 U. S. 124, 27 L. ed. 104 (obiter).

<sup>2</sup> *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.

<sup>3</sup> *Johnson v. Mutual Life Ins. Co.*, 180 Mass. 407, 63 L. R. A. 833, 62 N. E. 733.

So a provision as to forfeiture does not apply to a policy issued by a foreign corporation. *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181.

So a statute which requires contracts for conditional sales to be recorded is held not to apply to contracts of non-residents concerning property without the state. *Hirsch v. C. W. Leatherbee Lumber Co.*, 69 N. J. L. 509, 55 Atl. 645.

<sup>4</sup> See § 1182.

<sup>5</sup> *Fant v. Miller*, 58 Va. (17 Gratt.) 47.

ever, the stamp act affects the form of the contract, and makes a contract in violation of the statute invalid and not merely inadmissible in evidence, the contract is unenforceable in other jurisdictions.<sup>6</sup> The necessity of affixing a stamp has been held to be governed by the law of the place of performance.<sup>7</sup> In some jurisdictions the law of the forum is applied if the stamp act of the jurisdiction in which the contract was made is a revenue law, on the theory that a state will not enforce the revenue laws of other states.<sup>8</sup>

While many of the cases which are cited in support of the principle that the law of the place of making the contract controls as to form and execution, are cases involving the Statute of Frauds, this subject will be treated separately,<sup>9</sup> since some courts regard the statute as dealing with the execution of the contract, and other courts regard it as merely a rule of evidence.

**§ 3586. Form of contract relating to realty.** The form of a contract which relates to realty is controlled by the law of the place where the realty is situated.<sup>1</sup> This is in analogy to the principle that the validity of conveyances of realty,<sup>2</sup> such as deeds<sup>3</sup> and mortgages,<sup>4</sup> is determined by the law of the place where the land is situated. The form and validity of a power of attorney to

<sup>6</sup> *Alves v. Hodgson*, 7 T. R. 241; *Sattherthwaite v. Doughty*, 44 N. Car. (Bush) 314, 59 Am. Dec. 544; *Clegg v. Levy*, 3 Camp. 166 (obiter: as foreign law was not proved).

<sup>7</sup> *Valery v. Scott*, 3 Ct. of Sessions Cases (4th Series) 965 (this was also the place in which the parties were domiciled, and the forum).

<sup>8</sup> *Wynne v. Jackson*, 2 Russ. 351; *Ludlow v. Van Rennselaer*, 1 Johns. (N. Y.) 94.

<sup>9</sup> See § 3587.

<sup>1</sup> *United States. Thomas J. Baird Investment Co. v. Harris*, 209 Fed. 291, 126 C. C. A. 217.

*Colorado. Wolf v. Burke*, 18 Colo. 264, 10 L. R. A. 702, 32 Pac. 427.

*Illinois. Dalton v. Taliaferro*, 101 Ill. App. 592.

*Iowa. Meylink v. Rhea*, 123 Ia. 310, 98 N. W. 779.

*Kentucky. New Domain Oil & Gas*

*Co. v. McKinney*, 188 Ky. 183, 221 S. W. 245.

*South Dakota. Bowdle v. Jencks*, 18 S. D. 80, 99 N. W. 98; *Dal v. Fischer*, 20 S. D. 426, 107 N. W. 534; *Brown v. Wm. Pearson Co.*, 169 Ia. 50, 150 N. W. 1057 (obiter).

<sup>2</sup> *Post v. First Nat'l Bank*, 138 Ill. 550, 28 N. E. 978; *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303; *Richardson v. De Giverville*, 107 Mo. 422, 28 Am. St. Rep. 426, 17 S. W. 974; *Sell v. Miller*, 11 O. S. 331.

<sup>3</sup> *Clark v. Graham*, 19 U. S. (6 Wheat.) 577, 5 L. ed. 334; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918; *Watson v. Holden*, 58 Kan. 657, 50 Pac. 883.

<sup>4</sup> *Manton v. Seiberling*, 107 Ia. 534, 78 N. W. 194; *People's Building, Loan & Savings Association v. Parish*, 1 Neb. (Unofficial) 505, 96 N. W. 243; *Baum v. Birchall*, 150 Pa. St. 164, 30 Am. St. Rep. 797, 24 Atl. 620.

convey realty is controlled by the law of the place where the realty is situated and not the law of the place where the instrument is executed.<sup>5</sup> The question whether a covenant of warranty acts as an estoppel is controlled by the law of the place where the land is situated, where the covenant fails of effect because the vendor, a married woman, did not acknowledge the deed and was not examined separately as to her consent to such instrument.<sup>6</sup> However, the requirement of the law of Cuba that an option for rent should be authenticated by a notary or competent public official in order to be enforceable, is said to be a rule which regulates the remedy and not the form or validity of the contract; and a contract which has not been authenticated in this manner has been enforced in a common-law jurisdiction where such authentication was not required.<sup>7</sup>

**§ 3587. Statute of Frauds.** In addition to the difficulty caused by the inability of the courts to agree on the question whether a contract should be controlled by the law of the place of making, or by the law of the place of performance, additional difficulties have been caused by inability to agree as to what are matters of substantive law and what are matters of evidence, procedure, and remedy, which are to be governed by the law of the forum. The courts have been unable to agree whether an oral contract which was within the Statute of Frauds was void, voidable, or valid, but unenforceable because of a lack of proper evidence.<sup>1</sup> In part, this lack of harmony is due to the different wording of the different statutes; some of the statutes using the expression "no action shall be brought," while others say that the contract is "void" or "invalid," and the like,<sup>2</sup> and in part to a difference in judicial opinion as to the effect of statutes which are practically identical in their terms.

In many jurisdictions the Statute of Frauds is regarded as a rule of evidence which does not affect the formation or validity of the contract, and where this view is taken, the law of the forum is held to control.<sup>3</sup> The courts are especially willing to take this

<sup>5</sup> *Morris v. Linton*, 61 Neb. 537, 85 N. W. 565 (power of attorney executed in England; land situated in Nebraska).

<sup>6</sup> *Smith v. Ingram*, 132 N. Car. 959, 95 Am. St. Rep. 680, 61 L. R. A. 878, 44 S. E. 643 [affirming on rehearing, 130 N. Car. 100, 61 L. R. A. 878, 40 S. E. 948].

<sup>7</sup> *Reilly v. Steinhart*, 217 N. Y. 549, 112 N. E. 468.

<sup>1</sup> See §§ 1398 et seq.

<sup>2</sup> See §§ 1398 et seq.

<sup>3</sup> *England. Leroux v. Brown*, 12 C. B. 801.

*United States. C. W. Rantoul Co. v. Claremont Paper Co.*, 196 Fed. 305.

view where the contract was made in the jurisdiction of the forum.<sup>4</sup> In other jurisdictions the Statute of Frauds is held to affect the formation of the contract or to regulate the form in which it is to be made. Where this view obtains, the law of the forum does not control.<sup>5</sup>

The question is then presented whether such contract is to be governed by the law of the place where it is made or where it is to be performed. Many jurisdictions apply the general principle that the form of the contract is governed by the law of the place where the contract is made, and accordingly the Statute of Frauds of the jurisdiction where the contract is made is held to control.<sup>6</sup> A bill of exchange was drawn in Illinois upon a partnership domiciled in Missouri. It was accepted orally by a member of such

**Kansas.** *Barbour v. Campbell*, 101 Kan. 616, 168 Pac. 879.

**Kentucky.** *Kleeman v. Collins*, 69 Ky. (9 Bush) 460; *Boone v. Coe*, 153 Ky. 233, 51 L. R. A. (N.S.) 907, 154 S. W. 900.

**Massachusetts.** *Emery v. Burbank*, 163 Mass. 326, 47 Am. St. Rep. 456, 28 L. R. A. 57, 39 N. E. 1026.

**Michigan.** *New York Third National Bank v. Steel*, 129 Mich. 434, 64 L. R. A. 119, 88 N. W. 1050.

**Ohio.** *Heaton v. Eldridge*, 56 O. S. 87, 60 Am. St. Rep. 737, 36 L. R. A. 817, 46 N. E. 638.

<sup>4</sup>*Mathews v. Libbey*, 42 D. C. App. 272.

<sup>5</sup>**United States.** *Scudder v. Union Nat'l Bank*, 91 U. S. 406, 23 L. ed. 245.

**Arkansas.** *Ringgold v. Newkirk*, 3 Ark. 96.

**Illinois.** *Miller v. Wilson*, 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. 1111.

**Iowa.** *Brown v. Wm. Pearson Co.*, 169 Ia. 50, 150 N. W. 1057.

**Michigan.** *Kling v. Fries*, 33 Mich. 275; *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629; *Matson v. Bauman*, 139 Minn. 296, 166 N. W. 343.

**Missouri.** *Krohn-Fechheimer Co. v. Palmer*, — Mo. —, 221 S. W. 353.

**Nebraska.** *Fruit Dispatch Co. v. Gilinsky*, 84 Neb. 821, 122 N. W. 45.

**New Jersey.** *Dacosta v. Davis*, 24 N. J. L. 319.

**New York.** *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 55 Am. St. Rep. 680, 44 N. E. 959.

**Rhode Island.** *Perry v. Mount Hope Iron Co.*, 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632.

<sup>6</sup>**United States.** *Scudder v. Union Nat'l Bank*, 91 U. S. 406, 23 L. ed. 245.

**Arkansas.** *Ringgold v. Newkirk*, 3 Ark. 96.

**Illinois.** *Miller v. Wilson*, 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. 1111.

**Iowa.** *Brown v. Wm. Pearson Co.*, 169 Ia. 50, 150 N. W. 1057.

**Michigan.** *Kling v. Fries*, 33 Mich. 275; *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629.

**Minnesota.** *Matson v. Bauman*, 139 Minn. 296, 166 N. W. 343.

**Missouri.** *Krohn-Fechheimer Co. v. Palmer*, — Mo. —, 221 S. W. 353.

**Nebraska.** *Fruit Dispatch Co. v. Gilinsky*, 84 Neb. 821, 122 N. W. 45.

**New Jersey.** *Dacosta v. Davis*, 24 N. J. L. 319.

**New York.** *Wilson v. Lewiston Mill Co.*, 150 N. Y. 314, 55 Am. St. Rep. 680, 44 N. E. 959.

**Rhode Island.** *Perry v. Mount Hope Iron Co.*, 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632.

firm in Illinois. By the law of Illinois a bill of exchange could be accepted orally. By the Statute of Frauds of Missouri, such oral acceptance was unenforceable. It was held that Illinois law governed.<sup>7</sup> A guaranty which does not express the consideration on its face is held to be enforceable, if valid by the law of the place where it is delivered, although it is not valid by the law of the forum.<sup>8</sup> If an offer is made in one state and is accepted in another, the law of the state where the contract is accepted controls with reference to the Statute of Frauds, although the action is brought in the state where the offer was made.<sup>9</sup> If the contract is made in the jurisdiction of the forum, the law of that jurisdiction is applied, under this theory, as to the Statute of Frauds.<sup>10</sup> The practical result is, of course, the same, whether the law of the place of making the contract, or the law of the forum, is taken as the law which controls.

The law of the place of making the contract is sometimes taken as the law which controls, on the theory that the parties contracted with reference thereto.<sup>11</sup> The rule that the law of the place of making controls, applies with especial force where the requisites of a valid obligation in that jurisdiction are substantially different from the requisites at the law of the forum. In cases of this sort, it is sufficient if the memorandum shows the requisites of the obligation, in accordance with the law of the place of making the contract, even if such memorandum is not in compliance with the law of the forum.<sup>12</sup> Since consideration is not necessary at Louisiana law, a written memorandum which shows the promise, but which does not show the consideration, is a compliance with the Statute of Frauds, although the action is brought in another jurisdiction in which consideration is necessary.<sup>13</sup>

If the Statute of Frauds affects the validity of the contract, and it is made and to be performed in one jurisdiction, the law of that jurisdiction controls, and not the law of the forum.<sup>14</sup> If the law of the place where the contract is made and the law of the

<sup>7</sup> *Scudder v. Union Nat'l Bank*, 91 U. S. 406, 23 L. ed. 245.

<sup>8</sup> *Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917E, 777, 162 N. W. 1082 (also to be performed where delivered).

<sup>9</sup> *Tyng v. Converse*, 180 Mich. 195, 146 N. W. 629.

<sup>10</sup> *Krohn-Fechheimer Co. v. Palmer*, — Mo. —, 221 S. W. 353.

<sup>11</sup> *Matson v. Bauman*, 139 Minn. 296, 166 N. W. 343.

<sup>12</sup> *Ringgold v. Newkirk*, 3 Ark. 96.

<sup>13</sup> *Ringgold v. Newkirk*, 3 Ark. 96.

<sup>14</sup> *Halloran v. Schmidt Brewing Co.*, 137 Minn. 141, L. R. A. 1917E, 777, 162 N. W. 1082.

place where it is to be performed are the same, such rule of law will be held to apply, under this theory, although it is contrary to the law of the forum.<sup>15</sup>

In other jurisdictions, the law of the place of performance is held to control.<sup>16</sup> A bill of exchange was drawn in Missouri upon a firm in Illinois. An oral agreement was made in Missouri to accept such bill when presented in Illinois. It was held that Illinois law applied and that such contract was enforceable.<sup>17</sup>

In other jurisdictions it seems to be held that the law of the place which the parties have in mind is the law which will control as to the obligation of the Statute of Frauds.<sup>18</sup> If an oral contract is made, where such a contract is enforceable, but it is to be performed where an oral contract would be unenforceable, an action is brought in the latter jurisdiction, it is held that the presumption that the parties intended a valid and binding obligation will control; and that accordingly the contract will be governed by the law of the place where it was made.<sup>19</sup>

The effect of the Statute of Frauds upon a contract to convey realty is held in some states to be controlled by the law of the state where the realty is situated.<sup>20</sup> Where this view obtains, an action may be brought upon a contract part in writing and part oral,<sup>21</sup> or a contract no part of which is in writing,<sup>22</sup> for conveying realty in a jurisdiction where such contract is enforceable, even if suit is brought in a jurisdiction where such contract could not be enforced. The law of the situs of the realty is said to control as

<sup>15</sup> *Drovers' Deposit National Bank v. Tichenor*, 156 Wis. 251, 145 N. W. 777.

<sup>16</sup> *Hall v. Cordell*, 142 U. S. 116, 35 L. ed. 956.

<sup>17</sup> *Hall v. Cordell*, 142 U. S. 116, 35 L. ed. 956. (Suit was brought in Illinois. The law applied was therefore the law of the forum. It was not referred to as the law of the forum, however, but solely as the law of the place of performance).

<sup>18</sup> *D. Canale & Co. v. Pauly & Pauly Cheese Co.*, 155 Wis. 541, 145 N. W. 372.

<sup>19</sup> *D. Canale & Co. v. Pauly & Pauly Cheese Co.*, 155 Wis. 541, 145 N. W. 372.

<sup>20</sup> *United States. Thomas J. Baird*

*Inv. Co. v. Harris*, 209 Fed. 291, 126 C. C. A. 217; *Hotel Woodward Co. v. Ford Motor Co.*, 258 Fed. 322.

*Colorado. Wolf v. Burke*, 18 Colo. 264, 19 L. R. A. 792, 32 Pac. 427.

*Illinois. Miller v. Wilson*, 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. 1111.

*Indiana. Cochran v. Ward*, 5 Ind. App. 89, 51 Am. St. Rep. 229, 29 N. E. 795, 31 N. E. 581.

*Pennsylvania. Siegel v. Robinson*, 56 Pa. St. 19, 93 Am. Dec. 775.

*Wisconsin. Gates v. Paul*, 117 Wis. 170, 94 N. W. 55.

<sup>21</sup> *Gates v. Paul*, 117 Wis. 170, 94 N. W. 55.

<sup>22</sup> *Wolf v. Burke*, 18 Colo. 264, 19 L. R. A. 792, 32 Pac. 427.

to the necessity of written authority for an agency with reference to realty.<sup>23</sup> A statute which requires a contract to pay commissions for effecting a sale of realty is held to be governed by the law of the place where the land is situated.<sup>24</sup>

In some jurisdictions an action to recover damages is regarded as a personal action, although the subject-matter of the contract is realty; and the courts refuse to apply the law of the place where the land is situated.<sup>25</sup> If A and B make an oral contract in Kentucky by which A leases to B a farm in Texas, and an action is brought thereon in Kentucky, the Kentucky Statute of Frauds applies.<sup>26</sup> An oral contract to pay commissions for effecting the sale of realty has been held not to be governed by the law of the place where the land is situated,<sup>27</sup> but by the law of the place where the contract is made,<sup>28</sup> or by the law of the forum.<sup>29</sup>

**§ 3588. Law controlling as to validity of subject-matter in general—Theory that law of place of making controls.** Whether the subject-matter of a contract is such as to make it valid, or void, or illegal, is a question often presented to the courts for decision. A court always has power to refuse to recognize and to protect rights which are acquired under other systems of law, and this power is frequently exercised with reference to contracts, the subject-matter of which is lawful where the contract is made or to be performed, or both, but which is contrary to the settled ideas of morality and policy which the law of the forum entertains.<sup>1</sup> Subject to this qualification, and assuming that there is a conflict between the different systems of law as to the validity of the subject-matter, but that the law of the forum is willing to recognize and to enforce the right, although such a right could not have been created under its own system of law, there still remains a great divergence of authority as to the rule which controls the legality of the subject-matter. Some of the cases might be distinguished on the theory that some rules of law forbid the making

<sup>23</sup> *Hotel Woodward Co. v. Ford Motor Co.*, 258 Fed. 322 (also the forum).

<sup>24</sup> *Howell v. North*, 93 Neb. 505, 140 N. W. 779.

<sup>25</sup> *Boone v. Coe*, 153 Ky. 233, 51 L. R. A. (N.S.) 907, 154 S. W. 900.

<sup>26</sup> *Boone v. Coe*, 153 Ky. 233, 51 L. R. A. (N.S.) 907, 154 S. W. 900.

<sup>27</sup> *Marvell v. Marvell*, 70 Neb. 498,

113 Am. St. Rep. 792, 97 N. W. 640; *Callaway v. Prettyman*, 218 Pa. St. 293, 67 Atl. 418.

<sup>28</sup> *Callaway v. Prettyman*, 218 Pa. St. 293, 67 Atl. 418 (contract made in jurisdiction of forum).

<sup>29</sup> *Marvell v. Marvell*, 70 Neb. 498, 113 Am. St. Rep. 792, 97 N. W. 640.

<sup>1</sup> See §§ 3600 et seq.

of the contract in that jurisdiction, while other rules of law forbid the performance of the contract in that jurisdiction, and still others forbid both making and performance. The courts lay but little stress on these distinctions, however.

In many cases it is held that the validity of a contract is to be determined by the law of the place at which it is made.<sup>2</sup> In some of the cases in which the law of the place of making has been held to control the legality of the subject-matter, the rule of law which is claimed to make the contract illegal appears to be intended to prevent the making of such contracts within the jurisdiction of the forum,<sup>3</sup> or within the jurisdiction in which the contract is in fact made.<sup>4</sup> A statute which forbids the payment of seamen's wages in advance does not apply to alien seamen who ship on a foreign vessel outside of the jurisdiction of the United States.<sup>5</sup> Whether a power of attorney to confess judgment may be incorporated in a note is to be determined by the law of the state where the note is delivered, and not by the law of the state where

<sup>2</sup> **England.** *Saxby v. Fulton* [1909], 2 K. B. 208; *Trinidad Shipping & Trading Co. v. Alston* [1920], A. C. 888.

**United States.** *Bond v. Hume*, 243 U. S. 15, 61 L. ed. 565; *Sanberg v. McDonald*, 248 U. S. 185, 63 L. ed. 200; *Neilson v. Rhine Shipping Co.*, 248 U. S. 205, 63 L. ed. 208; *Robinson v. Suburban Brick Co.*, 127 Fed. 804, 62 C. C. A. 484; *The Fri*, 154 Fed. 333 [reversing, 140 Fed. 123]; *The Talus*, 248 Fed. 670.

**Connecticut.** *Loveland v. Dinnan*, 81 Conn. 111, 17 L. R. A. (N.S.) 1119, 70 Atl. 634.

**Kentucky.** *Orr's Admr. v. Orr*, 157 Ky. 570, 163 S. W. 757.

**Maryland.** *Mandru v. Ashby*, 108 Md. 693, 71 Atl. 312 (obiter).

**Michigan.** *Dolan v. Supreme Council of Catholic Mutual Benefit Association*, 152 Mich. 266, 13 L. R. A. (N.S.) 424, 113 N. W. 10.

**Minnesota.** *Carpenter v. United States Express Co.*, 120 Minn. 59, 139 N. W. 154.

**North Carolina.** *Carpenter, Baggott & Co. v. Hanes*, 167 N. Car. 551, 83 S. E. 577.

**Oklahoma.** *Wagner v. Minnie Harvester Co.*, 25 Okla. 558, 106 Pac. 969 (presumed same as law of forum in absence of evidence); *Marx v. Hefner*, — Okla. —, 149 Pac. 207.

**Texas.** *Chicago, Rock Island & Pacific Ry. v. Thompson*, 100 Tex. 185, 7 L. R. A. (N.S.) 191, 97 S. W. 459.

**Wisconsin.** *Seamans v. Knapp-Stout & Co.*, 89 Wis. 171, 61 N. W. 757; *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 29 L. R. A. (N.S.) 92, 120 N. W. 408.

<sup>3</sup> *Sanberg v. McDonald*, 248 U. S. 185, 63 L. ed. 200; *Neilson v. Rhine Shipping Co.*, 248 U. S. 205, 63 L. ed. 208.

<sup>4</sup> *Seamans v. Knapp-Stout Co.*, 89 Wis. 171, 61 N. W. 757; *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 29 L. R. A. (N.S.) 92, 120 N. W. 408.

<sup>5</sup> *Sanberg v. McDonald*, 248 U. S. 185, 63 L. ed. 200; *Neilson v. Rhine Shipping Co.*, 248 U. S. 205, 63 L. ed. 208.

such note is payable.<sup>6</sup> If, by the law of the state where the note is delivered, such power is invalid, and a judgment is taken thereon, in the state where such note is payable and where such provision is valid, the courts of the state where such note was made will not enforce such judgment.<sup>7</sup> Whether a contract is gambling or not, is to be determined by the law of the place where the contract is made, and not by the law of the place where the action is brought,<sup>8</sup> if not contrary to the settled policy of the law of the forum.<sup>9</sup> The validity of a contract as affected by the failure of an agent of a foreign corporation to secure a license to do business, is controlled by the law of the place where the contract is made,<sup>10</sup> whether that is the law of the forum<sup>11</sup> or not.<sup>12</sup> If the law of the jurisdiction in which a contract is made forbids the making of contracts on Sunday, a contract which is made on Sunday will not be enforced in other jurisdictions, although it provides for performance on Sunday in a jurisdiction in which such performance is lawful.<sup>13</sup> This principle has been carried to such an extent that an offer which was made on Sunday by delivering it to the offeree's agent, is said to be invalid everywhere, if the making of such offer was illegal in that jurisdiction, although such offer is accepted in another jurisdiction by the principal on a secular day.<sup>14</sup> The validity of a sale in violation of the statutes against monopolies depends on the law of the place where such sale is made.<sup>15</sup> The validity of a loan for gambling depends on the law of the place where the loan is made.<sup>16</sup> A certificate of deposit was indorsed to secure a gambling debt where such indorsement was valid. Suit was brought where such indorsement was illegal. It was held that the law of the place where such con-

<sup>6</sup> *Acme Food Co. v. Kirsch*, 166 Mich. 433, 38 L. R. A. (N.S.) 814, 131 N. W. 1123.

<sup>7</sup> *Acme Food Co. v. Kirsch*, 166 Mich. 433, 38 L. R. A. (N.S.) 814, 131 N. W. 1123.

<sup>8</sup> *Bond v. Hume*, 243 U. S. 15, 61 L. ed. 565.

<sup>9</sup> See §§ 3600 et seq.

<sup>10</sup> *Seamans v. Knapp-Stout Co.*, 89 Wis. 171, 61 N. W. 757; *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 29 L. R. A. (N.S.) 92, 120 N. W. 408.

<sup>11</sup> *Southwestern Slate Co. v. Steph-*

*ens*, 139 Wis. 616, 29 L. R. A. (N.S.) 92, 120 N. W. 408.

<sup>12</sup> *Seamans v. Knapp-Stout Co.*, 89 Wis. 171, 61 N. W. 757.

<sup>13</sup> *Lovell v. Boston & Maine Ry.*, 75 N. H. 568, 34 L. R. A. (N.S.) 67, 78 Atl. 621.

<sup>14</sup> *International Text-book Co. v. Ohl*, 150 Mich. 131, 121 Am. St. Rep. 612, 13 L. R. A. (N.S.) 1157, 111 N. W. 768.

<sup>15</sup> *Wagner v. Minnie Harvester Co.*, 25 Okla. 558, 106 Pac. 969.

<sup>16</sup> *Saxby v. Fulton* [1909], 2 K. B. 208 (loan made at Monte Carlo, where valid).

tract was made would control.<sup>17</sup> If an order for goods is signed in a state by the law of which the sale of such goods is illegal, since they are fraudulently marked, if such order is approved by the seller in another jurisdiction in which such goods can be sold lawfully, the law of the jurisdiction in which the order was accepted controls.<sup>18</sup> The validity of the designation as a beneficiary, of one who is not a relative of the insured, is determined by the law of the place where the contract is made, and not by the law of the jurisdiction in which the insurance company is incorporated.<sup>19</sup> The validity of a contract requiring an injured employee to give notice of his injury within a certain time thereafter, is governed by the law of the place where the contract is made and is to be performed, as opposed to the law of the forum.<sup>20</sup> The validity of a discharge of a right of action for negligence by acceptance of benefits from relief department, depends on the law of the place where such relief is accepted, and not on the law of the forum.<sup>21</sup>

In some cases it is said that the law of the place where the property is situated determines the validity of contracts which are made with reference thereto.<sup>22</sup> A contract of agency with reference to realty to be performed where the realty is situated is invalid everywhere if unenforceable by that law.<sup>23</sup> The question whether a warehouseman can issue his own warehouse certificates to himself and pledge them for his own debt is controlled by the law of the place where the property thus pledged is situated.<sup>24</sup> A covenant not to compete in business, which is a part of the contract by which realty is conveyed, is said to be personal and is to

<sup>17</sup> *Sullivan v. German National Bank*, 18 Colo. App. 99, 70 Pac. 162.

<sup>18</sup> *Loveland v. Dinnan*, 81 Conn. 111, 17 L. R. A. (N.S.) 1119, 70 Atl. 634 (offer made in jurisdiction of forum).

<sup>19</sup> *Dolan v. Supreme Council of Catholic Mutual Benefit Association*, 152 Mich. 266, 13 L. R. A. (N.S.) 424, 113 N. W. 10 (contract made in jurisdiction of forum; designation there invalid).

<sup>20</sup> *Chicago, Rock Island & Pacific Ry. v. Thompson*, 100 Tex. 185, 123 Am. St. Rep. 798, 7 L. R. A. (N.S.) 191, 97 S. W. 459.

<sup>21</sup> *Cannaday v. Atlantic Coast Line*

*Ry.*, 143 N. Car. 439, 118 Am. St. Rep. 821, 8 L. R. A. (N.S.) 939, 55 S. E. 836.

<sup>22</sup> *Alexander v. Barker*, 64 Kan. 396, 67 Pac. 829; *Swedish-American National Bank v. First National Bank*, 89 Minn. 98, 94 N. W. 218.

<sup>23</sup> *Alexander v. Barker*, 64 Kan. 396, 67 Pac. 829 (land in the Cherokee nation).

<sup>24</sup> *Swedish-American National Bank v. First National Bank*, 89 Minn. 98, 94 N. W. 218. (Hence if the warehouses are in different states, some of the contracts of pledge may be valid; others not.)

be determined by the law of the place where such contract is made and not by the law of the place where the realty is situated.<sup>25</sup>

If the act alleged to be illegal has been performed before the contract is entered into, and the liability arising therefrom forms the consideration for the executory agreement, the question of the legality of such transaction is controlled by the law of the place where the transaction takes place.<sup>26</sup>

If a contract is made in one jurisdiction and part of the performance is to take place there, the law of such jurisdiction controls.<sup>27</sup> The validity of a contract made in Trinidad, to transport goods from Trinidad to the United States, and to give rebates to the shipper, is governed by the law of Trinidad.<sup>28</sup> If a person who is domiciled in New York subscribes to stock in a corporation formed under the laws of New Jersey, his liability upon such subscription is to be determined by the laws of New Jersey, although the action is brought in New York, as far as the laws of New Jersey did not violate the law or the settled policy of the law of his domicile.<sup>29</sup>

### § 3589. Theory that law of place of performance controls.

In many cases, it is said that questions of legality are to be determined by the law of the place of performance, at least as far as such contract requires the performance of acts which are illegal where they are to be performed.<sup>1</sup> Effect has been given to the

<sup>25</sup> *Robinson v. Suburban Brick Co.*, 127 Fed. 804, 62 C. C. A. 484.

<sup>26</sup> *Akers v. Demond*, 103 Mass. 318; *Winward v. Lincoln*, 23 R. I. 476, 64 L. R. A. 160, 51 Atl. 106.

<sup>27</sup> *Trinidad Shipping & Trading Co. v. Alston* [1920], A. C. 888.

<sup>28</sup> *Trinidad Shipping & Trading Co. v. Alston* [1920], A. C. 888 (contract forbidden by Act of Congress).

<sup>29</sup> *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N.S.) 56, 98 N. E. 490 (subscription for less than nominal value of shares; no evidence of New Jersey law).

<sup>1</sup> *England. Moulis v. Owen* [1907], 1 K. B. 746; *Saxby v. Fulton* [1909], 2 K. B. 208.

*Alabama. Southern Express Co. v. Gibbs*, 155 Ala. 303, 130 Am. St. Rep.

24, 18 L. R. A. (N.S.) 874, 46 So. 465. *Illinois. Price v. Burns*, 101 Ill. App. 418.

*Iowa. Bigelow v. Burnham*, 83 Ia. 120, 32 Am. St. Rep. 294, 49 N. W. 104.

*Massachusetts. Commonwealth v. Griffith*, 204 Mass. 18, 25 L. R. A. (N. S.) 957, 90 N. E. 394.

*Michigan. International Text-book Co. v. Ohl*, 150 Mich. 131, 121 Am. St. Rep. 612, 13 L. R. A. (N.S.) 1157, 111 N. W. 768.

*Missouri. Gaylord v. Duryea*, 95 Mo. App. 574, 69 S. W. 607.

*North Carolina. Morris v. Hockaday*, 94 N. Car. 286, 55 Am. Rep. 607.

*Ohio. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Sheppard*, 56 O. S. 68, 60 Am. St. Rep. 732, 46 N. E. 61.

law of the place of performance as distinguished from the law of the forum.<sup>2</sup> If the question of the legality of the subject-matter involves its performance, there is especial reason for selecting the law of the place of performance,<sup>3</sup> for it is not to be expected that a state would tolerate performance of contracts made by aliens without its jurisdiction, when it would not tolerate performance of similar contracts made by its subjects within its jurisdiction; and the legality of the act should depend on the law of the place where the act is to be done.

It is occasionally sought to combine this rule with the rule that the law of the place of making controls, by saying that the law of the place of making controls unless the contract is to be performed elsewhere,<sup>4</sup> but in case of a conflict between the law of the place of making and the place of performance, this rule selects the law of the place of performance. If a contract is made, and to be performed in the same jurisdiction, the law of such jurisdiction determines the validity of the contract as against the law of the forum,<sup>5</sup> except in cases in which the contract is contrary to the settled policy of the forum.<sup>6</sup> If a contract is made in one state and to be performed in another, and the subject-matter of the contract is valid under both systems of law, such contract will be enforced in a jurisdiction in which the subject-matter would have been invalid,<sup>7</sup> subject to the exception as to the settled policy of the forum.<sup>8</sup>

The rule that the law of the place of performance controls, has been applied to gambling contracts,<sup>9</sup> to contracts to pay to brokers

**Pennsylvania.** *Burnett v. Pennsylvania Ry.*, 176 Pa. St. 45, 34 Atl. 972.

**Tennessee.** *Hubble v. Morristown Land & Improvement Co.*, 95 Tenn. 585, 32 S. W. 965.

**Virginia.** *R. S. Oglesby Co. v. New York Bank*, 114 Va. 663, 77 S. E. 468.

**Wisconsin.** *Brown v. Gates*, 120 Wis. 349, 97 N. W. 221.

<sup>2</sup> *R. S. Oglesby Co. v. Bank of New York*, 114 Va. 663, 77 S. E. 468.

<sup>3</sup> *Zenatello v. Hammerstein*, 231 Pa. St. 56, 79 Atl. 922.

<sup>4</sup> *The Miguel di Larrinaga*, 217 Fed. 678; *Southern Express Co. v. Gibbs*, 155 Ala. 303, 130 Am. St. Rep. 24, 18 L. R. A. (N.S.) 874, 46 So. 465; *Illus-*

*trated Postal Card & Novelty Co. v. Holt*, 85 Conn. 140, 81 Atl. 1061.

<sup>5</sup> *Geo. A. Shaw & Co. v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 173 Fed. 746, 97 C. C. A. 520; *First National Bank v. Doeden*, 21 S. D. 400, 113 N. W. 81.

<sup>6</sup> See §§ 3600 et seq.

<sup>7</sup> *Clarey v. Union Central Insurance Co.*, 143 Ky. 540, 33 L. R. A. (N.S.) 881, 136 S. W. 1014.

<sup>8</sup> See §§ 3600 et seq.

<sup>9</sup> **England.** *Moulis v. Owen* [1907], 1 K. B. 746; *Saxby v. Fulton* [1909], 2 K. B. 208.

**United States.** *Berry v. Chase*, 146 Fed. 625, 77 C. C. A. 161.

commissions on sales alleged to be gambling,<sup>10</sup> and to a contract made in one state to deliver a gambling device in another.<sup>11</sup> On the theory that the place where the contract is made is *prima facie* the place of performance, a note given in Louisiana for Confederate money, held there to be an illegal contract, is unenforceable in Mississippi.<sup>12</sup> The validity of a negotiable instrument given for gambling,<sup>13</sup> or transferred upon a gambling consideration,<sup>14</sup> is determined by the law of the place of its payment. An order to buy or sell on a stock exchange is governed by the law of the jurisdiction in which the exchange is located, and not by the law of the jurisdiction in which the order is given.<sup>15</sup>

The law of the place of payments is said to control the validity of notes delivered on Sunday in another jurisdiction,<sup>16</sup> at least in the absence of evidence of an intent to be governed by the law of the place where the contract was made.

A contract which is made in a state where child labor is lawful, and to be performed in a state where child labor is unlawful, is governed by the law of the place of performance.<sup>17</sup>

**§ 3590. Other theories as to law controlling validity of subject-matter.** In some cases it is said that the law which determines the legality of the subject-matter is the law by which the parties intend to be governed.<sup>1</sup> If negotiable instruments are delivered on Sunday, in one jurisdiction, and are payable in another, it is said that it will be presumed that the parties intended to be bound by the law of the place of performance, unless a con-

**Alabama.** Peet v. Hatcher, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711.

**Missouri.** A. G. Edwards Brokerage Co. v. Stevenson, 160 Mo. 516, 61 S. W. 617.

**Rhode Island.** Winward v. Lincoln, 23 R. I. 476, 64 L. R. A. 160, 51 Atl. 106.

<sup>10</sup> Gaylord v. Duryea, 95 Mo. App. 574, 69 S. W. 607.

<sup>11</sup> Price v. Burns, 101 Ill. App. 418.

<sup>12</sup> Ivey v. Lalland, 42 Miss. 444, 2 Am. Rep. 606, 97 Am. Dec. 475.

<sup>13</sup> Moulis v. Owen [1907], 1 K. B. 746 (also law of forum).

<sup>14</sup> Thomas v. First National Bank, 213 Ill. 261, 72 N. E. 801 (also law of forum).

<sup>15</sup> Berry v. Chase, 146 Fed. 625, 77 C. C. A. 161.

<sup>16</sup> Brown v. Gates, 120 Wis. 349, 97 N. W. 221.

<sup>17</sup> Commonwealth v. Griffith, 204 Mass. 18, 25 L. R. A. (N.S.) 957, 90 N. E. 394 (criminal prosecution).

<sup>1</sup> Carey v. Mackey, 82 Me. 516, 17 Am. St. Rep. 500, 9 L. R. A. 113, 20 Atl. 84; Green v. Northwestern Trust Co., 128 Minn. 30, L. R. A. 1916D, 739, 150 N. W. 229; Cannaday v. Atlantic Coast Line Ry., 143 N. Car. 439, 118 Am. St. Rep. 821, 8 L. R. A. (N.S.) 939, 55 S. E. 836; Brown v. Gates, 120 Wis. 349, 97 N. W. 221.

trary intent clearly appears.<sup>2</sup> This principle is frequently applied to contracts which are attacked on the ground of usury; and it is said that the law by which the parties intend the contract to be governed controls as to such question.<sup>3</sup>

Under peculiar circumstances the law of the domicile, if also the law of the forum, controls. Thus a man and woman were domiciled in California. She had been divorced within the year, and under California law her marriage was forbidden. They intermarried in another state, where such marriage was lawful. An ante-nuptial contract whereby in consideration of such marriage and of her releasing her interest in his property, he agreed to pay her ten thousand dollars, was held unenforceable in California.<sup>4</sup> Under special circumstances the law of the domicile of one of the parties or of the place in which he practices his profession has been followed;<sup>5</sup> but rather on the theory that, under the circumstances, the law of the place where the contract was made and performed did not make it illegal, although it would have been illegal but for such additional facts. An attorney who has been admitted to the bar in Pennsylvania may recover for legal services rendered in North Carolina, which consist of examination of titles of land in Pennsylvania.<sup>6</sup>

A contract to act as agent for a corporation in the state in which such business can not be transacted has been upheld,<sup>7</sup> but rather on the theory that the contract of agency was collateral to a void contract,<sup>8</sup> than on the theory that the contract was governed by the law of the jurisdiction under which such corporation was organized.

**§ 3591. Special illustrations—Contract relieving carrier of goods from liability.** Before federal legislation had regulated the validity of contracts of common carriers, by which they attempted to regulate their liability, the question of the law which controls the validity of such a provision in an interstate contract was a question of considerable importance. The validity of a contract with a common carrier relieving him from his common-law liability

<sup>2</sup> *Brown v. Gates*, 120 Wis. 349, 97 N. W. 221 (instrument held illegal).

<sup>3</sup> See § 3598.

<sup>4</sup> *Wood v. Wood's Estate*, 137 Cal. 148, 69 Pac. 981.

<sup>5</sup> *Wescott v. Baker*, 83 N. J. L. 460, 85 Atl. 315.

<sup>6</sup> *Wescott v. Baker*, 83 N. J. L. 460, 85 Atl. 315.

<sup>7</sup> *Rosenbaum v. U. S. Credit System Co.*, 65 N. J. L. 255, 53 L. R. A. 449.

<sup>8</sup> See § 1130.

was held to be controlled by the law of the state where the property was to be delivered.<sup>1</sup> It will be noted that in many of these cases the action was brought in the jurisdiction in which the contract was to be performed; and the rule that the place of performance is to control is sometimes qualified by adding that it controls if it is also the jurisdiction of the forum.<sup>2</sup>

In other jurisdictions such a contract was held to be governed by the law of the place where it is made, unless it clearly appears that it was made in view of another system of law.<sup>3</sup> This rule has been applied where no part of the contract was to be performed within the jurisdiction of the forum.<sup>4</sup> A statute forbidding carriers to limit their common-law liability was held applicable only to shipments beginning and ending within that state.<sup>5</sup> Hence, such statute has been held inapplicable to a through shipment into another state, even if the first carrier limited his liability to his own line.<sup>6</sup> A rule of a public service corporation which fixes the

<sup>1</sup> *Alabama*. *Southern Express Co. v. Gibbs*, 155 Ala. 303, 18 L. R. A. (N.S.) 874, 46 So. 465 (also forum).

*New York*. *Curtis v. Delaware, Lackawanna & Western Ry.*, 74 N. Y. 116, 30 Am. Rep. 271 (also forum); *Hasbrouck v. New York Central & Hudson River Ry.*, 202 N. Y. 363, 35 L. R. A. (N.S.) 537, 95 N. E. 808 (not forum).

*Ohio*. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Sheppard*, 56 O. S. 68, 60 Am. St. Rep. 732, 46 N. E. 61 (also forum).

*Pennsylvania*. *Hughes v. Pennsylvania Ry.*, 202 Pa. St. 222, 97 Am. St. Rep. 713, 63 L. R. A. 513, 51 Atl. 990 (also place of breach and forum).

*Washington*. *Carstens Packing Co. v. Southern Pacific Ry.*, 58 Wash. 239, 27 L. R. A. (N.S.) 975, 108 Pac. 613 (also forum).

<sup>2</sup> *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42.

<sup>3</sup> *United States*. *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 32 L. ed. 788; *Central of Georgia Ry. v. Kavanaugh*, 92 Fed. 56; *The Fri*, 154 Fed. 333 [reversing, 140 Fed. 123].

*Georgia*. *Western & Atlantic Ry. v. Exposition Cotton Mills*, 81 Ga. 522, 2 L. R. A. 102, 7 S. E. 916.

*Kentucky*. *Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Druen*, 118 Ky. 237, 66 L. R. A. 275, 80 S. W. 778.

*Massachusetts*. *Brockway v. American Express Co.*, 171 Mass. 158, 50 N. E. 626; 168 Mass. 257, 47 N. E. 87; *Hooker v. Boston & Maine Ry.*, 209 Mass. 598, 95 N. E. 945.

*New Hampshire*. *Kimball v. American Express Co.*, 76 N. H. 81, 79 Atl. 492.

*Ohio*. *Knowlton v. Erie Ry.*, 19 O. S. 260, 2 Am. Rep. 395.

*Wisconsin*. *Davis v. Chicago, Milwaukee & St. Paul Ry.*, 93 Wis. 470, 57 Am. St. Rep. 935, 33 L. R. A. 654, 67 N. W. 16, 1132; *Berger-Crittenden Co. v. Chicago, Milwaukee & St. Paul Ry.*, 159 Wis. 256, 150 N. W. 496.

<sup>4</sup> *The Fri*, 154 Fed. 333, 83 C. C. A. 205 [reversing, 140 Fed. 123].

<sup>5</sup> *Missouri Pacific Ry. v. Sherwood*, 84 Tex. 125, 17 L. R. A. 643, 19 S. W. 455.

<sup>6</sup> *Missouri Pacific Ry. v. Sherwood*, 84 Tex. 125, 17 L. R. A. 643, 19 S. W. 455.

liability of the carrier for loss of baggage, is said not to be intended to apply to losses which take place in other states.<sup>7</sup>

In other jurisdictions the law of the forum was applied on the ground of public policy.<sup>8</sup> It is said that such a provision, if contrary to the law of the forum, will not be enforced, since it is contrary to the public policy of such jurisdictions.<sup>9</sup>

It was also held that the law of the state where the loss occurs and the action is brought should control.<sup>10</sup>

Under the Carmack Amendment, provisions of this sort are regulated by federal law,<sup>11</sup> and the rules of state law are superseded as to interstate commerce.<sup>12</sup> The question of the law which controls in cases of this sort has therefore ceased to have any practical importance in interstate shipments, though it may still be of importance in shipments between the United States and a foreign country.

**§ 3592. Contract of carrier of passengers.** Federal legislation has not attempted to regulate the validity of contracts which limit the liability of a carrier of passengers in interstate commerce;<sup>1</sup>

<sup>7</sup> *Hasbrouck v. New York Central & Hudson River Ry.*, 202 N. Y. 363, 35 L. R. A. (N.S.) 537, 95 N. E. 808 (rule made in jurisdiction of forum).

<sup>8</sup> *The Kensington*, 183 U. S. 263, 46 L. ed. 190; *Chicago, Burlington & Quincy Ry. v. Gardiner*, 51 Neb. 70, 70 N. W. 508.

<sup>9</sup> *United States. The Kensington*, 183 U. S. 263, 46 L. ed. 190.

*Illinois. Nonotuck Silk Co. v. Adams Express Co.*, 256 Ill. 66, 99 N. E. 893.

*Kentucky. Adams Express Co. v. Walker*, 119 Ky. 121, 67 L. R. A. 412, 83 S. W. 106.

*North Dakota. Hanson v. Great Northern Ry.*, 18 N. D. 324, 138 Am. St. Rep. 768, 121 N. W. 78.

*Ohio. Knowlton v. Erie Ry.*, 19 O. S. 260, 2 Am. Rep. 395.

*Tennessee. Louisville & Nashville Ry. v. Smith*, 123 Tenn. 678, 134 S. W. 866.

*Contra, Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660, 12 L. R. A. 340, 27 N. E. 665.

<sup>10</sup> *Hughes v. Pennsylvania Ry.*, 202 Pa. St. 222, 97 Am. St. Rep. 713, 63 L. R. A. 513, 51 Atl. 990 [affirmed for want of a federal question, *Pennsylvania R. R. v. Hughes*, 191 U. S. 477, 48 L. ed. 268].

See also, *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Sheppard*, 56 O. S. 68.

<sup>11</sup> See § 751.

<sup>12</sup> *Boston & Maine Ry. v. Hooker*, 233 U. S. 97, 58 L. ed. 868; *American Express Co. v. United States Horseshoe Co.*, 244 U. S. 58, 61 L. ed. 990 [reversing judgment, *United States Horseshoe Co. v. American Express Co.*, 250 Pa. St. 527, 95 Atl. 706]; *Boston & Maine Ry. v. Piper*, 246 U. S. 439, 62 L. ed. 820 [affirming, *Piper v. Boston & Maine Ry.*, 90 Vt. 176, 97 Atl. 508].

<sup>1</sup> *Chicago, Rock Island & Pacific Ry. v. Maucher*, 248 U. S. 359, 63 L. ed. 294 [dismissing writ of error to *Maucher v. Chicago, Rock Island & Pacific Ry.*, 100 Neb. 237, 159 N. W. 422].

and the question of the law which controls such contract is still an important question even in interstate commerce. On this question, we find the usual conflict of authority. It has been said that the law of the place of making controls,<sup>2</sup> especially if the contract was to be performed there, in part, and the action is brought there.<sup>3</sup> It has been said that the law of the place of performance controls.<sup>4</sup> It has also been said that the law of the place at which the breach takes place is to control,<sup>5</sup> especially if the action is brought in that jurisdiction,<sup>6</sup> since the idea of the controlling effect of the law of the place in which the contract is to be performed in part, and is broken, coincides with the idea of the policy of the forum. It has also been suggested that the intention of the parties should control;<sup>7</sup> and that, in the absence of evidence of such intention, it would be presumed that the parties intended to be controlled by the law of whichever jurisdiction would treat the contract as valid.<sup>8</sup>

**§ 3593. Contract limiting liability of telegraph company.** A provision which limits the liability of a telegraph company, is said to be so contrary to the policy of the law of the forum in a jurisdiction in which such provision is invalid, that it will not be enforced.<sup>1</sup> In other jurisdictions, such a provision is said to be

<sup>2</sup>Wiley v. Grand Trunk Ry., 227 Fed. 127; Eubanks v. Southern Ry., 244 Fed. 891; Illinois Central Ry. v. Beebe, 174 Ill. 13, 66 Am. St. Rep. 253, 43 L. R. A. 210, 50 N. E. 1019; Fonseca v. Cunard Steamship Co., 153 Mass. 553, 25 Am. St. Rep. 660, 12 L. R. A. 340, 27 N. E. 665; O'Regan v. Cunard Steamship Co., 160 Mass. 356, 39 Am. St. Rep. 484, 35 N. E. 1070; Meuer v. Chicago, Milwaukee & St. Paul Ry., 5 S. D. 568, 49 Am. St. Rep. 898, 25 L. R. A. 81, 59 N. W. 945; Meuer v. Chicago, Milwaukee & St. Paul Ry., 11 S. D. 94, 74 Am. St. Rep. 774, 75 N. W. 823 (even if one of the parties resided in another state).

<sup>3</sup>Davis v. Chicago, Milwaukee & St. Paul Ry., 93 Wis. 470, 57 Am. St. Rep. 935, 33 L. R. A. 654, 67 N. W. 16, 1132 (breach in other jurisdiction).

<sup>4</sup>Burnett v. Pennsylvania Ry., 176 Pa. St. 45, 34 Atl. 972.

<sup>5</sup>Lake Shore & Michigan Southern Ry. v. Teeters, 166 Ind. 335, 5 L. R. A. (N.S.) 425, 77 N. E. 599; Davis v. Chesapeake & Ohio Ry., 122 Ky. 528, 5 L. R. A. (N.S.) 458, 92 S. W. 339; Maucher v. Chicago, Rock Island & Pacific Ry., 100 Neb. 237, 159 N. W. 422.

<sup>6</sup>Lake Shore & Michigan Southern Ry. v. Teeters, 166 Ind. 335, 5 L. R. A. (N.S.) 425, 77 N. E. 599; Davis v. Chesapeake & Ohio Ry., 122 Ky., 528, 5 L. R. A. (N.S.) 458, 92 S. W. 339; Maucher v. Chicago, Rock Island & Pacific Ry., 100 Neb. 237, 159 N. W. 422.

<sup>7</sup>Atchison, Topeka & Santa Fe Ry. v. Smith, 38 Okla. 157, 132 Pac. 494.

<sup>8</sup>Atchison, Topeka & Santa Fe Ry. v. Smith, 38 Okla. 157, 132 Pac. 494.

<sup>1</sup>Fox v. Postal Telegraph-Cable Co., 138 Wis. 648, 28 L. R. A. (N.S.) 490, 120 N. W. 399.

governed by the law of the jurisdiction in which the contract is made,<sup>2</sup> even if the contract was to be performed, and was broken, in the jurisdiction of the forum.<sup>3</sup> It has also been said that the law of the place of performance is to control,<sup>4</sup> although with the qualification that if the contract is invalid where made, it is invalid everywhere.<sup>5</sup>

**§ 3594. Usurious contracts—General principles.** The question of the law which controls the validity of a contract with reference to usury, presents a number of difficulties which are not found in most contracts whose subject-matter is illegal or void. This difficulty, in part, grows out of the widely different views as to the propriety of charging any interest at all, on the one hand, and of limiting the rate of interest to be paid, on the other. This lack of harmony as to the fundamental principles which are to be applied, probably means that, at present, there is nothing immoral in exacting interest, and the only question as to regulating the rate is one of policy. We have, therefore, subject-matter which is professedly regulated on principles of expediency, and a lack of harmony as to what method of regulation expediency would suggest. An additional difficulty is due to the fact that the entire question of the regulation of interest rates is a matter of statutory law, and that some of the statutes forbid the making of a contract, while others merely attempt to limit the remedy which is to be given in case the contract exceeds a certain rate, or impose a penalty which is to be exacted if such a contract is entered into. Contracts of the latter type are influenced by the principle that remedies are governed by the law of the forum,<sup>1</sup> and that the courts are unwilling to enforce the penal laws of other states.<sup>2</sup> If the defense of usury could not be interposed under the laws of either state, the question of which law controls is, of course, immaterial.<sup>3</sup>

<sup>2</sup> *Shaw v. Postal Telegraph-Cable Co.*, 79 Miss. 670, 89 Am. St. Rep. 666, 56 L. R. A. 486, 31 So. 222; *Carter v. Western Union Telegraph Co.*, 101 S. Car. 284, 85 S. E. 584; *Stone v. Postal Telegraph Co.*, 31 R. I. 174, 29 L. R. A. (N.S.) 795, 76 Atl. 762. [For subsequent opinion, see 35 R. I. 498, 46 L. R. A. (N.S.) 180, 87 Atl. 319.]

<sup>3</sup> *Stone v. Postal Telegraph Co.*, 31 R. I. 174, 29 L. R. A. (N.S.) 795, 76 Atl. 762. [For subsequent opinion, see

35 R. I. 498, 46 L. R. A. (N.S.) 180, 87 Atl. 319.]

<sup>4</sup> *Western Union Telegraph Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361, 36 L. R. A. 711, 38 S. W. 1068.

<sup>5</sup> *Western Union Telegraph Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361, 36 L. R. A. 711, 38 S. W. 1068.

<sup>1</sup> See §§ 3617 et seq.

<sup>2</sup> See § 3598b.

<sup>3</sup> *Binghamton Trust Co. v. Auten*, 68 Ark. 299, 82 Am. St. Rep. 295, 57 S. W. 1105.

**§ 3595. Law of forum not controlling.** Since the exaction of an excessive rate of interest is at most inexpedient, and since the views of expediency are found in statute law, the law of the forum does not control with reference to the validity of the contract itself,<sup>1</sup> as distinguished from the remedies which are to be given in case of usury. If the contract is to be made and to be performed in the same jurisdiction, the law of that jurisdiction controls.<sup>2</sup> This position is usually taken to justify the court in upholding such contract, although it is usurious by the law of the forum.<sup>3</sup> If, however, the contract is usurious in each jurisdiction, the law of the forum determines whether a given party can take advantage thereof.<sup>4</sup>

**§ 3596. Theory that law of place of making controls.** On the question of the law which controls the validity of such contracts, if made in one jurisdiction and to be performed in another, there is a greater divergency of authority than usual. In a number of jurisdictions it is said that the law of the place of making controls.<sup>1</sup> A contract valid where made may be enforced in another

<sup>1</sup> **United States.** *O'Toole v. Meysenburg*, 251 Fed. 191.

**Kansas.** *Midland Savings & Loan Co. v. Solomon*, 71 Kan. 185, 79 Pac. 1077; *Steinman v. Midland Savings & Loan Co.*, 78 Kan. 479, 96 Pac. 860.

**Minnesota.** *Green v. Northwestern Trust Co.*, 128 Minn. 30, L. R. A. 1916D, 739, 150 N. W. 229.

**New Hampshire.** *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30.

**New York.** *Manhattan Life Insurance Co. v. Johnson*, 188 N. Y. 108, 9 L. R. A. (N.S.) 1142, 80 N. E. 658.

**Oklahoma.** *Midland Savings & Loan Co. v. Henderson*, 47 Okla. 693, 150 Pac. 868 [sub nomine, *Midland Savings & Loan Co. v. Beats*, L. R. A. 1916D, 745].

**Washington.** *Bank v. Doherty*, 42 Wash. 317, 4 L. R. A. (N.S.) 1191, 84 Pac. 872.

<sup>2</sup> **United States.** *Brown v. Crawford*, 252 Fed. 248.

**Minnesota.** *Patterson v. Wyman*, 142 Minn. 70, 170 N. W. 928.

**New Hampshire.** *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30.

**New Jersey.** *Seacoast Real Estate Co. v. American Timber Co.*, 89 N. J. Eq. 293, 104 Atl. 437.

**North Dakota.** *Gold-Stabeck Loan & Credit Co. v. Kinney*, 33 N. D. 495, 157 N. W. 482.

**Washington.** *Bank v. Doherty*, 42 Wash. 317, 4 L. R. A. (N.S.) 1191, 84 Pac. 872.

<sup>3</sup> See § 3596.

<sup>4</sup> *Runkle v. Smith*, 89 N. J. Eq. 103, 103 Atl. 382 (also place of performance; second assignee allowed to set up usury).

<sup>1</sup> *Whitlock v. Cohn*, 72 Ark. 83, 80 S. W. 141; *Ives v. Farmers' Bank*, 84 Mass. (2 All.) 236; *Staples v. Nott*, 128 N. Y. 403, 26 Am. St. Rep. 480, 28 N. E. 515; *Manhattan Life Insurance Co. v. Johnson*, 188 N. Y. 108, 9 L. R. A. (N.S.) 1142, 80 N. E. 658; *Fisher v. Otis*, 3 Pinney (Wis.) 78; *Richards v. Globe Bank*, 12 Wis. 692.

state, even if usurious by the law of such state.<sup>2</sup> If the place of making is also the forum, and the contract is not usurious at such law, the place of making is said to control;<sup>3</sup> but in cases of this sort, the tendency on the part of the forum to enforce its own law, as well as the tendency to apply the system of law which renders the contract valid, in order to give effect to the presumed intention of the parties,<sup>4</sup> contributes to this result. The law of the place of making which is also the law of the domicile of the parties, has been applied in preference to the law of the forum.<sup>5</sup> If no place of payment is fixed the law of the state where the notes are executed and delivered will control.<sup>6</sup> If no place of payment is provided for in the note it is controlled by the law of the place where it is made, even if the by-laws of the payee loan association require all payments to be made at the home office;<sup>7</sup> but this has been explained on the theory that the notes are prima facie payable there.<sup>8</sup> If oral negotiations for the loan are made in one jurisdiction, and the notes are executed in another, the law of the place where the notes are executed is said to control.<sup>9</sup>

**§ 3597. Theory that place of performance governs.** In some jurisdictions it is said that the law of the place of performance controls.<sup>1</sup> If valid where payment is to be made, a contract is not usurious, even though if controlled by the law of the place where such borrower is domiciled it would be usurious.<sup>2</sup> If a building and loan association is really domiciled in the state where the loan is given and the maker resides, and the real intention of the

<sup>2</sup> Farmers' & Mechanics' Savings Co. v. Bazore, 67 Ark. 252, 54 S. W. 339; Crebbin v. Deloney, 70 Ark. 49, 69 S. W. 312; American Building, Loan & Tontine Association v. McClellan, 71 Ark. 643, 70 S. W. 463.

<sup>3</sup> Whitlock v. Cohn, 72 Ark. 83, 80 S. W. 141; Fisher v. Otis, 3 Pinney (Wis.) 78; Richards v. Globe Bank, 12 Wis. 692.

<sup>4</sup> See §§ 3590 and 3598.

<sup>5</sup> Manhattan Life Insurance Co. v. Johnson, 188 N. Y. 108, 9 L. R. A. (N. S.) 1142, 80 N. E. 658.

<sup>6</sup> New York Security & Trust Co. v. Davis, 96 Md. 81, 53 Atl. 689.

<sup>7</sup> Spinney v. Chapman, 121 Ia. 38, 95 N. W. 230.

<sup>8</sup> All v. British & American Mortgage Co., 104 S. Car. 239, 88 S. E. 529.

<sup>9</sup> First Natl. Bank v. Rambo, 143 Ga. 665, 85 S. E. 840 (also forum).

<sup>1</sup> Junction Ry. v. Ashland Bank, 79 U. S. (12 Wall.) 226, 20 L. ed. 385; Ringer v. Virgin Timber Co., 213 Fed. 1001; Dickinson v. Edwards, 77 N. Y. 573, 33 Am. Rep. 671; Midland Savings & Loan Co. v. Henderson, 47 Okla. 693, 150 Pac. 868 [sub nomine, Midland Savings & Loan Co. v. Beats, L. R. A. 1916D, 745]; Peck v. Mayo, 44 Vt. 33, 39 Am. Dec. 205.

<sup>2</sup> Hieronymus v. New York National Building & Loan Association, 101 Fed. 12 [affirmed, 107 Fed. 1005, 46 C. C. A. 684].

parties is that it shall be paid there, a formal provision making the loan payable at the chief office of the company in another state does not make the law of such latter state control.<sup>3</sup> Establishing a local agent in a state other than the one in which the corporation has its main office is for this purpose held to give it a domicile in that state.<sup>4</sup> While in most of the cases in which this principle is invoked, the system of law which makes the contract legal, is held to control,<sup>5</sup> it is sometimes applied so as to treat as usurious contracts which were lawful where made.<sup>6</sup> The courts are especially willing to give effect to the law of the place of payment, if it is the same as the law of the forum.<sup>7</sup>

**§ 3598. Theory that law which parties intend governs.** It is frequently held that the law which the parties intend to control the transaction will be permitted to control, in accordance with their intent, at least if such system of law is one which might fairly be regarded as having some connection with the transaction, and if the parties are acting in good faith and not intending to evade the system of law which is really applicable. Accordingly, if a contract is made in one state and is payable in another, the parties may, if acting in good faith, contract with reference to the interest laws of either state, and a rate of interest, valid under either system of law, will not be regarded as usurious.<sup>1</sup> The intent

<sup>3</sup> *Vermont Loan & Trust Co. v. Hoffman*, 5 Ida. 376, 95 Am. St. Rep. 186, 37 L. R. A. 509, 49 Pac. 314; *Hoskins v. Rochester Savings & Loan Association*, 133 Mich. 505, 95 N. W. 566; *Shannon v. Georgia State Building & Loan Association*, 78 Miss. 955, 84 Am. St. Rep. 657, 57 L. R. A. 800, 30 So. 51; *Georgia State Building & Loan Association v. Shannon*, 80 Miss. 642, 31 So. 900.

<sup>4</sup> *National Mutual Building & Loan Association v. Brahan*, 80 Miss. 407, 57 L. R. A. 793, 31 So. 840.

<sup>5</sup> See § 3590.

<sup>6</sup> *Ringer v. Virgin Timber Co.*, 213 Fed. 1001.

<sup>7</sup> *Middle States Loan & Construction Co. v. Baker*, 19 D. C. App. 1.

<sup>1</sup> *United States. Hieronymus v. New York National Building & Loan Asso-*

*ciation*, 107 Fed. 1005, 46 C. C. A. 684 [affirming, 101 Fed. 12]; *O'Toole v. Meysenburg*, 251 Fed. 191.

**Alabama.** *Pioneer Savings & Loan Co. v. Nonnemacher*, 127 Ala. 521, 30 So. 79; *Barrett v. Central Building & Loan Association*, 130 Ala. 204, 30 So. 347; *United States Savings & Loan Co. v. Beckley*, 137 Ala. 119, 97 Am. St. Rep. 19, 33 So. 934.

**Arkansas.** *Whitlock v. Cohn*, 72 Ark. 83, 80 S. W. 141.

**Georgia.** *Jackson v. American Mortgage Co.*, 88 Ga. 756, 15 S. E. 812; *Harvard v. Davis*, 145 Ga. 580, 89 S. E. 740.

**Idaho.** *Zimmerman v. Brown*, 30 Ida. 640, 166 Pac. 924.

**Minnesota.** *Green v. Northwestern Trust Co.*, 128 Minn. 30, L. R. A. 1916D, 739, 150 N. W. 229; *Jenkins v.*

of the parties to adopt a given system of law may be set forth in express terms;<sup>2</sup> but more frequently it is inferred from the contract taken as a whole. If the contract does not show affirmatively what system of law the parties intend to control the transaction, and the contract is valid by one of the competing systems of law, and invalid by the others, the court will assume that the parties intend to have the transaction controlled by that system of law by which it is valid,<sup>3</sup> on the theory that they will be presumed to intend a valid obligation rather than an invalid one.<sup>4</sup> In accord-

Union Savings Association, 132 Minn. 19, 155 N. W. 765.

Ohio. *Scott v. Perlee*, 39 O. S. 63, 48 Am. Rep. 421.

Oklahoma. *Midland Savings & Loan Co. v. Henderson*, 47 Okla. 693, 150 Pac. 868 [sub nomine, *Midland Savings & Loan Co. v. Beats*, L. R. A. 1916D, 745]; *Midland Savings & Loan Co. v. Evans*, — Okla. —, 171 Pac. 726.

South Carolina. *Thornton v. Dean*, 19 S. Car. 583, 45 Am. Rep. 796; *British-American Mortgage Co. v. Bates*, 58 S. Car. 551, 36 S. E. 917.

Texas. *Dugan v. Lewis*, 79 Tex. 246, 12 L. R. A. 93, 14 S. W. 1024.

Virginia. *Ware v. Bankers' Loan & Investment Co.*, 95 Va. 680, 64 Am. St. Rep. 826, 29 S. E. 744.

Washington. *Crawford v. Seattle, Renton & Southern Ry.*, 86 Wash. 628, L. R. A. 1916D, 732, 150 Pac. 1155.

Wisconsin. *Fisher v. Otis*, 3 Pinney (Wis.) 78; *Newman v. Kershaw*, 10 Wis. 333.

"The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance and if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate of interest be higher at the

place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate." *Andrews v. Pond*, 38 U. S. (13 Pet.) 65, 77, 10 L. ed. 61 [quoted in *Miller v. Tiffany*, 68 U. S. (1 Wall.) 298, 310, 17 L. ed. 540, and in *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 242, 45 L. ed. 834].

<sup>2</sup> *United States Savings & Loan Co. v. Beckley*, 137 Ala. 119, 97 Am. St. Rep. 19, 62 L. R. A. 33, 33 So. 934 (domicile of creditor and probably also place of making; not the forum); *Harvard v. Davis*, 145 Ga. 580, 89 S. E. 740 (not place of payment); *Dugan v. Lewis*, 79 Tex. 246, 23 Am. St. Rep. 332, 12 L. R. A. 93, 14 S. W. 1024 (place of making and forum; not place of payment).

<sup>3</sup> *United States. Andrews v. Pond*, 38 U. S. (13 Pet.) 65, 10 L. ed. 61.

Arkansas. *Whitlock v. Cohn*, 72 Ark. 83, 80 S. W. 141.

Idaho. *Zimmerman v. Brown*, 30 Ida. 640, 166 Pac. 924.

Minnesota. *Green v. Northwestern Trust Co.*, 128 Minn. 30, L. R. A. 1916D, 739, 150 N. W. 229.

Ohio. *Kilgore v. Dempsey*, 25 O. S. 413, 18 Am. Rep. 306; *Scott v. Perlee*, 39 O. S. 63, 48 Am. Rep. 421.

Washington. *Crawford v. Seattle, Renton & Southern Ry.*, 86 Wash. 628, L. R. A. 1916D, 732, 150 Pac. 1155.

Wisconsin. *Newman v. Kershaw*, 10 Wis. 333.

<sup>4</sup> See § 2051.

ance with this theory, the courts have presumed that the parties intend that the law of the place of making the contract shall govern, if it is valid in such jurisdiction, but invalid by the law of the place of payment.<sup>5</sup> If the contract is usurious by the law of the place at which it is made, but if it is valid by the law of the place at which it is to be paid, or otherwise performed, it will be presumed that the parties intend that the law of the place of performance shall control.<sup>6</sup> Hence, a contract made in Pennsylvania between a citizen of that state and a building and loan association domiciled in New York, payable in New York, has been held to be governed by New York law.<sup>7</sup> Even if the makers are domiciled in one state, the realty mortgaged to secure the note is situated there, and the note is delivered there, the note will be valid if not usurious by the law of the place of payment.<sup>8</sup> If a loan for the purpose of buying up liens is not usurious where the lender is domiciled, nor where the liens are to be purchased, it is valid

§ **Alabama.** *American Freehold Land Mortgage Co. v. Sewell*, 92 Ala. 163, 13 L. R. A. 299, 9 So. 143.

**Arkansas.** *Whitlock v. Cohn*, 72 Ark. 83, 80 S. W. 141 (also forum).

**New York.** *Chapman v. Robertson*, 6 Paige (N. Y.) 627, 31 Am. Dec. 264.

**Ohio.** *Kilgore v. Dempsey*, 25 O. S. 413, 18 Am. Rep. 306.

**Wisconsin.** *Newman v. Kershaw*, 10 Wis. 333.

§ **United States.** *Junction Ry. v. Ashland Bank*, 79 U. S. (12 Wall.) 226, 20 L. ed. 385.

**Alabama.** *Hayes v. Southern Home Building & Loan Association*, 124 Ala. 663, 82 Am. St. Rep. 216, 26 So. 527.

**Idaho.** *Zimmerman v. Brown*, 30 Ida. 640, 166 Pac. 924.

**Iowa.** *Bigelow v. Burnham*, 83 Ia. 120, 49 N. W. 104.

**Minnesota.** *Green v. Northwestern Trust Co.*, 128 Minn. 30, L. R. A. 1916D, 739, 150 N. W. 229; *Jenkins v. Union Savings Association*, 132 Minn. 19, 155 N. W. 765.

**Missouri.** *Central National Bank v. Cooper*, 85 Mo. App. 383.

**Oklahoma.** *Midland Savings & Loan Co. v. Henderson*, 47 Okla. 693, 150 Pac.

868 [sub nomine, *Midland Savings & Loan Co. v. Beats*, L. R. A. 1916D, 745]; *Midland Savings & Loan Co. v. Evans*, — Okla. —, 171 Pac. 726.

**Oregon.** *Casner v. Haskins*, 64 Or. 254, 128 Pac. 841, 130 Pac. 55.

**Pennsylvania.** *People's Building, Loan & Savings Association v. Berlin*, 201 Pa. St. 1, 88 Am. St. Rep. 764, 50 Atl. 308.

**Tennessee.** *Pioneer Savings & Loan Co. v. Cannon*, 96 Tenn. 599, 54 Am. St. Rep. 858, 33 L. R. A. 112, 36 S. W. 386.

§ *Gale v. Southern Building & Loan Association*, 117 Fed. 732; *Interstate Building & Loan Association v. Edgefield Hotel Co.*, 120 Fed. 422; *Alexander v. Southern Home Building & Loan Association*, 120 Fed. 963; *People's Building, Loan & Savings Association v. Berlin*, 201 Pa. St. 1, 88 Am. St. Rep. 764, 50 Atl. 308.

So if a building and loan association note is payable at the home office, the law of the domicile of such association controls. *Pacific States Savings, Loan & Building Co. v. Green*, 123 Fed. 43.

§ *Hamilton v. Fowler*, 99 Fed. 18, 40 C. C. A. 47.

though usurious where made.<sup>9</sup> The law of the jurisdiction in which the debtor is domiciled has been held to be the law which the parties intend, if the contract is not usurious by such law,<sup>10</sup> although the loan was made and payable in the jurisdiction in which the grantor was domiciled, where the transaction was usurious.<sup>11</sup> The jurisdiction in which the creditor is domiciled has been held to be intended as the law which controls, if the transaction is valid under such law, although it is invalid in the jurisdiction in which the loan was made and in which it was payable.<sup>12</sup> By statute, a contract may be made enforceable if it is valid by the law of that jurisdiction, and is made therein, or if the borrower is a citizen of such jurisdiction.<sup>13</sup> Since security is a mere incident to the debt which is secured, the law of the jurisdiction in which the mortgaged land is situated does not ordinarily control the validity of the contract.<sup>14</sup> If the contract is not usurious by the law of the place where the debt is incurred, and is payable,<sup>15</sup> or by the law of the place where the debt is payable,<sup>16</sup> a mortgage which is given to secure such debt upon realty located in a jurisdiction in which such debt would have been usurious, if made or

<sup>9</sup> *Kroegher v. Calivada Colonization Co.*, 119 Fed. 641.

<sup>10</sup> *Scott v. Perlee*, 39 O. S. 63, 48 Am. Rep. 421; *Crawford v. Seattle, Renton & Southern Ry.*, 86 Wash. 628, L. R. A. 1916D, 732, 150 Pac. 1155.

<sup>11</sup> *Crawford v. Seattle, Renton & Southern Ry.*, 86 Wash. 628, L. R. A. 1916D, 732, 150 Pac. 1155.

<sup>12</sup> *Green v. Northwestern Trust Co.*, 128 Minn. 30, L. R. A. 1916D, 739, 150 N. W. 229 (land by which debt secured, also in domicile of creditor).

<sup>13</sup> *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 35 L. ed. 786 (Illinois).

<sup>14</sup> *United States, Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 45 L. ed. 834.

**Florida.** *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 193, 23 So. 12.

**Illinois.** *Walker v. Lovitt*, 250 Ill. 543, 95 N. E. 631.

**Minnesota.** *Jenkins v. Union Savings Association*, 132 Minn. 19, 155 N. W. 765; *Patterson v. Wyman*, 142 Minn. 70, 170 N. W. 928.

**New York.** *Manhattan Life Insurance Co. v. Johnson*, 188 N. Y. 108, 9 L. R. A. (N.S.) 1142, 80 N. E. 658.

**North Dakota.** *Gold-Stabeck Loan & Credit Co. v. Kinney*, 33 N. D. 495, 157 N. W. 482.

**Oklahoma.** *Midland Savings & Loan Co. v. Henderson*, 47 Okla. 693, 150 Pac. 868 [sub nomine, *Midland Savings & Loan Co. v. Beats*, L. R. A. 1916D, 745].

**Pennsylvania.** *Bennett v. Eastern Building & Loan Association*, 177 Pa. St. 233, 55 Am. St. Rep. 723, 34 L. R. A. 595, 35 Atl. 684.

**Washington.** *Bank v. Doherty*, 42 Wash. 317, 4 L. R. A. (N.S.) 1191, 84 Pac. 872.

<sup>15</sup> *Manhattan Life Insurance Co. v. Johnson*, 188 N. Y. 108, 9 L. R. A. (N. S.) 1142, 80 N. E. 658.

<sup>16</sup> *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 45 L. ed. 834; *Central National Bank v. Cooper*, 85 Mo. App. 383.

payable there, as the case may be, is nevertheless valid and enforceable. If the debt is usurious where it is made or payable, as the case may be, a mortgage on land in another jurisdiction can not be enforced,<sup>17</sup> in the absence of statute. By statute, a contract may be made valid, even if exceeding the legal rate in the state where made, if valid by the law of the state where the property mortgaged to secure such debt is situated.<sup>18</sup>

**§ 3598a. Intent of parties if contract usurious by each system.**

If a contract is usurious under the law of each of the competing jurisdictions, the parties will not be aided by the presumption that they intend a valid contract, since they evidently intended an invalid contract no matter to which jurisdiction we look. They will not be aided by a presumption that they intended the jurisdiction in which the lightest penalty will be inflicted.<sup>1</sup> According to the weight of authority, the law of the place of making will control,<sup>2</sup> although there is some authority in favor of the law of the place of performance.<sup>3</sup>

**§ 3598b. Effect of usury—Penalties and remedies.** As a rule, the consequences of a contract which is usury where made, are regarded as a part of the substantive rights of the parties, and are given effect in other jurisdictions.<sup>1</sup> If, however, the consequences of usury are clearly penal in their character, the courts of other jurisdictions will not enforce such penal laws.<sup>2</sup> A loan to a citizen of the forum will be regarded as payable there, presumptively, so as to enable him to recover the penalties for usury.<sup>3</sup> Since remedies are controlled, in general, by the law of the forum,<sup>4</sup> the remedies upon usurious contracts, as distinguished from the sub-

<sup>17</sup> Gold-Stabeck Loan & Credit Co. v. Kinney, 33 N. D. 495, 157 N. W. 482.

<sup>18</sup> Kendrick v. Kyle, 78 Miss. 278, 28 So. 951.

<sup>1</sup> Andrews v. Pond, 38 U. S. (13 Pet.) 65, 10 L. ed. 61; Ringer v. Virgin Timber Co., 213 Fed. 1001; George v. Oscar Smith & Sons Co., 250 Fed. 41; O'Toole v. Meysenburg, 251 Fed. 191; Arnold v. Potter, 22 Ia. 194; Bascom v. Zediker, 48 Neb. 380, 67 N. W. 148.

<sup>2</sup> Andrews v. Pond, 38 U. S. (13 Pet.) 65, 10 L. ed. 61; George v. Oscar Smith & Sons Co., 250 Fed. 41; O'Toole v. Meysenburg, 251 Fed. 191; Arnold v.

Potter, 22 Ia. 194; Bascom v. Zediker, 48 Neb. 380, 67 N. W. 148.

<sup>3</sup> Ringer v. Virgin Timber Co., 213 Fed. 1001.

<sup>1</sup> De Wolf v. Johnson, 23 U. S. (10 Wheat.) 367, 6 L. ed. 343; Trower Bros. Co. v. Hamilton, 179 Mo. 205, 77 S. W. 1081.

<sup>2</sup> Crebbin v. Deloney, 70 Ark. 493, 69 S. W. 312; Blaine v. Curtis, 59 Vt. 120, 50 Am. Rep. 702, 7 Atl. 708.

<sup>3</sup> All v. British & American Mortgage Co., 104 S. Car. 239, 88 S. E. 529.

<sup>4</sup> See §§ 3617 et seq.

stantive rights of the parties, are determined by the law of the forum.<sup>5</sup> The application of this principle may sometimes result in the refusal of the court to grant a remedy against usury, on the theory that the remedy of the jurisdiction where the contract was made and to be performed can not be applied, while the remedy which is given by the law of the forum is limited to contracts which are forbidden by the law of the forum.<sup>6</sup> If a transaction is usurious where it is made, but a corporation is not allowed to set up usury, it is said that this restriction is a matter of remedy and not of substantive law, and the court will allow such corporation to plead usury.<sup>7</sup>

**§ 3599. Sales of intoxicating liquors.** Before the Eighteenth Amendment to the Constitution of the United States and the legislation which has been enacted thereunder, sales of intoxicating liquors frequently presented important and difficult questions with reference to the law which controlled the validity of such transactions.

In discussing this topic an important distinction is to be noted. There are cases involving the sale of intoxicating liquors, which are confessedly governed by the law of a state where such sales are legal, which are nevertheless held to be illegal because intended to aid in the violation of the law of another state.<sup>1</sup> With this principle we have nothing to do here. The question to be considered in this connection is solely whether the law of the state in which such sale is legal, or that in which such sale is illegal, controls.

The general rule is that the law of the state where the title of the property passes from the vendor to the vendee controls.<sup>2</sup> This

<sup>5</sup> *Massachusetts*. *Gale v. Eastman*, 48 Mass. (7 Met.) 14.

*Michigan*. *Stack v. Detour Lumber & Cedar Co.*, 151 Mich. 21, 16 L. R. A. (N.S.) 616, 114 N. W. 876 (contract made in jurisdiction of forum).

*Mississippi*. *Kendrick v. Kyle*, 78 Miss. 278, 28 So. 951.

*North Carolina*. *Commissioners of Craven v. Atlantic & North Carolina Ry.*, 77 N. Car. 289.

*South Carolina*. *Meares v. Finlayson*, 55 S. Car. 105, 32 S. E. 986.

<sup>6</sup> *Gale v. Eastman*, 48 Mass. (7 Met.) 14.

<sup>7</sup> *Stack v. Detour Lumber & Cedar Co.*, 151 Mich. 21, 16 L. R. A. (N.S.) 616, 114 N. W. 876 (contract made in jurisdiction of forum); *Commissioners of Craven v. Atlantic & North Carolina Ry.*, 77 N. Car. 289.

<sup>1</sup> See §§ 1105 et seq.

<sup>2</sup> *Connecticut*. *J. & J. Eager Co. v. Burke*, 74 Conn. 534, 51 Atl. 544.

*Iowa*. *Fred Miller Brewing Co. v. De France*, 90 Ia. 395, 57 N. W. 959.

*Massachusetts*. *Portsmouth Brewing Co. v. Smith*, 155 Mass. 100, 28 N. E. 1130.

is ordinarily the place of delivery of the property.<sup>3</sup> Hence, if such sales are made where valid and title passes, the fact that the vendor acting for vendee delivers the liquor to a common carrier for transportation to a state where such sale is invalid does not make the law of the latter state control.<sup>4</sup> If intoxicating liquor is to be delivered by the vendor free on board in Wisconsin, where such contract is legal, the fact that it is to be shipped into Iowa, where such contract is illegal, does not make such contract illegal.<sup>5</sup> On the other hand, if by the contract between the parties delivery is to be made to the vendee at his domicile, the vendor causing the goods to be transported to that place by a carrier the law of such place controls.<sup>6</sup> If a conditional agreement for a sale is made in one state, to become a binding contract only when the prospective vendee shall make an order, a sale made subsequently in another state pursuant to such order is controlled by the law of the latter state and not that of the former.<sup>7</sup> If an order for intoxicating liquors is solicited by an agent where such contract is illegal, but does not become a binding contract until acceptance by the principal of the agent where such contract is legal, the law of the latter state controls and the contract is legal.<sup>8</sup> This principle applies where the order is given direct to the agent and under his direction it is held until the vendee sends in his order direct to the vendor,<sup>9</sup> and to cases where the vendee does not know that the agent has no authority to make a binding contract as long as neither the agent nor his principal attempt to mislead him.<sup>10</sup>

**Nebraska.** *P. Schoenhofen Brewing Co. v. Whipple* (Neb.), 89 N. W. 751.

**Oklahoma.** *Fist v. La Batte*, — Okla. —, 171 Pac. 1120.

**Vermont.** *Bacon v. Hunt*, 72 Vt. 98, 47 Atl. 394.

<sup>3</sup> *Lewis v. McCabe*, 49 Conn. 141, 44 Am. Rep. 217; *Weil v. Golden*, 141 Mass. 364, 6 N. E. 229.

<sup>4</sup> *Engs v. Priest*, 65 Ia. 232, 21 N. W. 580; *Brown v. Wieland*, 116 Ia. 711, 61 L. R. A. 417, 89 N. W. 17; *Sullivan v. Sullivan*, 70 Mich. 583, 38 N. W. 472; *Bollinger v. Wilson*, 76 Minn. 262, 77 Am. St. Rep. 646, 79 N. W. 109.

<sup>5</sup> *Hamilton v. Schlitz Brewing Co.*, 129 Ia. 172, 2 L. R. A. (N.S.) 1078, 105 N. W. 438; *Bollinger v. Wilson*, 76

Minn. 262, 77 Am. St. Rep. 646, 79 N. W. 109.

<sup>6</sup> *Weil v. Golden*, 141 Mass. 364, 6 N. E. 229.

<sup>7</sup> *Fred Miller Brewing Co. v. De France*, 90 Ia. 395, 57 N. W. 959.

<sup>8</sup> *J. & J. Eager Co. v. Burke*, 74 Conn. 534, 51 Atl. 544; *Fegler v. Shipman*, 33 Ia. 194, 11 Am. Rep. 118; *Sachs v. Garner*, 111 Ia. 424, 82 N. W. 1007; *Brown v. Wieland*, 116 Ia. 711, 61 L. R. A. 417, 89 N. W. 17; *Bacon v. Hunt*, 72 Vt. 98, 47 Atl. 394.

<sup>9</sup> *Bacon v. Hunt*, 72 Vt. 98, 47 Atl. 394.

<sup>10</sup> *Sachs v. Garner*, 111 Ia. 424, 82 N. W. 1007.

In some jurisdictions the act of sending an agent into the state where the resale of intoxicating liquors is unlawful is held to be such aid to the illegal intent as to make the original sale illegal.<sup>11</sup> As said before,<sup>12</sup> this rule does not involve the question of the law controlling.

When the original interstate commerce law was in force, a contract appointing an agent to sell intoxicating liquors in the original package was valid even in states where such sale in general was forbidden,<sup>13</sup> since a state could not forbid the importation of articles of interstate commerce,<sup>14</sup> and the state statutes to that effect were therefore unconstitutional. Under the "Wilson act," which provides that liquors transported into any state shall on arrival there be subject to its laws, and shall not be exempt because in the original package, it has been held that if orders are taken in one state, and the vendor ships such liquor in from another state, the law of the former state determines his rights.<sup>15</sup>

By express legislation, in some jurisdictions, no action could be brought to recover a debt which was contracted for intoxicating liquors, no matter where such sale was made.<sup>16</sup> By the statutes of some states, no recovery could be had upon a contract for the sale of intoxicating liquors although valid where made and to be performed, if such sale was entered into in order to enable the purchaser to violate the law of the forum.<sup>17</sup>

The whole subject is now obsolete with reference to shipments of goods from one state of the Union to another. The principles which are here discussed may have some application to contracts which are made in a foreign country and which provide for the sale of liquor to be transported to the United States.

<sup>11</sup> *Tolman v. Johnson*, 43 Ia. 127; *McConihe v. McMann*, 27 Vt. 95 (so by statute in Iowa); *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187.

<sup>12</sup> See ante, this section.

<sup>13</sup> *Green v. Schoenhofen Brewing Co.*, 103 Ia. 252, 72 N. W. 655; *Richards v. Woodward*, 113 Mass. 285; *Carstairs v. O'Donnell*, 154 Mass. 357, 28 N. E. 271; *Jones v. Surprise*, 64 N. H. 243, 9 Atl. 384; *Durkee v. Moses*, 67 N. H. 115, 23 Atl. 793 [overruling, *Dunbar v. Locke*, 62 N. H. 442].

<sup>14</sup> *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150.

<sup>15</sup> *Bluthenthal v. McWhorter*, 131 Ala. 642, 31 So. 559.

<sup>16</sup> *J. & S. Goodman v. Swett*, 108 Miss. 224, 66 So. 535.

<sup>17</sup> *J. & J. Eager Co. v. Burke*, 74 Conn. 534, 51 Atl. 544; *Lindsey v. Stone*, 123 Mass. 332; *Bluthenthal v. Kennedy*, 165 N. Car. 372, 81 S. E. 337.

**§ 3600. Contracts in violation of policy of law of forum not enforced—General principles.** In the last analysis the forum has power to refuse to recognize any rules of foreign law, and any rights which have arisen thereunder. While this power is not usually exercised, in theory at least, and while the common law usually insists that the substantive rights of the parties are to be controlled by the law of the place where the contract was made, or was to be performed,<sup>1</sup> the power to refuse to recognize foreign rights is exercised in cases in which the contract under which the rights arise is so contrary to the settled policy and the moral ideals of the forum that they will decline to give any protection thereto.<sup>2</sup>

<sup>1</sup> See §§ 3566 et seq.

<sup>2</sup> *England.. Kaufman v. Gerson* [1904], 1 K. B. 501.

*United States. Smith v. Union Bank*, 30 U. S. (5 Pet.) 518, 8 L. ed. 212; *Kennett v. Chambers*, 55 U. S. (14 How.) 33, 14 L. ed. 316; *Union Trust Co. v. Grosman*, 245 U. S. 412, 62 L. ed. 368; *Parker v. Moore*, 111 Fed. 470.

*Alabama. Western Union Telegraph Co. v. Hill*, 163 Ala. 18, 50 So. 248.

*Georgia. Benton v. Singleton*, 114 Ga. 548, 58 L. R. A. 181, 40 S. E. 811.

*Illinois. Pope v. Hanke*, 155 Ill. 617, 28 L. R. A. 568, 40 N. E. 839; *Rhodes v. Missouri Savings & Loan Co.*, 173 Ill. 621, 42 L. R. A. 93, 50 N. E. 998; *Thomas v. First National Bank*, 213 Ill. 261, 72 N. E. 801; *Nonotuck Silk Co. v. Adams Express Co.*, 256 Ill. 66, 99 N. E. 893.

*Indiana. Vandalia Ry. Co. v. Kelley*, 187 Ind. 323, 119 N. E. 257.

*Iowa. Hamilton v. Chicago, Burlington & Quincy Ry.*, 145 Ia. 431, 124 N. W. 363.

*Kentucky. Rogers v. Rains*, 100 Ky. 295, 38 S. W. 483; *Brown v. Dalton*, 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443.

*Michigan. Curtis v. Mueller*, 184 Mich. 148, 150 N. W. 847.

*Mississippi. J. & S. Goodman v.*

*Swett*, 104 Miss. 228, 66 So. 535 (statute).

*New Hampshire. True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164.

*New Jersey. Varnum v. Camp*, 13 N. J. L. 326, 25 Am. Dec. 476.

*New York. Despard v. Churchill*, 53 N. Y. 192; *Dearing v. McKinnon Dash & Hardware Co.*, 165 N. Y. 78, 80 Am. St. Rep. 708, 58 N. E. 773; *Meacham v. Jamestown, Franklin & Clearfield Ry.*, 211 N. Y. 346, 105 N. E. 653.

*North Carolina. Armstrong v. Best*, 112 N. Car. 59, 34 Am. St. Rep. 473, 25 L. R. A. 188, 17 S. E. 14; *Williamson v. Postal Telegraph-Cable Co.*, 151 N. Car. 223, 65 S. E. 974; *Burrus v. Witcover*, 158 N. Car. 384, 39 L. R. A. (N. S.) 1005, 74 S. E. 11; *Standard Fashion Co. v. Grant*, 165 N. Car. 453, 81 S. E. 606.

*North Dakota. Hanson v. Great Northern Ry. Co.*, 18 N. D. 324, 121 N. W. 78.

*Oklahoma. Union Savings Association v. Cummins*, 78 Okla. 265, 190 Pac. 869.

*Oregon. Hirschfield v. McCullach*, 64 Or. 502, 130 Pac. 1131 [affirming, *Hirschfield v. McCullach*, 64 Or. 502, 127 Pac. 541].

*Rhode Island. Winward v. Lincoln*, 23 R. I. 476, 64 L. R. A. 160, 51 Atl. 106.

There is some difference as to the fundamental theory which underlies this fact. Whether we are to say that the courts, in cases of this sort, refuse to recognize the existence of rights which have arisen under the foreign law, or whether we are to say that the courts recognize the existence of such rights but that they decline to enforce them, if they are contrary to its own settled policy, is a question upon which there has been considerable discussion. The theory that the court recognizes the existence of the foreign right but declines to enforce it, gives an appearance of harmony to the rules on the subject of conflict of laws; but, on the other hand, the idea of a right which is recognized but to which no protection of any sort is given, while not uncommon in early periods of law, is opposed to modern analysis, which makes legal protection the test of the existence of the right. A right of this sort does not seem to be even a so-called imperfect right, since there is no way by which it is protected, directly or indirectly.

Whatever may be the theory which justifies the result, the fact remains that the courts frequently refuse to enforce contracts which are valid where they are made and where they are to be performed, but which are opposed to the policy of the forum. This general principle is stated in some cases with apparent limitations. It has been said that the courts will not enforce a contract which is in violation of its policy as declared in its written law.<sup>3</sup> While a clear declaration of the policy of the state, in a constitution or a

**South Carolina.** *Ex parte Dickinson*, 29 S. Car. 453, 13 Am. St. Rep. 749, 1 L. R. A. 685, 7 S. E. 593; *Welling v. Eastern Building & Loan Association*, 56 S. Car. 280, 34 S. E. 409.

**South Dakota.** *Hudson v. Sheafe*, 41 S. D. 475, 171 N. W. 320.

**Tennessee.** *Pennegar v. State*, 87 Tenn. 244, 10 Am. St. Rep. 648, 2 L. R. A. 703, 10 S. W. 305.

**Texas.** *St. Louis Southwestern Ry. Co. of Texas v. McIntyre (Tex.)*, 82 S. W. 346; *St. Louis, I. M. & S. Ry. Co. v. Moon (Tex.)*, 103 S. W. 1176.

**Utah.** *Palmer v. Palmer*, 26 Utah 31, 61 L. R. A. 641, 72 Pac. 3.

**Virginia.** *National Car Advertising Co. v. Louisville & Nashville Ry.*, 110 Va. 413, 24 L. R. A. (N.S.) 1010, 66 S. E. 88.

**Washington.** *Carstens Packing Co. v. Southern Pacific Ry.*, 58 Wash. 239, 27 L. R. A. (N.S.) 975, 108 Pac. 613.

**Wisconsin.** *Wight v. Rindskopf*, 43 Wis. 344; *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703; *Fox v. Postal Telegraph-Cable Co.*, 138 Wis. 648, 120 N. W. 309; *International Harvester Co. of America v. McAdam*, 142 Wis. 114, 26 L. R. A. (N.S.) 774, 124 N. W. 1042; *Barbee v. Bevins*, 176 Ky. 113, 195 S. W. 154 (obiter).

<sup>3</sup>*Nonotuck Silk Co. v. Adams Express Co.*, 256 Ill. 76, 99 N. E. 893; *Vandalia Ry. Co. v. Kelley*, 187 Ind. 323, 119 N. E. 257; *Corbin v. Houlehan*, 100 Me. 246, 70 L. R. A. 568, 61 Atl. 131; *Carpenter v. Hanes*, 167 N. Car. 551, 83 S. E. 577.

statute, shows such policy in definite form, the public policy of the state is frequently found in principles of common law and equity, as well as in statutes and constitutional provisions;<sup>4</sup> and the courts may refuse to recognize foreign contracts which are contrary to the well settled principles of policy as determined by common law and equity.<sup>5</sup> It has been said that the courts will not enforce contracts which are in violation of its policy and which will operate to the prejudice of its citizens.<sup>6</sup> A statute may be so drawn as to show that it is intended only for the protection of the citizens of such state;<sup>7</sup> but the refusal of the courts to enforce foreign contracts is not usually thus limited.<sup>8</sup>

In theory at least, the refusal of courts to enforce contracts which are contrary to their own settled policy does not mean that they will always refuse to enforce contracts which would be illegal or void if made in the forum. On the contrary, the general rule is that the validity of the subject-matter is governed by the law of the place where the contract is made, or is to be performed,<sup>9</sup> and not by the law of the forum. In practice, this rule generally indicates a conflict of authority on most of the specific types of subject-matter; some courts enforce such contracts, if valid where made or to be performed, on the theory that such law governs; and other courts refuse to enforce contracts of the same types on the theory that they are contrary to the settled policy of the forum.

**§ 3601. Contracts in violation of policy of law of forum—**  
**Specific illustrations.** Courts have refused to enforce wager contracts, though valid where made or to be performed.<sup>1</sup> A note

<sup>4</sup> See §§ 669 et seq.

<sup>5</sup> See note 2, this section.

<sup>6</sup> *Rhodes v. Missouri Savings & Loan Co.*, 173 Ill. 621, 42 L. R. A. 92, 50 N. E. 998; *Marshall v. Sherman*, 148 N. Y. 9, 51 Am. St. Rep. 654, 34 L. R. A. 757, 42 N. E. 419; *Burrus v. Witcover*, 158 N. Car. 384, 39 L. R. A. (N.S.) 1005, 74 S. E. 11; *Coffe v. Wilhite*, 56 Okla. 394, 156 Pac. 169.

<sup>7</sup> *Lane v. J. E. Roach's Banda Mexicana Co.*, 78 N. J. Eq. 439, 79 Atl. 365.

<sup>8</sup> See note 2, this section.

<sup>9</sup> See §§ 3588 et seq.

<sup>1</sup> *United States. Parker v. Moore*, 115 Fed. 799 [reversing, 111 Fed. 470].  
*Illinois. Pope v. Hanke*, 155 Ill. 617,

28 L. R. A. 568, 40 N. E. 839; *Thomas v. First National Bank*, 213 Ill. 261, 72 N. E. 801.

*Indiana. Sondheim v. Gilbert*, 117 Ind. 71, 10 Am. St. Rep. 23, 5 L. R. A. 432, 18 N. E. 687.

*Mississippi. Ascher v. Moyse*, 101 Miss. 36, 57 So. 299.

*New Jersey. Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, 45 Atl. 611.

*North Carolina. Burrus v. Witcover*, 158 N. Car. 384, 39 L. R. A. (N.S.) 1005, 74 S. E. 11.

In many jurisdictions contracts of this sort, though illegal in the forum, are not so contrary to its policy that they will not be enforced there if valid

given in renewal of a note given to pay a bet on a race,<sup>2</sup> or a note on gambling consideration, enforceable in the hands of a bona fide holder where given,<sup>3</sup> even though valid where given and payable, has been held unenforceable in an action brought in a jurisdiction where such contracts are illegal. Equity has refused to enforce a foreign judgment rendered on a wager in a jurisdiction where a wager was lawful, even though the illegal character of the transaction was not set up as a defense.<sup>4</sup> A contract to aid in divorce, even if valid where made, will not be enforced in another jurisdiction where against public policy.<sup>5</sup> A contract relieving a carrier from liability for negligence, which results in injury to passengers, has been held to be unenforceable, at least in the jurisdiction in which the accident took place, if contrary to its policy, although valid where made.<sup>6</sup> A contract to relieve a telegraph company from liability for negligence has been held to be unenforceable in a forum which regards such provision as contrary to public policy, although valid where made and to be performed.<sup>7</sup> Courts have refused to enforce a provision in a contract of employment to the effect that acceptance of benefits of a relief department would discharge a right of action for negligence, although such provision was valid where the contract was made.<sup>8</sup> A provision which requires an employe to give notice of an injury within a certain time which is valid where made, but invalid in the jurisdiction of the forum, has been enforced.<sup>9</sup> A contract which is obtained by duress and undue influence and which provides for stifling criminal prosecution, will not be enforced in a forum in which such contract is invalid, although it is valid where the parties were domiciled and the contract was made.<sup>10</sup> A con-

where made or to be performed. *Saxby v. Fulton* [1909], 2 K. B. 208.

See § 3588.

<sup>2</sup> *Gooch v. Faucett*, 122 N. Car. 270, 39 L. R. A. 835, 29 S. E. 362.

<sup>3</sup> *Pope v. Hanke*, 155 Ill. 617, 28 L. R. A. 568, 40 N. E. 839.

<sup>4</sup> *Minzesheimer v. Do little*, 69 N. J. Eq. 394, 45 Atl. 611.

<sup>5</sup> *Palmer v. Palmer*, 26 Utah 31, 61 L. R. A. 641, 72 Pac. 3.

<sup>6</sup> *Lake Shore & Michigan Southern Railroad v. Teeters*, 166 Ind. 335, 5 L. R. A. (N.S.) 425, 77 N. E. 599; *Davis v. Chesapeake & Ohio Ry.*, 122 Ky. 528, 5 L. R. A. (N.S.) 458, 92 S. W. 339.

<sup>7</sup> *Fox v. Postal Telegraph-Cable Co.*, 138 Wis. 648, 120 N. W. 399.

<sup>8</sup> *Vandalia Ry. v. Kelley*, 187 Ind. 323, 119 N. E. 257 (forum also place of performance).

*Contra, Cannaday v. Atlantic Coast Line Ry.*, 143 N. Car. 439, 118 Am. St. Rep. 821, 8 L. R. A. (N.S.) 939, 55 S. E. 836.

See § 3588.

<sup>9</sup> *Chicago, Rock Island & Pacific Ry. v. Thompson*, 100 Tex. 185, 123 Am. St. Rep. 798, 7 L. R. A. (N.S.) 191, 97 S. W. 459.

<sup>10</sup> *Kaufman v. Gerson* [1904], 1 K. B. 591.

tract for turning state's evidence and escaping with the minimum penalty will not be enforced by a state court, where such contract is against public policy, although the criminal prosecution was in the federal court, by whose law such contract is valid.<sup>11</sup> A contract which is not champertous where made, will not be enforced in a jurisdiction in which such contract is contrary to public policy.<sup>12</sup> A contract by a common carrier for exclusive advertising privileges in its cars will not be enforced where such contract is against public policy, although it is valid according to the laws of the state by which such carrier was incorporated.<sup>13</sup>

By specific statutory provisions certain prohibited classes of contracts can not be enforced in the courts of such jurisdiction, no matter where made.<sup>14</sup> The refusal of a court to enforce the contract of a married woman, although valid where made, is explained by this general theory,<sup>15</sup> as is the refusal of the courts to enforce a contract between husband and wife, which was valid where it was made.<sup>16</sup>

#### C. CAPACITY

**§ 3602. Capacity of parties—General principles.** Questions of the capacity of the parties to a contract are said by the weight of authority to be determined by the law of the place where the contract is made.<sup>1</sup> An adjudication that one who is domiciled in that jurisdiction is a spendthrift for whom a conservator must be appointed, does not render him incompetent to enter into a contract in another jurisdiction.<sup>2</sup>

<sup>11</sup> *Wight v. Rindskopf*, 43 Wis. 344.

<sup>12</sup> *Hudson v. Sheafe*, 41 S. D. 475, 171 N. W. 320.

<sup>13</sup> *National Car Advertising Co. v. Louisville & Nashville Ry.*, 110 Va. 413, 24 L. R. A. (N.S.) 10, 66 S. E. 88 (forum probably place of performance in part).

<sup>14</sup> *J. & S. Goodman v. Swett*, 108 Miss. 224, 66 So. 535 (sale of intoxicating liquor).

<sup>15</sup> *Union Trust Co. v. Grosman*, 245 U. S. 412, 62 L. ed. 368.

<sup>16</sup> *Brown v. Dalton*, 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443.

<sup>1</sup> *Illinois. Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028.

*Iowa. Nichols & Shepard Co. v. Marshall*, 108 Ia. 518, 79 N. W. 282.

*Kentucky. Barbee v. Bevins*, 176 Ky. 113, 195 S. W. 154.

*Maryland. Union Trust Co. of New Jersey v. Knabe*, 122 Md. 584, 89 Atl. 1106.

*New York. Union National Bank v. Chapman*, 169 N. Y. 538, 88 Am. St. Rep. 614, 57 L. R. A. 513, 62 N. E. 672.

*Wisconsin. International Harvester Co. of America v. McAdam*, 142 Wis. 114, 26 L. R. A. (N.S.) 774, 124 N. W. 1042; *Male v. Roberts*, 3 Esp. 163 (obiter, as no evidence of law of place where contract made).

<sup>2</sup> *Worms v. De Valdor*, 49 L. J. (N. S.) Ch. 261; *Gates v. Bingham*, 49 Conn. 275 (liability for necessaries).

In some jurisdictions, however, it has been said that the capacity of the parties is to be determined by the law of the domicile, and not by the law of the place at which the contract is made.<sup>3</sup> This is an attempt to apply to the common law the theory of the statute personal.<sup>4</sup> The effect of an adjudication of insanity of one who is domiciled in the state in which such adjudication is rendered, seems to be determined by the law of such state;<sup>5</sup> and if the effect of such adjudication is to make subsequent contracts void, it is said that they are void in other jurisdictions.<sup>6</sup>

**§ 3603. Infants.** The capacity of an infant to bind himself by a contract is said to be governed by the law of the place where the contract was made.<sup>1</sup> The liability of an infant for attorney's fees is said to be governed by the law of the place where the contract was made and not by the law of the forum.<sup>2</sup> In the absence of evidence of the law of the place of making the contract, it is said that lack of capacity will not be presumed.<sup>3</sup>

In some jurisdictions the law of the domicile is said to control.<sup>4</sup> It has been said that his capacity is to be determined by the law

<sup>3</sup> *Sottomayor v. De Barros*, 3 P. D. 1 (validity of marriage: on a second trial, the parties were found to be domiciled where the marriage took place. 5 P. D. 94); *Barrera v. Alpuente*, 6 Mart. (N.S., La.) 69, 17 Am. Dec. 179; *International Text-book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722 (also forum and place of performance).

<sup>4</sup> See § 3563.

<sup>5</sup> *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 40 L. R. A. 250, 29 S. E. 182.

<sup>6</sup> *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 40 L. R. A. 250, 29 S. E. 182.

After an adjudication of insanity in Florida an insane person drew checks on a bank in Georgia in his capacity as executor. His successor brought action against the bank to recover the amount of deposit without giving credit for such checks, and it was held that the bank could not claim such credits. It is possible, however, from the statement of the case, that such

checks were for the personal debts of the drawer and that the bank knew of this fact. *American Trust & Banking Co. v. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 40 L. R. A. 250, 29 S. E. 182.

<sup>1</sup> *Male v. Roberts*, 3 Esp. 163 (obiter, as no evidence of law of place where contract made); *Carmen v. Fox Film Corporation*, 258 Fed. 703; *Marx v. Hefner*, — Okla. —, 149 Pac. 207 (obiter, as no evidence of law of place of making).

<sup>2</sup> *Marx v. Hefner*, — Okla. —, 149 Pac. 207 (obiter).

<sup>3</sup> *Thompson v. Ketcham*, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332 (note given in Jamaica by party under twenty-one).

<sup>4</sup> *Barrera v. Alpuente*, 6 Mart. (N.S., La.) 69, 17 Am. Dec. 179.

Law of domicile held to control as to capacity of minor to maintain action in other state. *Woodward v. Woodward*, 87 Tenn. 644, 11 S. W. 892.

Contra, that law of forum controls, *Gilbreath v. Bunce*, 65 Mo. 349.

of the domicile, if the contract is to be performed there, and the action is brought there, rather than by the law of the place at which the contract is made.<sup>5</sup> One who is of full age in the jurisdiction in which he is domiciled is permitted to control an action which is brought in another state, for the protection of his interests, although in such latter state he is not of full age.<sup>6</sup>

If the transaction involves realty, the capacity of the infant is governed by the law of the place where the realty is situated.<sup>7</sup> A decree of a court of the jurisdiction in which the infant is domiciled, removing his disabilities and empowering him to convey realty in another state, does not confer capacity on him in the state in which the land is situated, and in spite of such decree he may disaffirm such conveyance.<sup>8</sup>

#### § 3604. Married women—Contracts not concerning realty.

Under the question of the law which controls the capacity of the parties to a contract, the most numerous class of cases is that which deals with contracts of married women. This is due, in part, to the fact that the number of married women who undertake to make contracts is much greater than the corresponding number of infants, insane persons, and the like; and in part due to the fact that there is a much greater difference between the laws of the different states on the question of the capacity of a married woman, than on the question of the capacity of an infant or of an insane person.

There are five inconsistent theories as to the law which controls the capacity of a married woman to bind herself by contract in transactions which do not involve realty, although frequently the result which is reached under two or more of these theories is the same in many of the concrete cases.

(1) It has been held, in contracts which do not deal with realty, that the capacity of a married woman to bind herself by contract is governed by the law of the place where the contract is made,<sup>1</sup>

<sup>5</sup> *International Text-book Co. v. Connelly*, 206 N. Y. 188, 42 L. R. A. (N.S.) 1115, 99 N. E. 722 (obiter, as no evidence of foreign law; so that court would presume it to be the same as the forum).

<sup>6</sup> *Harris v. Berry*, 82 Ky. 137.

<sup>7</sup> *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

<sup>8</sup> *Beauchamp v. Bertig*, 90 Ark. 351, 23 L. R. A. (N.S.) 659, 119 S. W. 75.

<sup>1</sup> *Illinois*. *Nixon v. Halley*, 78 Ill. 611; *Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028; *Burr v. Beckler*, 264 Ill. 230, 106 N. E. 206.

*Indiana*. *Garrigue v. Kellar*, 164 Ind. 676, 108 Am. St. Rep. 324, 69 L. R. A. 870, 74 N. E. 523 (also domicile).

at least, unless by the law of place of her domicile she lacks capacity entirely.<sup>2</sup> Accordingly; the contract of a married woman, if valid at her domicile where made, will be enforced in another jurisdiction by the law of which she has no capacity to contract.<sup>3</sup> In some of these cases the contract is made at the domicile of the married woman and is to be performed there. If valid there, it is enforced in other states, though if made at the state of the forum it would be void.<sup>4</sup> It must be observed that the place where the contract is made is not the place where it is signed, but where it takes effect.<sup>5</sup> Accordingly, if a married woman signs a contract in the state of her domicile and delivers it in another state, the latter is the place where the contract is made and under this doctrine its laws will control.<sup>6</sup> A note was executed in form by a

**Kentucky.** *Brown v. Dalton*, 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443; *Moody v. Barker*, 188 Ky. 401, 222 S. W. 89.

**Louisiana.** *Baer v. Terry*, 108 La. 597, 92 Am. St. Rep. 394, 51 L. R. A. 417, 32 So. 353.

**Michigan.** *State Bank v. Maxson*, 123 Mich. 250, 81 Am. St. Rep. 196, 82 N. W. 31; *Miller v. Hilton*, 189 Mich. 635, 155 N. W. 574.

**Nebraska.** *Benton v. German-American National Bank*, 45 Neb. 850, 64 N. W. 227; *Farmers' State Bank v. Butler*, 101 Neb. 635, 164 N. W. 562.

**New Jersey.** *Thompson v. Taylor*, 66 N. J. L. 253, 88 Am. St. Rep. 485, 54 L. R. A. 585, 49 Atl. 544 [reversing, 65 N. J. L. 107, 46 Atl. 567].

**New York.** *Union National Bank v. Chapman*, 169 N. Y. 538, 88 Am. St. Rep. 614, 57 L. R. A. 513, 62 N. E. 672.

**North Carolina.** *Wood v. Wheeler*, 111 N. Car. 231, 16 S. E. 418.

**Pennsylvania.** *Evans v. Cleary*, 125 Pa. St. 204, 11 Am. St. Rep. 886, 17 Atl. 440.

**Tennessee.** *Robinson v. Queen*, 87 Tenn. 445, 10 Am. St. Rep. 690, 3 L. R. A. 214, 11 S. W. 38.

**West Virginia.** *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681.

**Virginia.** *Young v. Hart*, 101 Va. 480, 44 S. E. 703.

**Wisconsin.** *International Harvester Co. of America v. McAdam*, 142 Wis. 114, 26 L. R. A. (N.S.) 774, 124 N. W. 1042.

<sup>2</sup> *Young v. Hart*, 101 Va. 480, 44 S. E. 703; *Poole v. Perkins*, 126 Va. 331, 101 S. E. 240.

<sup>3</sup> *Marks v. Bank*, 110 La. 659, 34 So. 725; *Millar v. Hilton*, 189 Mich. 635, 155 N. W. 574.

<sup>4</sup> **Kentucky.** *Gibson v. Sublett*, 82 Ky. 596; *Moody v. Barker*, 188 Ky. 401, 222 S. W. 89.

**Michigan.** *Millar v. Hilton*, 189 Mich. 635, 155 N. W. 574.

**New Jersey.** *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180.

**Tennessee.** *Robinson v. Queen*, 87 Tenn. 445, 10 Am. St. Rep. 690, 3 L. R. A. 214, 11 S. W. 38.

**West Virginia.** *Dulin v. McCaw*, 39 W. Va. 721, 20 S. E. 681.

<sup>5</sup> See §§ 3573 et seq.

<sup>6</sup> **Kentucky.** *Barbee v. Bevins*, 176 Ky. 113, 195 S. W. 154.

**Maine.** *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251.

**Massachusetts.** *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241.

**New Jersey.** *Thompson v. Taylor*, 66

husband to his wife, and indorsed by her as accommodation indorser in New Jersey, where she had no power to contract with her husband. She knew that it was to be negotiated in New York, where such contract was valid. It was in fact negotiated there, and there first went into effect. It was held that she was liable on such contract in New Jersey.<sup>7</sup> A married woman domiciled in Alabama signed a note there as surety for her husband. The note was payable in Illinois and suit thereon was brought in New York. In Alabama she had no authority to act as surety for her husband; in Illinois she had. The majority of the court found from the record that, though the note was intended by the makers to be negotiated in Illinois, the married woman did not know of such intention, and accordingly held that her capacity was to be determined by Alabama law. A dissenting opinion held that Illinois law should govern, on the ground that the record showed that she knew of such intention.<sup>8</sup> A married woman, domiciled in Kentucky, accepted a conveyance there from her husband, in which she assumed a note given for the purchase money. By the law of Kentucky, where the common-law rule was in force, a husband could not contract with his wife. The realty was situated in Virginia, by the law of which state a husband could contract with his wife. In a suit against her on the note in Kentucky it was held that the law of Kentucky controlled as to her capacity, and that accordingly she was not personally liable.<sup>9</sup> A married woman who is domiciled in Kentucky indorsed a note as surety for her husband. The note was payable in West Virginia, and the husband delivered it in West Virginia. It was held that the validity of the note was controlled by the law of West Virginia, by which such contract was valid.<sup>10</sup> A married woman delivered notes in Missouri, where she was domiciled, as security for her husband to pay for certain mules. In Missouri she had power to bind her separate estate by a contract not made for the benefit thereof. In

N. J. L. 253, 88 Am. St. Rep. 485, 54 L. R. A. 585, 49 Atl. 544 [reversing, 65 N. J. L. 107, 46 Atl. 567].

Virginia. *Poole v. Perkins*, 126 Va. 331, 101 S. E. 240.

Contra, *Freeman's Appeal*, 68 Conn. 533, 57 Am. St. Rep. 112, 37 L. R. A. 452, 37 Atl. 420.

<sup>7</sup> *Thompson v. Taylor*, 66 N. J. L. 253, 88 Am. St. Rep. 485, 54 L. R. A.

585, 49 Atl. 544 [reversing, 65 N. J. L. 107, 46 Atl. 567].

<sup>8</sup> *Union National Bank v. Chapman*, 109 N. Y. 538, 88 Am. St. Rep. 614, 57 L. R. A. 513, 62 N. E. 672.

<sup>9</sup> *Brown v. Dalton*, 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443.

<sup>10</sup> *Barbee v. Bevins*, 176 Ky. 113, 195 S. W. 154.

Louisiana she had no such power. In a suit on the notes in Louisiana, it was held that Missouri law governed and that the notes were valid.<sup>11</sup> It has been suggested that the validity of a note given by a married woman to discharge a pre-existing liability is controlled by the law of the place where such liability was incurred, and not by the law of the place where such note is given. A married woman signed a bond in Ohio as surety where she could thus bind herself. Subsequently, in Indiana, where she could not thus bind herself, she gave a note in discharge of such liability. The note was held valid.<sup>12</sup>

(2) In some cases it has been said that the law of the place of performance controls the capacity of the married woman,<sup>13</sup> although this has sometimes been placed on the theory of presumed intent.<sup>14</sup> If a contract is made and to be performed in the same jurisdiction, the law of that jurisdiction controls without regard to the law of the forum,<sup>15</sup> at least as long as the contract is not inconsistent with the settled policy of the forum. This rule is applied in cases where the contract is valid where made and to be performed, although invalid by the law of the forum,<sup>16</sup> and to cases in which it is invalid where it is made and to be performed, although it is valid by the law of the forum.<sup>17</sup>

(3) In some jurisdictions it is said that the law of the domicile controls as to the capacity of a married woman to make a binding contract, without regard to the place at which it is made.<sup>18</sup> A note was signed in Tennessee by a married woman there domiciled. It was delivered in Ohio and there payable. By the law of Ohio she had capacity to bind herself. By the law of Tennessee she did not.

<sup>11</sup> *Baer v. Terry*, 108 La. 597, 92 Am. St. Rep. 394, 32 So. 353. (A previous action for the value of the mules had failed. 105 La. 479, 20 So. 886.)

<sup>12</sup> *Robison v. Pease*, 28 Ind. App. 610, 63 N. E. 479.

<sup>13</sup> *Smoot v. Judd*, 161 Mo. 673, 84 Am. St. Rep. 738, 61 S. W. 854; *Mayer v. Roche*, 77 N. J. L. 681, 26 L. R. A. (N.S.) 763, 75 Atl. 235 (place of making not shown); *Poole v. Perkins*, 126 Va. 331, 101 S. E. 240.

<sup>14</sup> *Mayer v. Roche*, 77 N. J. L. 681, 26 L. R. A. (N.S.) 763, 75 Atl. 235 (place of making contract not shown).

<sup>15</sup> *Evans v. Beaver*, 50 O. S. 190, 40

Am. St. Rep. 666, 33 N. E. 643 (also valid by law of domicile); *Barbee v. Bevins*, 176 Ky. 113, 195 S. W. 154 (also invalid by law of domicile).

<sup>16</sup> *Barbee v. Bevins*, 176 Ky. 113, 195 S. W. 154 (also invalid by law of domicile).

<sup>17</sup> *Evans v. Beaver*, 50 O. S. 190, 40 Am. St. Rep. 666, 33 N. E. 643 (also valid by law of domicile).

<sup>18</sup> *Freret v. Taylor*, 119 La. 307, 121 Am. St. Rep. 522, 44 So. 26; *National City Bank v. Barringer*, 143 La. 14, 78 So. 134; *First National Bank v. Shaw*, 109 Tenn. 237, 97 Am. St. Rep. 840, 59 L. R. A. 498, 70 S. W. 807.

Suit was brought in Tennessee. It was held that her capacity was determined by Tennessee law.<sup>19</sup> In Louisiana, in which the distinction between real and personal statutes, which was so marked a feature of some of the theories of the law of the continent of Europe, still persists to some extent, this result is reached on the theory that a statute which requires the assent of the husband to a contract of the wife is personal only; and accordingly it does not apply to a temporary sojourner who has capacity to make a contract by the law of her domicile.<sup>20</sup>

(4) It has been said that the capacity of a married woman to bind herself by contract is governed by the law of the place by which the parties intend the contract to be governed.<sup>21</sup> This rule is never carried to the extreme to which it might be carried, if such form of statement were intended by the courts to be taken literally. It is invoked as a means of determining whether the law of the domicile, of the place of making, and the like, should control. The absurdity of the rule which allows the intention of the parties to select the law by which the validity of the contract is to be governed, is brought out most clearly in cases of this sort. The very question which the court is to decide, is whether the law will give any effect to the intention of the married woman no matter how deliberately it may be expressed; and under this theory we are to begin the solution of the problem by giving effect to her intention in the first instance.

(5) It has also been said that the law of the forum controls.<sup>22</sup> A contract between husband and wife, which was valid in Virginia, where it was made, was said to be so "patently against public policy" in Kentucky, that the courts of the latter state would not enforce it.<sup>23</sup> The only justification for this theory is to be found in cases which regard the contract of the married woman as so opposed to their settled policy that they refuse to enforce it without regard to its original validity.<sup>24</sup> This theory must be con-

<sup>19</sup> *First National Bank v. Shaw*, 109 Tenn. 237, 97 Am. St. Rep. 840, 59 L. R. A. 498, 70 S. W. 807.

<sup>20</sup> *Freret v. Taylor*, 119 La. 307, 121 Am. St. Rep. 522, 44 So. 26.

<sup>21</sup> *Mayer v. Roche*, 77 N. J. L. 681, 26 L. R. A. (N.S.) 763, 75 Atl. 235; *Basilea v. Spagnuolo*, 80 N. J. L. 88, 77 Atl. 531; *Poole v. Perkins*, 126 Va.

331, 101 S. E. 240.

<sup>22</sup> *Brown v. Dalton*, 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443; *Hayden v. Stone*, 13 R. I. 106.

<sup>23</sup> *Brown v. Dalton*, 105 Ky. 669, 88 Am. St. Rep. 325, 49 S. W. 443.

<sup>24</sup> This is an application to questions of capacity, of a rule which originates in the conflict as to the validity of the subject-matter. See §§ 3600 et seq.

sidered in connection with the qualification already suggested, that the married woman must not be totally disqualified by the law of her domicile, needs comment. This negative proposition is too broad and can not safely be converted into an affirmative proposition. A narrower principle, however, will go far toward reconciling some of the differences of opinion. If the policy of the law of a married woman's domicile forbids her from binding herself by contract, and an attempt is made to enforce such contract in the forum of her domicile, the principle that no court can be required by comity to enforce a contract which is contrary to its own public policy,<sup>25</sup> has been invoked to prevent the enforcing of such contract.<sup>26</sup> A married woman who is domiciled in Texas, guaranteed her husband's debt while temporarily in Illinois. It was held that the courts of Texas would not enforce such obligation against her separate property.<sup>27</sup> Since this rule does not involve the liability of the married woman, but solely the policy of the law of the forum, a change in the policy of the law between the time that the contract is made and the time that action is brought, will make such contract enforceable in the forum of her domicile.<sup>28</sup> Since some jurisdictions regard the enforcement of contracts of married women as a matter of the settled policy of the state, and since they apply to such contracts the rule which they apply to contracts which are illegal or void,<sup>29</sup> and refuse to enforce such contracts if they are regarded as fundamentally inconsistent with the settled policy of the forum, it is difficult, in many of these cases, to be sure whether the courts refuse to enforce the contract because they are following the law of the domicile, or because they are refusing to enforce a contract which is contrary to their settled principles of policy. Further, this principle can not protect a married woman who makes a contract at her domicile where it is valid, and subsequently removes her domicile to a state where such contract is invalid.<sup>30</sup> A married woman became surety for her husband in

<sup>25</sup> See §§ 3600 et seq.

<sup>26</sup> *Union Trust Co. v. Grosman*, 245 U. S. 412, 62 L. ed. 368; *Freeman's Appeal*, 68 Conn. 533, 57 Am. St. Rep. 112, 37 L. R. A. 452, 37 Atl. 420 (possibly also regarded as place of making); *Armstrong v. Best*, 112 N. Car. 59, 34 Am. St. Rep. 473; 25 L. R. A. 188, 17 S. E. 14; *Hanover National Bank v. Howell*, 118 N. Car. 271, 23 S. E. 1005;

*First National Bank v. Shaw*, 109 Tenn. 237, 97 Am. St. Rep. 840, 70 S. W. 807.

<sup>27</sup> *Union Trust Co. v. Grosman*, 245 U. S. 412, 62 L. ed. 368.

<sup>28</sup> *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241; *Case v. Dodge*, 18 R. I. 661, 29 Atl. 735.

<sup>29</sup> See §§ 3600 et seq.

<sup>30</sup> *Moody v. Barker*, 188 Ky. 401, 222 S. W. 89; *Taylor v. Sharp*, 108 N. Car.

Kansas, where she was domiciled, and where the debt was payable. Subsequently she bought land in Kentucky and changed her domicile to that state. It was held that the law of Kansas would apply to the validity of the contract and it would be enforced accordingly, although it would have been invalid if it had been made in Kentucky.<sup>31</sup>

While this principle will reconcile many cases apparently contradictory, it is not adopted uniformly. The rule that the contract of a married woman if valid where made will be enforced everywhere, has been applied by some courts even to cases where the contract was sought to be enforced in the forum within which the married woman was domiciled and by the law of which she had no capacity to make contracts.<sup>32</sup>

**§ 3605. Capacity of married women—Contracts concerning realty.** The foregoing contracts concern personal liability or personal property. Different principles usually control conveyances of realty or contracts affecting it. By reason of this difference in subject-matter neither of the theories on this subject, though inconsistent with each other, can properly be said to be inconsistent with any of the foregoing. The theories upon this subject are as follows:

First, it is said that the capacity of a married woman to deal with her realty and to contract concerning it is controlled by the law of the place where the realty is situated.<sup>1</sup> The validity of a sale of realty by a husband to his wife,<sup>2</sup> or of a mortgage given by her in one state on land situated in another,<sup>3</sup> are each con-

377, 13 S. E. 138; *International Harvester Co. of America v. McAdam*, 142 Wis. 114, 26 L. R. A. (N.S.) 774, 124 N. W. 1042.

<sup>31</sup> *Moody v. Barker*, 188 Ky. 401, 222 S. W. 89.

<sup>32</sup> *First National Bank v. Mitchell*, 92 Fed. 565 (involving the same parties and the same transaction as *Freeman's Appeal*, 68 Conn. 533, 57 Am. St. Rep. 112, 37 L. R. A. 452, 37 Atl. 420, and directly contrary thereto); *Thompson v. Taylor*, 66 N. J. L. 253, 88 Am. St. Rep. 485, 54 L. R. A. 585, 49 Atl. 544 [reversing, 65 N. J. L. 107, 46 Atl. 567]; *International Harvester Co. of America v. McAdam*, 142 Wis. 114, 26

L. R. A. (N.S.) 774, 124 N. W. 1042 (change of domicile after making contract).

<sup>1</sup> *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303; *Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870; *Rush v. Landers*, 107 La. 549, 57 L. R. A. 353, 32 So. 95; *Smith v. Ingram*, 130 N. Car. 100, 61 L. R. A. 878, 40 S. E. 984; *Sell v. Miller*, 11 O. S. 331.

<sup>2</sup> *Rush v. Landers*, 107 La. 549, 57 L. R. A. 353, 32 So. 95.

<sup>3</sup> *Swank v. Hufnagle*, 111 Ind. 453, 12 N. E. 303; *Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870; *Sell v. Miller*, 11 O. S. 331.

trolled by the law of the state where the land is situated. From the nature of actions concerning realty this is necessarily the law of the forum as well. The law of the place where the realty is situated and the suit is brought controls as to the validity of a contract whereby a married woman seeks to charge her separate estate.<sup>4</sup> The validity of a note and mortgage executed to bind the separate estate of a married woman for her husband's debt at her domicile, where she has no such power,<sup>5</sup> is controlled by the law of the place where the realty is situated, even if it is given to secure her liability as surety which is void where the contract is made.<sup>6</sup>

Second, a minority of the courts hold that in contracts concerning realty the law of the domicile controls if the contract is made there.<sup>7</sup> A married woman, domiciled in North Carolina, executed a covenant there whereby she released dower in realty in Massachusetts. By statute in North Carolina, after complying with the statute, she acquired capacity as a free trader to bind herself by contract. It was held that North Carolina law applied.<sup>8</sup> As pointed out in the dissenting opinion filed in the last case, this leads to the remarkable result that a contract for realty may be enforced specifically when, if the contract had been performed and the conveyance made, the contract would have been void.

Third, a minority of the courts also hold that a contract whereby a married woman seeks to charge her separate estate is to be controlled by the law of the place where made.<sup>9</sup> A married woman, domiciled in Kansas, indorsed her husband's note there. In Kansas she had power to charge her separate estate at law. She owned realty in Michigan, by the law of which state she did not have such power. Suit was brought on such note in Michigan. It was held that her capacity was controlled by Kansas law.<sup>10</sup>

<sup>4</sup> *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 103, 23 So. 12; *Shacklett v. Polk*, 51 Miss. 378; *Wick v. Dawson*, 42 W. Va. 43, 24 S. E. 587.

<sup>5</sup> *Thompson v. Kyle*, 39 Fla. 582, 63 Am. St. Rep. 103, 23 So. 12.

<sup>6</sup> *Frierson v. Williams*, 57 Miss. 451. Contra, *Evans v. Beaver*, 50 O. S. 190, 40 Am. St. Rep. 666, 33 N. E. 643.

<sup>7</sup> *Polson v. Stewart*, 167 Mass. 211, 57 Am. St. Rep. 452, 36 L. R. A. 771,

45 N. E. 737; *Wood v. Wheeler*, 111 N. Car. 231, 16 S. E. 418.

<sup>8</sup> *Polson v. Stewart*, 167 Mass. 211, 57 Am. St. Rep. 452, 36 L. R. A. 771, 45 N. E. 737.

<sup>9</sup> *State Bank v. Maxson*, 123 Mich. 250, 81 Am. St. Rep. 196, 82 N. W. 31; *Merrielles v. State Bank*, 5 Tex. Civ. App. 483, 24 S. W. 564.

<sup>10</sup> *State Bank v. Maxson*, 123 Mich. 250, 81 Am. St. Rep. 196, 82 N. W. 31.

**§ 3606. Agency.** Whether an agency which does not involve realty is created, is said to depend on the law of the state in which it is attempted to create such agency.<sup>1</sup> While this may be the correct view, the authority which is frequently cited in support of it,<sup>2</sup> is probably not a case of agency, but rather a case of the use of a messenger to transmit an offer for acceptance in another jurisdiction.

The authority of the agent and the manner in which he is to execute such authority is said to depend on the law of the jurisdiction in which he is to act, if the subject-matter of the agency does not involve realty,<sup>3</sup> on the theory that it can not be assumed that the principal intended the contract to be carried out in any manner except that which is prescribed by the law of the jurisdiction in which the agent is to act.<sup>4</sup>

If the subject-matter of the agency involves realty, the method of creating the agency and of performing it, depends upon the law of the place in which such realty is situated.<sup>5</sup>

#### D. OPERATION

**§ 3607. Effect of contract—Assignment.** The question of the law which controls assignability and assignment is one upon which there is a great divergence of authority which can be reconciled in part only, by distinguishing the different grounds upon which the validity of the assignment is attacked.

The validity of the assignment may be attacked on the ground that the contract is one which can not be assigned. This question is said to depend on the law of the jurisdiction which controls the original contract which it is thus sought to assign.<sup>1</sup> A life insurance policy was executed in New York, and there payable. The insured was domiciled in Massachusetts, and there assigned such policy to his wife. It was held that New York law controlled as

<sup>1</sup> Freeman's Appeal, 68 Conn. 533, 57 Am. St. Rep. 112, 37 L. R. A. 452, 37 Atl. 420.

<sup>2</sup> Freeman's Appeal, 68 Conn. 533, 57 Am. St. Rep. 112, 37 L. R. A. 452, 37 Atl. 420.

<sup>3</sup> Chatenay v. Brazilian Submarine Telegraph Co. [1891], 1 Q. B. 79; Owings v. Hull, 34 U. S. (9 Pet.) 607, 9 L. ed. 246 (power to executor to sell); Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137.

See also, Williams v. Colonial Bank, L. R., 38 Ch. Div. 388.

<sup>4</sup> Chatenay v. Brazilian Submarine Telegraph Co. [1891], 1 Q. B. 79.

<sup>5</sup> Hotel Woodward Co. v. Ford Motor Co., 258 Fed. 322; Wills v. Cowper, 2 Ohio 124 (whether power of sale given to executor passes to survivor); Linton v. Moorhead, 209 Pa. St. 646, 50 Atl. 264.

<sup>1</sup> Colburn's Appeal, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139; In re

to whether the assignment had any validity.<sup>2</sup> Whether the insured has an interest in an insurance policy which he may assign, or whether the sole interest in such policy is in the beneficiary, depends on the place where the contract of insurance is made, at least if against the law of the forum of the insurance company,<sup>3</sup> or as against the law of the place where the assignment was made.<sup>4</sup> An insurance policy was issued in Wisconsin and there payable. When it was issued the insured and beneficiary were domiciled in South Dakota. Subsequently the insured assigned such policy in Minnesota while temporarily there. By the law of Wisconsin and South Dakota the insured was the owner of such policy during his lifetime and he could assign it. By the law of Minnesota the beneficiary was the owner of the policy and the insured could not assign it. It was held that Minnesota law did not control, and that the assignment was valid.<sup>5</sup> On the other hand, for some purposes, the law of the place where the assignment is made is held to control.<sup>6</sup> A, who is domiciled in Indiana, was employed there under a contract which did not specify where his wages were to be paid. While temporarily in Illinois A assigned his unearned wages. By the law of Indiana such assignment was invalid; but by the law of Illinois it was valid. It was held that the law of Illinois controlled.<sup>7</sup>

The form of the assignment is said to be governed by the law of the place where the assignment is made.<sup>8</sup> If an assignment of book accounts is made in New York, in which state such an assignment passes the legal title, the assignee may maintain an action at

Estate of Breitung, 78 Wis. 33, 46 N. W. 891; Northwestern Mutual Life Insurance Company v. Adams, 155 Wis. 335, 52 L. R. A. (N.S.) 275, 144 N. W. 1108.

<sup>2</sup> Colburn's Appeal, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139. (Massachusetts law, however, controls as to the effect of such assignment—i. e., whether by such assignment the wife acquired the entire interest in such policy.)

<sup>3</sup> Estate of Breitung, 78 Wis. 33, 46 N. W. 891.

<sup>4</sup> Northwestern Mutual Life Insurance Co. v. Adams, 155 Wis. 335, 52 L. R. A. (N.S.) 275, 144 N. W. 1108.

<sup>5</sup> Northwestern Mutual Life Insurance Co. v. Adams, 155 Wis. 335, 52 L. R. A. (N.S.) 275, 144 N. W. 1108. (The rule of Minnesota law was construed as applicable only to Minnesota insurance contracts.)

<sup>6</sup> Monarch Discount Co. v. Chesapeake & Ohio Ry., 285 Ill. 233, 120 N. E. 743.

<sup>7</sup> Monarch Discount Co. v. Chesapeake & Ohio Ry., 285 Ill. 233, 120 N. E. 743.

<sup>8</sup> Colburn's Appeal, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139; Miller v. Manhattan Life Insurance Co., 110 La. 652, 34 So. 723.

law in his own name against the debtor, although the latter is domiciled in Pennsylvania, in which such assignment would have passed only an equitable interest, and the assignee could have maintained an action only in the name of the assignor.<sup>9</sup> If a policy of insurance is issued by a New York company, in New York, and payable in New York, and the insured is domiciled in Massachusetts, where he assigns to his wife for value, without delivering to her either the policy or the written assignment, such assignment is governed by the law of Massachusetts.<sup>10</sup> In some jurisdictions language is used which seems to indicate that the law of the domicile of the assignor should govern, on the theory that a contract is incorporeal personal property, which is to be regarded as being located at the domicile of the assignor.<sup>11</sup> If the assignor is engaged in business in Michigan, and he makes an oral assignment of book accounts in Connecticut as collateral security to prosecute an indorser who is domiciled in Connecticut, it is held that the law of Michigan applies to such assignment, since the subject-matter is located in Michigan; and accordingly such assignment is sufficient as against creditors of the assignor, although the assignee did not take possession, and although an assignment as security would be invalid as against creditors, if made in Connecticut.<sup>12</sup>

Whether a partial assignment has any validity is said to be governed by the law of the place of payment.<sup>13</sup> If a partial assignment is made in Tennessee, and the debt is payable in Maryland, where the debtor is domiciled, the law of Maryland controls; and if, by the law of Maryland, such assignee has an equitable interest, the law of Louisiana will protect it,<sup>14</sup> even if an action at law on such assignment can not be maintained in Maryland.<sup>15</sup> Whether a check or draft amounts to a partial assignment is governed by the law of the place where the deposit is payable.<sup>16</sup> A check or draft operates as a partial assignment in Illinois,<sup>17</sup> while by the law of New York it does not operate as a partial

<sup>9</sup> *Levy v. Levy*, 78 Pa. St. 507, 21 Am. Rep. 35.

<sup>10</sup> *Colburn's Appeal*, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139 (assignment held valid).

<sup>11</sup> *Black v. Zacharie*, 44 U. S. (3 How.) 483, 11 L. ed. 690 (obiter).

<sup>12</sup> *Union Trust Co. v. Bulkeley*, 150 Fed. 510.

<sup>13</sup> *Jackson v. Tiernan*, 15 La. 485.

<sup>14</sup> *Jackson v. Tiernan*, 15 La. 485.

<sup>15</sup> *Tiernan v. Jackson*, 30 U. S. (5 Pet.) 580, 8 L. ed. 234.

<sup>16</sup> *Abt v. American Trust Co.*, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856.

<sup>17</sup> *Brown v. Leckie*, 43 Ill. 497; *Union National Bank v. Oceana County Bank*, 80 Ill. 212; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483.

assignment.<sup>18</sup> A draft which is drawn in Illinois upon a New York bank, and which is payable there, is accordingly held not to operate as a partial assignment,<sup>19</sup> even if such fund is subsequently paid over to the drawer's assignees in insolvency in Illinois.<sup>20</sup>

Whether an assignment is valid as far as its subject-matter is concerned, has been said to be governed by the law of the place at which the original contract was to be performed.<sup>21</sup> A certificate of deposit payable in Illinois was issued by an Illinois bank to a citizen of Illinois, and by him it was transferred in the District of Columbia to the agent of the assignee, to be used in gambling. The assignee had his principal office in Missouri, but part of his business was conducted in Illinois. It was held that the validity of such assignment was governed by the law of Illinois, and that the assignee could not recover, although such assignment would, apparently, have been good by the law of the District of Columbia or of Missouri.<sup>22</sup>

The effect of an assignment, if valid, is controlled by the law of the place where it is made.<sup>23</sup> Whether an assignment passes a legal or equitable title,<sup>24</sup> or whether an assignment for collection only passes a legal interest,<sup>25</sup> or whether an implied warranty of validity exists in a sale of bonds,<sup>26</sup> is determined in each case by the law of the place where the assignment is made. In many of

<sup>18</sup> *Aetna National Bank v. Fourth National Bank*, 46 N. Y. 82; *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325; *People v. Merchants & Mechanic's Bank*, 78 N. Y. 269; *First National Bank v. Clark*, 134 N. Y. 368.

<sup>19</sup> *Abt v. American Trust Co.*, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856.

<sup>20</sup> *Abt v. American Trust Co.*, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856.

<sup>21</sup> *Thomas v. First National Bank*, 213 Ill. 261, 72 N. E. 801.

<sup>22</sup> *Thomas v. First National Bank*, 213 Ill. 261, 72 N. E. 801.

<sup>23</sup> *England. Thompson v. Bell*, 3 El. & Bl. 236 (obiter: as re-assignment was set-up, which was good if original assignment was good); *Williams v. Colonial Bank*, 38 Ch. Div. 388.

*United States. Kobey v. Hoffman*, 229 Fed. 486, 143 C. C. A. 554.

*Arkansas. Lanigan v. North*, 69 Ark. 62, 63 S. W. 62.

*Connecticut. Colburn's Appeal*, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 130.

*Louisiana. Succession of Miller v. Manhattan Life Ins. Co.*, 110 La. 652, 34 So. 723.

*Massachusetts. May v. Wannemacher*, 111 Mass. 202.

*Minnesota. In re Dalpay*, 41 Minn. 532, 16 Am. St. Rep. 729, 6 L. R. A. 108, 43 N. W. 564.

*Tennessee. Allen v. Bain*, 39 Tenn. (2 Head.) 100.

<sup>24</sup> *Williams v. Colonial Bank*, 38 Ch. Div. 388; *Levy v. Levy*, 78 Pa. St. 507, 21 Am. Rep. 35.

<sup>25</sup> *Lanigan v. North*, 69 Ark. 62, 63 S. W. 62.

<sup>26</sup> *Meyer v. Richards*, 163 U. S. 385, 41 L. ed. 199.

the cases where this rule is laid down the assignor was domiciled where the assignment was made.<sup>27</sup>

If recognition of an assignment which is valid where made will defeat the settled policy of the law of the forum,<sup>28</sup> as where it will give a preference to non-resident creditors,<sup>29</sup> the courts will refuse to give effect to such assignment.

Whether a husband can make an assignment to his wife directly, depends on the law of the state in which the assignment is made, and where the parties are also domiciled; and not on the law of the place where the original contract was made, or where it was payable.<sup>30</sup>

In some jurisdictions it is necessary that the assignee should give notice to the debtor in order to protect his title as against third persons, while in other jurisdictions such notice is not necessary except for the protection of the debtor.<sup>31</sup> It seems that, in case of conflict of laws on this question, the law of the place at which the debt is payable should control.<sup>32</sup> This is sometimes based on the theory that the situs of the debt is in that place.<sup>33</sup> It is usually the place at which the debtor is domiciled;<sup>34</sup> but the same rule is followed if the debtor is domiciled elsewhere.<sup>35</sup> If A, who is domiciled in Illinois, makes an assignment in Illinois to B, who is domiciled in Louisiana, and thus transfers a debt which is owing from C, who is domiciled in Minnesota, to A, and which is payable in Minnesota, and D attempts to attach such debt in Canada before B gives notice to C, it is held that the law of Minnesota applies; and that B may recover as long as notice was given in time to enable C to protect himself, although B could not have recovered at Illinois law.<sup>36</sup> By the law of England, notice is necessary to perfect the title of the assignee; and by the law of New York such notice is not necessary. An assignment, made in

<sup>27</sup> *Davis v. Mills*, 99 Fed. 39; *Colburn's Appeal*, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139; *Consolidated Tank Line Co. v. Collier*, 148 Ill. 259, 39 Am. St. Rep. 181, 35 N. E. 756.

<sup>28</sup> *Zipcey v. Thompson*, 67 Mass. (1 Gray) 243.

<sup>29</sup> *Zipcey v. Thompson*, 67 Mass. (1 Gray) 243.

<sup>30</sup> *Lee v. Abdy*, L. R. 17 Q. B. 309; *Colburn's Appeal*, 74 Conn. 463, 92 Am. St. Rep. 231, 51 Atl. 139.

<sup>31</sup> See §§ 2774 et seq.

<sup>32</sup> *Kelly v. Selwyn* [1905], 2 Ch. 117; *Vanbuskirk v. Hartford Fire Insurance Co.*, 14 Conn. 583; *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113.

<sup>33</sup> *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113.

<sup>34</sup> *Kelly v. Selwyn* [1905], 2 Ch. 117; *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113.

<sup>35</sup> *Vanbuskirk v. Hartford Fire Insurance Co.*, 14 Conn. 583.

<sup>36</sup> *Lewis v. Bush*, 30 Minn. 244, 15 N. W. 113.

New York, of an interest in a trust fund which is administered by an English Court, is said to be governed by the law of England.<sup>37</sup> A, B and C were domiciled in New York. A assigned a claim against X, a Connecticut corporation, to B, in New York. Before B gave notice to X, C attempted to attach such debt in Connecticut. It was held that the law of New York controlled, and that B was entitled to priority as against C, B having given notice to X in time to enable X to protect itself. The fact that A, B and C were all citizens of New York was regarded as material; and the court declined to decide whether this result would have been reached if C had been a citizen of Connecticut.<sup>38</sup>

The relic of the common-law rule forbidding assignments still prevents an assignee of a contract from maintaining an action in his own name in some states. In this form the rule is a mere matter of procedure, and concerns the remedy only. If this is the effect of the rule, the law of the forum controls.<sup>39</sup> On the other hand, the law of the forum may permit the assignee to maintain an action in his own name, if he has acquired the legal title, and it requires him to make use of the name of the assignor only if he has a mere equitable title. If this is the effect of the rule, the law of the place in which the assignment is made, determines whether the assignee takes a legal title; and if by that law he has a legal title, he may maintain the action in his own name, although if the assignment had been made in the jurisdiction of the forum, it would have been held that he had an equitable interest only.<sup>40</sup>

Whether a subsequent assignee can interpose against a prior assignee, defenses which the assignor might have made depends on the law of the situs of the obligation, which is the forum, as distinct from the place of assignment.<sup>41</sup>

**§ 3608. Negotiability.** Whether a contract is negotiable or not is determined by the law of the place where the contract is made and where it is payable,<sup>1</sup> as opposed to the law of the forum.

<sup>37</sup> Kelly v. Selwyn [1905], 2 Ch. 117.

<sup>38</sup> Vanbuskirk v. Hartford Fire Insurance Co., 14 Conn. 583.

<sup>39</sup> Leach v. Greene, 116 Mass. 534.

<sup>40</sup> Lanigan v. North, 60 Ark. 62, 63 S. W. 62; Levy v. Levy, 78 Pa. St. 507, 21 Am. Rep. 35.

<sup>41</sup> Runkle v. Smith, 89 N. J. Eq. 103, 103 Atl. 382 (assignment of interest

in trust estate; right of second assignee to plead usury; contract usurious in place of assignment as well).

<sup>1</sup> California. Navajo County Bank v. Dolson, 163 Cal. 485, 41 L. R. A. (N.S.) 787, 126 Pac. 153 (provision for payment of attorney fees).

Illinois. Evans v. Anderson, 78 Ill. 558.

If a note is not payable at a bank, and such instrument is not negotiable where it is given, and apparently payable, one who takes by indorsement for value, before maturity and without notice, in a state in which such instrument would be negotiable if there delivered, in which the maker is then domiciled and in which the action is brought, takes subject to all defenses.<sup>2</sup> If to be performed in a different jurisdiction from that where made, the law of the place of performance is said to control.<sup>3</sup> Upon this question there is, however, a divergence of authority. Some courts hold that the question of negotiability is determined by the law of the place where the contract is made.<sup>4</sup>

It has also been held that the intention of the parties should control as to the law by which the contract is to be governed, with reference to its negotiability.<sup>5</sup> An express reference to the law of the place in which is situated the land which is mortgaged to secure such note, should control as against the law of the place at which the note is to be paid.<sup>6</sup>

The law of the place of performance is said to control as to what constitutes a bona fide holder.<sup>7</sup> Bonds were issued in Wisconsin, by a Wisconsin corporation, to one who gave no consideration therefor. Such bonds were payable in Wisconsin and were

**Michigan.** *Strawberry Point Bank v. Lee*, 117 Mich. 122, 75 N. W. 444 (no place of payment stated).

**Missouri.** *Clark v. Porter*, 90 Mo. App. 143 (made in the Indian Territory, where Arkansas law is in force, payable in Arkansas).

**Virginia.** *Corbin v. Planters' National Bank*, 87 Va. 661, 24 Am. St. Rep. 673, 13 S. E. 98.

See also, *Badger Machinery Co. v. Columbia County Electric Light & Power Co.*, — Wis. —, 163 N. W. 188.

For payment, discharge, etc., see §§ 3613 et seq.

<sup>2</sup> *Evans v. Anderson*, 78 Ill. 558 (the place of making, rather than that of payment is emphasized).

<sup>3</sup> *United States. Brabston v. Gibson*, 50 U. S. (9 How.) 263, 13 L. ed. 131.

**Kansas.** *Sykes v. Citizen's National Bank*, 78 Kan. 688, 19 L. R. A. (N.S.) 665, 98 Pac. 206 (obiter, as laws appear to be the same).

**Massachusetts.** *Shoe & Leather National Bank v. Wood*, 142 Mass. 563, 8 N. E. 753.

**Michigan.** *Barger v. Farnham*, 130 Mich. 487, 90 N. W. 281.

**Oklahoma.** *Security Trust & Savings Bank v. Gleichmann*, 50 Okla. 441, L. R. A. 1915F, 1203, 150 Pac. 908.

<sup>4</sup> *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775; *Woods v. Ridley*, 30 Tenn. (11 Humph.) 104.

<sup>5</sup> *Bell v. Riggs*, 34 Okla. 834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427.

<sup>6</sup> *Bell v. Riggs*, 34 Okla. 834, 41 L. R. A. (N.S.) 1111, 127 Pac. 427 (effect of clause accelerating maturity in case of default).

<sup>7</sup> *Webster v. Howe Machine Co.*, 54 Conn. 304, 8 Atl. 482; *Woodruff v. Hill*, 116 Mass. 310; *Limerick National Bank v. Howard*, 71 N. H. 13, 93 Am. St. Rep. 489, 51 Atl. 641; *Badger Machinery Co. v. Columbia County Electric Light & Power Co.* (Wis.), 163 N. W. 188.

negotiated to one who did not give value or extend the time for paying the debt to secure which such bonds were transferred to him. It was held that the law of Wisconsin determined whether such transferee was a holder in due course.<sup>8</sup> In New Hampshire the fact that one takes under circumstances that would lead a careful and prudent man to suspect that the note was invalid, does not necessarily prevent him from being a bona fide holder.<sup>9</sup> In Vermont, one who takes under such circumstances can not be a bona fide holder.<sup>10</sup> A note was given in New Hampshire, payable in Vermont, and action was brought thereon in New Hampshire. Vermont law was held to control as to whether the indorsee was a bona fide holder or not.<sup>11</sup> It has also been suggested that the law of the place at which the transfer was made should determine who is a bona fide holder.<sup>12</sup>

**§ 3609. Indorsement and acceptance.** The liability of an indorser of a promissory note is determined by the law of the place where such contract is made, as long as the parties are not shown to have intended a negotiation and delivery of such note in another state after indorsement.<sup>1</sup> Hence, even if a note is executed and payable in another state, a contract of indorsement is controlled by the law of the place where made.<sup>2</sup> The place of payment is said to govern as to the liability of an irregular indorser.<sup>3</sup>

The legality of a transaction of indorsement, as far as the subject-matter is concerned, is said to be controlled by the law of the place at which the instrument is payable,<sup>4</sup> as where the in-

<sup>8</sup> *Badger Machinery Co. v. Columbia County Electric Light & Power Co.* (Wis.), 163 N. W. 188.

<sup>9</sup> *Green v. Bickford*, 60 N. H. 159.

<sup>10</sup> *Limerick National Bank v. Adams*, 70 Vt. 132, 40 Atl. 166.

<sup>11</sup> *Limerick National Bank v. Howard*, 71 N. H. 13, 93 Am. St. Rep. 489, 51 Atl. 641.

<sup>12</sup> *Brook v. Vannest*, 58 N. J. L. 162, 33 Atl. 382.

Contra, *Badger Machinery Co. v. Columbia County Electric Light & Power Co.* (Wis.), 163 N. W. 188.

<sup>1</sup> *Case v. Heffner*, 10 Ohio 180.

For demand, protest, etc., see § 3615.

If a draft is drawn in Alabama on a

Virginia drawee and is deposited in Alabama under a contract by which the deposition is to check against it, and it is to be charged back if not paid, such latter contract is governed by the law of Alabama. *Fourth National Bank v. Bragg*, 127 Va. 47, 11 A. L. R. 1034, 102 S. E. 649.

<sup>2</sup> *Spies v. National City Bank*, 174 N. Y. 222, 61 L. R. A. 193, 66 N. E. 736.

<sup>3</sup> *Montana Coal & Coke Co. v. Cincinnati Coal & Coke Co.*, 69 O. S. 351, 69 N. E. 613.

<sup>4</sup> *Moulis v. Owen* [1907], 1 K. B. 746; *Thomas v. First National Bank*, 213 Ill. 261, 72 N. E. 801 (place of payment also forum).

strument was indorsed for a gambling debt.<sup>5</sup> The form of a contract of indorsement is said to be controlled by the law of the place where the indorsement is made.<sup>6</sup> If an indorsement in blank passes no interest where it is made, it will not be given effect elsewhere.<sup>7</sup> If an indorsement passes title where it is made, but is a forgery and without legal effect by the law of the forum, an indorsee can not be held for conversion.<sup>8</sup>

The liability of an acceptor is said to be governed by the law of the place of acceptance.<sup>9</sup> Accordingly, if an instrument is accepted at Leghorn by the law of which the acceptor is liable, if the drawer fails, only for the effects of the drawer in his hands, his liability is measured by the law of Leghorn.<sup>10</sup>

**§ 3610. Beneficiary contracts, joint liability, etc.** Whether a promise for the benefit of a third person imposes an obligation upon the promisor, in favor of such third person, is said to depend upon the law of the state where the contract is made, and not on the law of the state in which such payment is to be made.<sup>1</sup> If such a promise is a part of a transaction with reference to realty, the right of the beneficiary is said to depend on the law of the state where the contract is made, and the parties are domiciled, and not on the law of the state in which is located the property which is the subject-matter of the contract.<sup>2</sup> In Iowa, a covenant by a grantee to pay a mortgage debt imposes liability on him in favor of the mortgagee, whether the grantee was personally liable on the mortgage debt or not.<sup>3</sup> In Minnesota such a covenant does not impose a personal liability on the grantee unless the grantor was personally liable on the mortgage debt.<sup>4</sup> A deed conveying

<sup>5</sup> *Moulis v. Owen* [1907], 1 K. B. 746; *Thomas v. First National Bank*, 213 Ill. 261, 72 N. E. 801 (place of payment also forum).

<sup>6</sup> *Trimbey v. Vignier*, 1 Bing. (N. C.) 151; *Embiricos v. Anglo-Austrian Bank* [1905], 1 K. B. 677.

<sup>7</sup> *Trimbey v. Vignier*, 1 Bing. (N. C.) 151 (bill drawn and indorsed in France; drawee and indorsee domiciled in England).

<sup>8</sup> *Embiricos v. Anglo-Austrian Bank* [1905], 1 K. B. 677 (it is said to be possible that such indorsement passes a good title against drawer or acceptor).

<sup>9</sup> *Burrows v. Jemino*, 2 Strange 733; *Scudder v. Union National Bank*, 91 U. S. 406, 23 L. ed. 245.

<sup>10</sup> *Burrows v. Jemino*, 2 Strange 733 (judgment fixing this liability had already been rendered by the courts of Leghorn).

<sup>1</sup> *Carnegie v. Morrison*, 43 Mass. (2 Met.) 381.

<sup>2</sup> *Clement v. Willett*, 105 Minn. 267, 17 L. R. A. (N.S.) 1094, 117 N. W. 491.

<sup>3</sup> *Marble Savings Bank v. Mesarvey*, 101 Ia. 285, 70 N. W. 198.

<sup>4</sup> *Kramer v. Gardner*, 104 Minn. 370, 116 N. W. 925.

land in Iowa was delivered in Minnesota between parties who were there domiciled; and, as it did not appear where it was to be performed, it was held that the law of Minnesota applied, and that the grantee did not assume a personal liability.<sup>5</sup> The nature of the liability of two or more debtors is said to be governed by the law of the jurisdiction in which the obligation is payable, and not by the law of the jurisdiction in which the obligation was incurred.<sup>6</sup>

**§ 3611. Construction.** If a contract is made and to be performed in the same jurisdiction, its construction is controlled by the law of that jurisdiction,<sup>1</sup> and not by the law of the forum.<sup>2</sup> If a contract is made in one jurisdiction, and is to be performed in another, it is generally said that the construction of such contract is governed by the law of the place of performance,<sup>3</sup> although this result is reached in some cases on the theory that the intention of the parties controls, and that they intend the contract to be construed by the law of the place of performance. If a contract of sale provides for performance to the satisfaction of the purchaser, the law of the place of performance controls, and not the law of the domicile of the seller, or the law of the place where the contract was made.<sup>4</sup> An insurance policy payable in England is gov-

<sup>5</sup> *Clement v. Willett*, 105 Minn. 267, 17 L. R. A. (N.S.) 1094, 117 N. W. 491 (the court assumed that performance was to take place where the contract was made, and the court further found no intention that the validity of the obligation should be determined by the laws of Iowa).

<sup>6</sup> *Cox v. United States*, 31 U. S. (6 Pet.) 172, 8 L. ed. 359 (contract made in Louisiana; payable in District of Columbia).

<sup>1</sup> *United States. Owen v. Giles*, 157 Fed. 825, 85 C. C. A. 189.

*Michigan. Douglass v. Paine*, 141 Mich. 485, 104 N. W. 781.

*Mississippi. Couret v. Connor*, 118 Miss. 374, 79 So. 230.

*Oklahoma. American National Insurance Co. v. Donahue*, 54 Okla. 294, 153 Pac. 819.

*South Dakota. First National Bank v. Doeden*, 21 S. D. 400, 113 N. W. 81.

<sup>2</sup> *Owen v. Giles*, 157 Fed. 825, 85 C. C. A. 189 (whether time is of essence: statutory provision of forum).

<sup>3</sup> *Cox v. United States*, 31 U. S. (6 Pet.) 172, 8 L. ed. 359; *London Assurance v. Companhia de Moagens*, 167 U. S. 149, 42 L. ed. 113.

<sup>4</sup> *Illinois. Abt v. American Trust & Savings Bank*, 159 Ill. 467, 50 Am. St. Rep. 175, 42 N. E. 856.

*Iowa. Banco de Sonora v. Bankers' Mutual Casualty Co. (Ia.)*, 95 N. W. 232; *Inman Manufacturing Co. v. American Cereal Co.*, 133 Ia. 71, 8 L. R. A. (N.S.) 1140, 110 N. W. 287.

*Kansas. Alexandria, Arcadia & Ft. Smith Ry. v. Johnson*, 61 Kan. 417, 59 Pac. 1063.

*Kentucky. Farmer v. Etheridge (Ky.)*, 69 S. W. 761; *Stevens v. Gregg*, 89 Ky. 461, 12 S. W. 775.

*Massachusetts. Shoe & Leather Na-*

erned by English law as to the meaning of the term "in collision."<sup>5</sup> A contract of guaranty dated in Illinois, signed in Michigan, mailed from Michigan to the guarantee in Illinois, and payable if at all in Illinois, was controlled as to the liability of the guarantor by Illinois law.<sup>6</sup> If a contract of insurance is made where the insured is domiciled and is there to be performed, the law of that state controls as to the meaning of the word "heirs" used in the policy to indicate the beneficiaries, though the insured removes his domicile to another state after taking such policy and before his death.<sup>7</sup> A contract for insuring valuable packages during transportation, which provides that they are to be "sealed by an adult," impliedly requires them to be sealed at the place of business of the insured, which in this case was in Mexico, though the transportation covered by the insurance began and ended within Arizona; and hence while they must be actually sealed in Mexico, the law of Mexico determines who is an adult.<sup>8</sup>

If a contract is to be performed in part in one place and in part in another, the law of each place has been said to govern as to the construction of that part there to be performed.<sup>9</sup> It has also been said that a contract which is made in one state and which provides for payments in such state, is to be construed according to the law of such state, although it provides for cultivating land in another state, and the action is brought in the latter state.<sup>10</sup> In a

tional Bank v. Wood, 142 Mass. 563, 8 N. E. 753.

Michigan. Tolman Co. v. Reed, 115 Mich. 71, 72 N. W. 1104.

Minnesota. Stahl v. Mitchell, 41 Minn. 325, 43 N. W. 385.

New York. St. Nicholas Bank v. National Bank, 128 N. Y. 26, 13 L. R. A. 241, 27 N. E. 849.

Pennsylvania. Baum v. Birchall, 150 Pa. St. 164, 30 Am. St. Rep. 797, 24 Atl. 620.

Tennessee. Robinson v. Queen, 87 Tenn. 445, 10 Am. St. Rep. 690, 3 L. R. A. 214, 11 S. W. 38; Douglass v. Paine, 141 Mich. 485, 104 N. W. 781 (obiter); Inman Manufacturing Co. v. American Cereal Co., 133 Ia. 71, 8 L. R. A. (N.S.) 1140, 110 N. W. 287.

London Assurance v. Companhia de Moagens, 167 U. S. 149, 42 L. ed. 113.

<sup>6</sup>Tolman Co. v. Reed, 115 Mich. 71,

72 N. W. 1104. (The Michigan court had held the guarantor liable under its own law, Tolman v. Griffin, 111 Mich. 301, 69 N. W. 649, while the Illinois courts had held him not liable, Tolman Co. v. Rice, 164 Ill. 255, 45 N. E. 496).

<sup>7</sup>Mullen v. Reed, 64 Conn. 240, 42 Am. St. Rep. 174, 24 L. R. A. 664, 29 Atl. 478.

<sup>8</sup>Banco de Sonora v. Bankers' Mutual Casualty Co. (Ia.), 95 N. W. 232.

<sup>9</sup>Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 454, 32 L. ed. 788; Banco de Sonora v. Bankers' Mutual Casualty Co. (Ia.), 95 N. W. 232; Baldwin v. Thayer, 71 N. H. 257, 93 Am. St. Rep. 510, 52 Atl. 852.

<sup>10</sup>Wilson v. Todhunter, 137 Ark. 80, 207 S. W. 221 (as to whether contract creates partnership).

number of cases it is said that a contract is to be construed in accordance with the law of the place where it is made.<sup>11</sup> The interpretation of a contract of insurance is said to be controlled by the law of the state where it takes effect.<sup>12</sup> Whether a contract of life insurance which contains no express provision on the subject, includes the death of the insured at the hand of the law,<sup>13</sup> or whether the interest of a deceased beneficiary passes to his child,<sup>14</sup> or whether, under a policy of fire insurance, a breach of the "iron safe" condition terminates the policy, with reference to forfeitures or not,<sup>15</sup> is said to depend on the law of the place where the contract was made. If a contract in compromise of a will contest is made in the state in which the testator was domiciled and which the parties in interest were domiciled, the words "heirs at law" are to be governed by the law of that state, although the ancestor of such heirs was domiciled in another state at the time of his death.<sup>16</sup> Whether a contract by an employé for accepting certain benefits as a satisfaction of his right of action for negli-

<sup>11</sup> **United States.** *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262, 45 L. ed. 181; *Northwestern Mutual Life Insurance Co. v. McCue*, 223 U. S. 234, 38 L. R. A. (N.S.) 57, 56 L. ed. 419; *In re Swift*, 105 Fed. 493.

**Alabama.** *New York Life Insurance Co. v. Scheuer*, 198 Ala. 47, 73 So. 409.

**Indiana.** *Jackson v. Greene*, 112 Ind. 341, 14 N. E. 89.

**Massachusetts.** *Brandeis v. Atkins*, 204 Mass. 471, 26 L. R. A. (N.S.) 230, 90 N. E. 861; *Davis v. New York Life Insurance Co.*, 212 Mass. 310, 41 L. R. A. (N.S.) 250, 98 N. E. 1043.

**Mississippi.** *Bank of England v. Tarleton*, 23 Miss. 173 (assignment); *Aetna Insurance Co. v. Mount*, 90 Miss. 642, 15 L. R. A. (N.S.) 471, 44 So. 162, 45 So. 835.

**Nebraska.** *Antes v. State Ins. Co.*, 61 Neb. 55, 84 N. W. 412.

**New Jersey.** *Fiocchi v. Smith* (N. J.), 97 Atl. 283.

**North Carolina.** *Cannaday v. Atlantic Coast Line Ry.*, 143 N. Car. 439, 118 Am. St. Rep. 821, 8 L. R. A. (N.S.) 939, 55 S. E. 836; *Mandru v. Ashby*,

108 Md. 693, 71 Atl. 312 (obiter); *Griffin v. Metal Product Co. (Pa.)*, 107 Atl. 713 (obiter: since law the same in both jurisdictions).

See also, *Wilson v. Todhunter*, 137 Ark. 80, 207 S. W. 221.

<sup>12</sup> *Northwestern Mutual Life Insurance Co. v. McCue*, 223 U. S. 234, 38 L. R. A. (N.S.) 57, 56 L. ed. 419; *Davis v. New York Life Insurance Co.*, 212 Mass. 310, 41 L. R. A. (N.S.) 250, 98 N. E. 1043; *Aetna Insurance Co. v. Mount*, 90 Miss. 642, 15 L. R. A. (N.S.) 471, 44 So. 162, 45 So. 835; *Seely v. Manhattan Life Ins. Co.*, 72 N. H. 49, 55 Atl. 425.

<sup>13</sup> *Northwestern Mutual Life Insurance Co. v. McCue*, 223 U. S. 234, 38 L. R. A. (N.S.) 57, 56 L. ed. 419.

<sup>14</sup> *Davis v. New York Life Insurance Co.*, 212 Mass. 310, 41 L. R. A. (N.S.) 250, 98 N. E. 1043.

<sup>15</sup> *Aetna Insurance Co. v. Mount*, 90 Miss. 642, 15 L. R. A. (N.S.) 471, 44 So. 162, 45 So. 835.

<sup>16</sup> *Brandeis v. Atkins*, 204 Mass. 471, 26 L. R. A. (N.S.) 230, 90 N. E. 861.

gence is intended to operate as an absolute bar to such action, or whether it is intended to give to the employe the right to elect between such right of action and such benefits, is controlled by the law of the state where the contract is made.<sup>17</sup>

Most of the cases in which it is said that the law of the jurisdiction in which the contract is made is the law which controls its construction, are cases involving personal property or property other than realty; and it has been said that this rule has been limited to personalty.<sup>18</sup> Contracts for the conveyance of realty or some interest therein,<sup>19</sup> and real covenants which run with the land,<sup>20</sup> are said to be governed by the law of the place where the land is situated, although this has been based on the theory that this is the place of performance.<sup>21</sup> A covenant with reference to realty, which is regarded as a personal covenant,<sup>22</sup> such as a covenant of seizin,<sup>23</sup> is said to be governed by the law of the place at which the contract is made. Whether a contract for cultivating land creates a partnership or not, is said to be governed by the law of the jurisdiction in which such contract was made and in which payments were to be made, although the land was situated in another jurisdiction, and the action was brought in the latter jurisdiction.<sup>24</sup>

It has been said that a contract is to be construed according to the law of the jurisdiction which the parties have in mind and with reference to which they contract.<sup>25</sup> This theory finds support in the statement that the law of the place where the contract is made is to control, unless the parties clearly appear to contemplate

<sup>17</sup> *Cannaday v. Atlantic Coast Line Ry.*, 143 N. Car. 439, 118 Am. St. Rep. 821, 8 L. R. A. (N.S.) 939, 55 S. E. 836.

<sup>18</sup> *Fiocchi v. Smith* (N. J.), 97 Atl. 283.

<sup>19</sup> *United States. Freeman v. Falconer*, 201 Fed. 785.

*Louisiana. Cassidy's Succession*, 40 La. Ann. 827, 5 So. 292.

*Maryland. Latrobe v. Winans*, 89 Md. 636, 43 Atl. 829.

*Minnesota. True v. Northern Pacific Ry.*, 126 Minn. 72, 147 N. W. 948.

*Vermont. Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302.

<sup>20</sup> *Beauchamp v. Bertig*, 90 Ark. 351,

23 L. R. A. (N.S.) 659, 119 S. W. 75.

<sup>21</sup> *Beauchamp v. Bertig*, 90 Ark. 351,

23 L. R. A. (N.S.) 659, 119 S. W. 75.

<sup>22</sup> *Jackson v. Greene*, 112 Ind. 341, 14 N. E. 89.

<sup>23</sup> *Jackson v. Greene*, 112 Ind. 341, 14 N. E. 89.

<sup>24</sup> *Wilson v. Todhunter*, 137 Ark. 80, 207 S. W. 221.

<sup>25</sup> *White v. Holly*, 80 Conn. 438, 68 Atl. 997; *Croissant v. Empire State Realty Co.*, 29 D. C. App. 538; *Midland Savings & Loan Co. v. Henderson*, 47 Okla. 693, 150 Pac. 868 [sub nomine, *Midland Savings & Loan Co. v. Beats*, L. R. A. 1916D, 745].

some other system of law.<sup>26</sup> It is said, however, in jurisdictions in which the law of the place of performance is said to control, that oral evidence is inadmissible to show that the parties contemplated any other system of law.<sup>27</sup> If the intention of the parties as to the system of law by which the contract is to be controlled is ever to be given effect, it is in questions of construction. If the contract is valid, according to any of the competing systems of law, and the only question is that of the intention of the parties, it would seem as though they should be permitted to show this intention by referring to some definite system of law, as well as by repeating the rules of such system in their contract.

**§ 3612. Liens.** Whether a contract gives a lien on certain property, depends on the law of the jurisdiction in which the property is situated.<sup>1</sup> Whether a vendor's lien on property can be asserted or not, depends on the law of the place where such property is to be delivered.<sup>2</sup> Whether an agreement for a chattel mortgage creates a valid mortgage, is determined by the law of the jurisdiction in which the personal property is situated.<sup>3</sup> If the chattel mortgage is valid where the property is situated, and such property is thereupon removed into another jurisdiction where such transaction does not create a mortgage, which is valid against creditors and bona fide purchasers, such mortgage is defeated by

<sup>26</sup> *Croissant v. Empire State Realty Co.*, 29 D. C. App. 538.

<sup>27</sup> *Inman Mfg. Co. v. American Cereal Co.*, 133 Ia. 71, 8 L. R. A. (N.S.) 1140, 110 N. W. 287.

<sup>1</sup> *United States. Green v. Van Buskirk*, 74 U. S. (7 Wall.) 139, 19 L. ed. 109.

*Arkansas. Smead v. Chandler*, 71 Ark. 505, 65 L. R. A. 353, 76 S. W. 1066.

*Louisiana. De La Vergne Refrigerating Machine Co. v. New Orleans & Western Ry.*, 51 La. Ann. 1733, 26 So. 455; *Willey v. St. Charles Hotel Co.*, 52 La. Ann. 1596, 28 So. 188 [on rehearing from 52 La. Ann. 1581, 28 So. 182]; *Borne v. Alexander Hardwood Co.*, 140 La. 315, 72 So. 979.

*Massachusetts. Langworthy v. Little*, 66 Mass. (12 Cush.) 109.

*New York. Dearing v. McKinnon*

*Dash & Hardware Co.*, 165 N. Y. 78, 80 Am. St. Rep. 708, 58 N. E. 773.

<sup>2</sup> *Borne v. Alexander Hardwood Co.*, 140 La. 315 (72 So. 979 (delivery where lien not recognized)); *De La Vergne v. New Orleans & Western Ry.*, 51 La. Ann. 1733, 26 So. 455 (delivery in jurisdiction of forum where lien recognized); *Willey v. St. Charles Hotel Co.*, 52 La. Ann. 1598, 28 So. 188 [on rehearing from 52 La. Ann. 1581, 28 So. 182] (delivery where lien not recognized).

<sup>3</sup> *Green v. Van Buskirk*, 74 U. S. (7 Wall.) 139, 19 L. ed. 109; *Smead v. Chandler*, 71 Ark. 505, 65 L. R. A. 353, 76 S. W. 1066; *Langworthy v. Little*, 66 Mass. (12 Cush.) 109; *Dearing v. McKinnon Dash & Hardware Co.*, 165 N. Y. 78, 80 Am. St. Rep. 708, 58 N. E. 773.

such removal if it is made with the assent of the mortgagee,<sup>4</sup> but not if it is made without his assent.<sup>5</sup> If the property is sold under a contract of conditional sale, and, with the assent of the seller, it is taken into a jurisdiction in which the original contract does not reserve title as against third persons, the interest of the seller is subordinate to the interest which third persons may acquire.<sup>6</sup> If personal property which has been leased is taken by the lessee without the consent of the lessor, into a jurisdiction by the law of which the interests of the lessor would have been subordinate to the interests of bona fide purchasers, the interest of the lessor will be protected as against third persons,<sup>7</sup> at least if he acts with due diligence. A contract for material, entered into in one state and to be performed by delivering it in another for use in a building, entitles the vendor to the benefit of the mechanic's lien laws of the latter state, if suit is there brought.<sup>8</sup> Questions of this sort, however, involve the law of property, in addition to the law of contract, and they will not be discussed here in any detail.

A statute which gives a lien to an attorney applies only to proceedings within the jurisdiction in which such statute is in effect.<sup>9</sup>

#### E. PERFORMANCE AND OTHER FORMS OF DISCHARGE

**§ 3613. Performance.** What constitutes performance is said to be governed by the place of performance.<sup>1</sup> If the contract pro-

<sup>4</sup> *Farmers' & Merchants' State Bank v. Sutherland*, 93 Neb. 707, 46 L. R. A. (N.S.) 95, 141 N. W. 827; *Kanaga v. Taylor*, 7 O. S. 134, 70 Am. Dec. 62; *Newsum v. Hoffman*, 124 Tenn. 369, 137 S. W. 490; *Jones v. North Pacific Fish & Oil Co.*, 42 Wash. 332, 114 Am. St. Rep. 131, 6 L. R. A. (N.S.) 940, 84 Pac. 1122.

For the theory that the chattel mortgage statutes are to be construed so as to protect the citizens of the state into which the property is brought, see *Snyder v. Yates*, 112 Tenn. 309, 105 Am. St. Rep. 941, 64 L. R. A. 353, 79 S. W. 796.

For a similar theory as to the conditional Sales Statute, see *Lane v. J. E. Roach's Banda Mexicana Co.*, 78 N. J. Eq. 439, 79 Atl. 365.

<sup>5</sup> *Kanaga v. Taylor*, 7 O. S. 134, 70

Am. Dec. 62; *Yund v. First National Bank*, 14 Wyom. 81, 82 Pac. 6.

See however, *Lane v. J. E. Roach's Banda Mexicana Co.*, 78 N. J. Eq. 439, 79 Atl. 365.

<sup>6</sup> *Fuller v. Webster*, 28 Del. (5 Boyce) 538, 95 Atl. 335 (apparently with assent of seller to removal); *Boyer v. Knowlton Co.*, 85 O. S. 104, 38 L. R. A. (N.S.) 224, 93 N. E. 137.

<sup>7</sup> *Adams v. Fellers*, 88 S. Car. 212, 35 L. R. A. (N.S.) 385, 70 S. E. 722.

<sup>8</sup> *Mack v. Roberts' Quarries*, 57 O. S. 463, 63 Am. St. Rep. 729, 49 N. E. 467.

<sup>9</sup> *Plummer v. Great Northern Ry.*, 60 Wash. 214, 31 L. R. A. (N.S.) 1215, 110 Pac. 989 (Washington Statute: fund recovered in British Columbia under Workmen's Compensation Act which forbade lien).

<sup>1</sup> *Guernsey v. Imperial Bank*, 188 Fed.

vides for performance satisfactory to the adversary party, such performance is to be determined by the law of the place of performance and not by the law of the place at which the contract was made, or the promisor was domiciled.<sup>2</sup> If a note is made and payable in one jurisdiction, and is attached in another, the effect of payment by the maker before attachment is determined by the law of the place where the note was made and was payable.<sup>3</sup> The question as to what constitutes such change of possession as to pass title to personalty under a contract of sale is controlled by the law of the place where the personalty is situated, as it is performable there.<sup>4</sup> The law of the place of performance controls as to the number of days of grace,<sup>5</sup> and whether if the last day of grace falls on Sunday the note is payable on Saturday or Monday.<sup>6</sup>

It has also been said that the law of the place of making controls as to performance.<sup>7</sup> If a note was made in Vermont, and was payable there to a Vermont bank, the effect of a tender in Connecticut of notes of such banks was to be determined by the law of Vermont;<sup>8</sup> and such tender could be used as a set-off, on the theory that it was a substantive right even if the law of Connecticut did not allow a set-off.<sup>9</sup>

The effect of the payment of a debt of another as operating as an involuntary assignment to the person who makes the payment, is determined by the law of the place in which such payment is made, at least if it is the place in which the original obligation

300, 40 L. R. A. (N.S.) 377, 110 C. C. A. 278; *Inman Manufacturing Co. v. American Cereal Co.*, 133 Iowa 71, 8 L. R. A. (N.S.) 1140, 110 N. W. 287; *Baldwin v. Thayer*, 71 N. H. 257, 93 Am. St. Rep. 510, 52 Atl. 852; *Murray v. Gibson*, 2 La. Ann. 311 (obiter).

<sup>2</sup> *Inman Manufacturing Co. v. American Cereal Co.*, 133 Iowa 71, 8 L. R. A. (N.S.) 1140, 110 N. W. 287.

<sup>3</sup> *Murray v. Gibson*, 2 La. Ann. 311 (obiter, as the evidence showed that no payment had been made and that the receipt was given in fraud of the attaching creditor).

<sup>4</sup> *Baldwin v. Thayer*, 71 N. H. 257, 93 Am. St. Rep. 510, 52 Atl. 852.

<sup>5</sup> *United States. Washington Bank v. Triplett*, 26 U. S. (1 Pet.) 25, 7 L. ed. 37; *Guernsey v. Imperial Bank*, 188

Fed. 300, 40 L. R. A. (N.S.) 377, 110 C. C. A. 278.

*Indiana. Brown v. Jones*, 125 Ind. 375, 21 Am. St. Rep. 227, 25 N. E. 452.

*Kentucky. Goddin v. Shipley*, 46 Ky. (7 B. Mon.) 575.

*Vermont. Blodgett v. Durgin*, 32 Vt. 361.

*Wisconsin. Second National Bank v. Smith*, 118 Wis. 18, 94 N. W. 664.

<sup>6</sup> *Stebbins v. Leowolf*, 57 Mass. (3 Cush.) 137.

<sup>7</sup> *Vermont State Bank v. Porter*, 5 Day (Conn.) 316, 5 Am. Dec. 157 (also place of performance; but not forum).

<sup>8</sup> *Vermont State Bank v. Porter*, 5 Day (Conn.) 316, 5 Am. Dec. 157.

<sup>9</sup> *Vermont State Bank v. Porter*, 5 Day (Conn.) 316, 5 Am. Dec. 157.

was contracted.<sup>10</sup> If, by the law of Prussia, a payment by the King of Prussia to one whose money has been embezzled in the mails, gives to the King of Prussia a right of action against the party who is guilty of embezzlement, such right of action will be enforced in a jurisdiction in which such payment would operate as a discharge and not as an assignment.<sup>11</sup> On the other hand, a statute which forbids payment of wages in advance does not apply to payments in a foreign port, either by a foreign vessel,<sup>12</sup> or by an American vessel,<sup>13</sup> even if such vessel subsequently enters an American port.<sup>14</sup>

**§ 3614. Breach and other forms of discharge.** It would seem that the question of the effect of breach or of other forms of discharge should be determined by the law of the place of performance; and this view has been expressed in some cases.<sup>1</sup> In other jurisdictions it is said that the law of the place of making the contract controls.<sup>2</sup> However, in some of these cases the place of making and the place of performance are the same; and they are held to control as opposed to the law of the forum, or as to the law of the domicile of one of the parties. If a contract,<sup>3</sup> such as an antenuptial contract,<sup>4</sup> is revocable where it is made, it seems that conduct in another jurisdiction which is inconsistent with the continued existence of such contract should operate as a revocation.<sup>5</sup>

<sup>10</sup> King of Prussia v. Kuepper, 22 Mo. 550.

<sup>11</sup> King of Prussia v. Kuepper, 22 Mo. 550.

<sup>12</sup> Sanberg v. McDonald, 248 U. S. 185, 63 L. ed. 200.

<sup>13</sup> Neilson v. Rhine Shipping Co., 248 U. S. 205, 63 L. ed. 208.

<sup>14</sup> Sanberg v. McDonald, 248 U. S. 185, 63 L. ed. 200; Neilson v. Rhine Shipping Co., 248 U. S. 205, 63 L. ed. 208.

<sup>1</sup> Brabston v. Gibson, 50 U. S. (9 How.) 263, 13 L. ed. 131; Spies v. National City Bank, 174 N. Y. 222, 61 L. R. A. 193, 66 N. E. 736 (obiter).

<sup>2</sup> Thomas v. Clarkson, 125 Ga. 72, 6 L. R. A. (N.S.) 658, 54 S. E. 77; McElroy v. Metropolitan Life Insurance Co., 84 Neb. 866, 23 L. R. A. (N.S.) 968, 122 N. W. 27.

<sup>3</sup> Fuss v. Fuss, 24 Wis. 256.

<sup>4</sup> Fuss v. Fuss, 24 Wis. 256.

<sup>5</sup> A and B were domiciled in Prussia and married there. While retaining their domicile in Prussia, and not contemplating any change of domicile, they entered into a post-nuptial contract by which each granted a transfer to the other of all the real or personal property which should belong to each at the death of each. The contract did not appear by its terms to refer to property situated outside of Prussia. The evidence showed that by the law of Prussia, such a contract could be revoked; but it did not show by what acts a revocation would be effected. The parties subsequently removed to Wisconsin and bought land in Wisconsin. It was held that the law of Wisconsin would control as to the right

In other cases, questions of the nature and effect of breach, or of other forms of discharge, are said to be governed by the law by which the parties intend the contract to be governed,<sup>6</sup> but this is usually the law of the place where the contract is made, or where it is to be performed, in part at least.

If the nature of the discharge is such that it is opposed to the well settled policy of the forum, the courts may refuse to recognize such discharge, although it would have been operative where the contract was made.<sup>7</sup>

A discussion in detail of some of the types of breach or discharge will illustrate the irreconcilable conflict of authority on the question of the law which should control as to such questions. If a contract, by its express terms, is to be governed and construed by the law of a given jurisdiction, the law of such jurisdiction is said to control as to the right to maintain an action in case of renunciation before performance is due.<sup>8</sup> If a negotiable instrument is delivered in one jurisdiction, and is payable in another and indorsed in the latter, the law of such jurisdiction controls as to the effect of a reconveyance from the maker to the payee, of the property in consideration of which such note was given.<sup>9</sup> Whether impossibility discharges a contract has been said to be controlled by the law by which the parties intend the contract to be governed.<sup>10</sup> A contract for shipping goods from Algiers to England is held not to be discharged by the outbreak of an insurrection in Algiers which renders the performance of the contract practically impossible, although by the French law which prevails in Algiers such fact would operate as a discharge of the contract,

of the survivor in Wisconsin land; and that if land was bought with the wife's money and the title was taken in the name of the husband, he could devise such land to her for life with the remainder over to others, since such will made a sufficient provision for her. *Fuss v. Fuss*, 24 Wis. 256.

<sup>6</sup> *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589; *Michaelsen v. Security Mutual Life Ins. Co.*, 150 Fed. 224 [reversed on another point, *Michaelsen v. Security Mutual Life Ins. Co.*, 154 Fed. 356].

<sup>7</sup> *Vandalia Ry. v. Kelly*, 187 Ind. 323,

119 N. E. 257 (forum also place of performance).

<sup>8</sup> *Michaelsen v. Security Mutual Life Ins. Co.*, 150 Fed. 224.

By such law it was held that an action could not be brought until performance was due. This was reversed on the theory that the law on which the parties had agreed allowed such action before performance was due. *Michaelsen v. Security Mutual Life Ins. Co.*, 154 Fed. 356.

<sup>9</sup> *Brabston v. Gibson*, 50 U. S. (9 How.) 263, 13 L. ed. 131.

<sup>10</sup> *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589.

on the theory that the parties intend the contract to be governed by the law of England.<sup>11</sup> Whether a contract is discharged by a subsequent contract between the parties is said to be governed by the law of the place where such new contract was made.<sup>12</sup> Whether a contract between a policy holder and an insurance company operates as a discharge of the original contract of insurance, is determined by the law of the place where the new contract was made, and not by the law of the place where the original contract of insurance was made.<sup>13</sup> Whether acceptance of benefits by an employe from a relief department operates as a discharge of his right of action for negligence is said to be determined by the law of the place where the contract was made.<sup>14</sup> It has been held, however, that such a contract may be so opposed to the settled policy of the law of the forum that it will refuse to recognize such discharge, although it would have been valid where the contract was made.<sup>15</sup> Whether a surety is discharged by failure of the creditor to bring an action against the principal debtor after an oral notice to bring such action, is controlled by the law of the place where the contract was made.<sup>16</sup> Whether a special notice of the election to treat the contract as discharged because of breach must be given or not, is said to depend on the law of the place where the contract is made, rather than on the law of the domicile of the party who seeks to take advantage of such default.<sup>17</sup> This principle applies to necessity of notice by an insurance company of forfeiture for non-payment of premium.<sup>18</sup> Whether a written notice must be given if the vendor wishes to terminate a land contract because of the vendee's default has been said to depend

<sup>11</sup> *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589.

<sup>12</sup> *New York Life Insurance Co. v. Head*, 234 U. S. 149, 58 L. ed. 1259; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357, 62 L. ed. 772.

<sup>13</sup> *New York Life Insurance Co. v. Head*, 234 U. S. 149, 58 L. ed. 1259; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357, 62 L. ed. 772; *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.

<sup>14</sup> *Cannaday v. Atlantic Coast Line Ry.*, 143 N. Car. 439, 118 Am. St. Rep. 821, 8 L. R. A. (N.S.) 939, 55 S. E. 836 (accident in jurisdiction of forum).

<sup>15</sup> *Vandalia Ry. v. Kelly*, 187 Ind. 323, 119 N. E. 257 (contract to be performed in jurisdiction of forum).

<sup>16</sup> *Thomas v. Clarkson*, 125 Ga. 72, 6 L. R. A. (N.S.) 658, 54 S. E. 77.

<sup>17</sup> *Grevenig v. Washington Life Ins. Co.*, 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790; *McElroy v. Metropolitan Life Insurance Co.*, 84 Neb. 866, 23 L. R. A. (N.S.) 968, 122 N. W. 27.

<sup>18</sup> *Grevenig v. Washington Life Ins. Co.*, 112 La. 879, 104 Am. St. Rep. 474, 36 So. 790; *McElroy v. Metropolitan Life Insurance Co.*, 84 Neb. 866, 23 L. R. A. (N.S.) 968, 122 N. W. 27.

on the law of the place of making the contract;<sup>19</sup> but the real question which was decided was that no federal question was presented, where, in an action brought in the jurisdiction where the contract was made, the court applied its own law, and not the law of the jurisdiction in which the land was situated.<sup>20</sup> In a later case, in which the action was brought in the jurisdiction in which the land was situated, it was held that no federal question was presented if the court applied its own law, and not the law of the jurisdiction in which the contract was made.<sup>21</sup> Whether a policy of life insurance is payable if the insured was executed legally, is said to be controlled by the law of the place where the contract was made, and not by the law of the place where the insurance company was domiciled.<sup>22</sup> Whether an insurance policy is payable on the execution of the insured for a felony, is not determined by the law of the place where the insured was executed, as opposed to the law of the forum.<sup>23</sup> Whether an insurance policy is payable in case the insured commits suicide, is said to be controlled by the law of the place where the contract was made.<sup>24</sup> Whether an express condition in a contract is waived or not, is said to be determined by the law of the place where the contract is made.<sup>25</sup> Whether an insurance company has waived a condition against suicide is said to be determined by the law of the place where the contract was made, rather than by the law of the domicile of the insurance company.<sup>26</sup> Whether a condition that the policy should not take effect unless the insured was alive and in sound health when it was delivered, is determined by the law of the place where the contract was made.<sup>27</sup> Whether an action can be brought on a judgment while an appeal therefrom is pending, is determined by

<sup>19</sup> *Selover v. Walsh*, 226 U. S. 112, 57 L. ed. 146 [affirming, 109 Minn. 136, 123 N. W. 291].

<sup>20</sup> *Selover v. Walsh*, 226 U. S. 112, 57 L. ed. 146 [affirming, 109 Minn. 136, 123 N. W. 291].

<sup>21</sup> *Kryger v. Wilson*, 242 U. S. 171, 61 L. ed. 229 [affirming, *Wilson v. Kryger*, 29 N. D. 28, 149 N. W. 721].

<sup>22</sup> *Northwestern Mutual Life Insurance Co. v. McCue*, 223 U. S. 234, 38 L. R. A. (N.S.) 57, 56 L. ed. 419.

<sup>23</sup> *Collins v. Metropolitan Life Insurance Co.*, 232 Ill. 37, 14 L. R. A. (N.S.) 356, 83 N. E. 542.

<sup>24</sup> *Tuttle v. Iowa State Traveling Men's Association*, 132 Ia. 652, 7 L. R. A. (N.S.) 223, 104 N. W. 1131 (also forum and domicile of insurer).

<sup>25</sup> *Pringle v. Modern Woodmen*, 87 Neb. 548, 127 N. W. 876 (also forum); *Keesler v. Mutual Benefit Life Insurance Co.*, 177 N. Car. 394, 99 S. E. 97 (also forum).

<sup>26</sup> *Pringle v. Modern Woodmen*, 87 Neb. 548, 127 N. W. 876 (also forum).

<sup>27</sup> *Keesler v. Mutual Benefit Life Insurance Co.*, 177 N. Car. 394, 99 S. E. 97 (not forum).

the law of the jurisdiction in which the judgment is rendered, and not by the law of the forum.<sup>28</sup>

The law which controls moratory legislation depends on the nature thereof, and on its effect upon the obligation.<sup>29</sup> A statute which is passed by the nation in which a negotiable instrument is payable, extending the time of payment on account of the war, operates as such extension, although no similar statute was passed by the nation in which such instrument was executed.<sup>30</sup> If such a statute merely forbade the courts of such country to proceed in an action upon an obligation, and did not extend the time of payment, it would not affect the right of the holder of the obligation to bring an action thereon in a jurisdiction in which a similar statute had not been enacted.

**§ 3615. Demand, protest, and notice.** The necessity of protest is said to be determined by the law of the place where the instrument is made, at least as far as this is determined by the nature of the instrument itself.<sup>1</sup> An instrument which was drawn in New York, and which, by the law of New York, was a foreign bill of exchange, was governed, as to the necessity of protest, by the law of New York, although it was payable in Austria, by the law of which such instrument was a commercial order, protest of which was not necessary.<sup>2</sup>

If demand, notice and protest are necessary by the law of the place at which the instrument is executed, the time, method and sufficiency thereof are said to be governed by the law of the place of payment.<sup>3</sup>

<sup>28</sup> *Ebner v. Steffanson*, — N. D. —, 172 N. W. 857 (judgment rendered in California).

<sup>29</sup> See *Moratory Legislation Relating to Bills and Notes and the Conflict of Laws*, by E. G. Lorenzen, 28 *Yale Law Journal* 324.

<sup>30</sup> *Rouquette v. Overmann*, L. R. 10 Q. B. 525.

<sup>1</sup> *Amsinck v. Rogers*, 189 N. Y. 252, 121 Am. St. Rep. 858, 82 N. E. 134.

<sup>2</sup> *Amsinck v. Rogers*, 189 N. Y. 252, 121 Am. St. Rep. 858, 82 N. E. 134.

<sup>3</sup> *England. Hirschfeld v. Smith*, L. R. 1 C. P. 340.

*United States. Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254; *Guernsey v.*

*Imperial Bank*, 188 Fed. 300, 40 L. R. A. (N.S.) 377, 110 C. C. A. 278.

*Connecticut. Gleason v. Thayer*, 87 Conn. 248, 87 Atl. 790.

*Illinois. Wooley v. Lyon*, 117 Ill. 244, 57 Am. Rep. 867, 6 N. E. 885 (not by law of place of indorsement).

*Massachusetts. Shoe & Leather National Bank v. Wood*, 142 Mass. 563, 8 N. E. 753.

*Wisconsin. Second National Bank v. Smith*, 118 Wis. 18, 94 N. W. 664. (This note was dated in Wisconsin, but executed, delivered and payable in Indiana. Indiana law controlled in a suit in Wisconsin).

**§ 3616. Bankruptcy.** A discharge in bankruptcy which is given by the courts of a state in which both debtor and creditor are domiciled, is a defense in any other jurisdiction.<sup>1</sup> A discharge in bankruptcy is not a defense against a creditor who is not domiciled within the jurisdiction of the court by which it is granted, and who has not submitted himself thereto.<sup>2</sup>

#### F. REMEDIES, PROCEDURE, ETC.

**§ 3617. Remedies—In general.** The remedy by which a contract is to be enforced is determined by the law of the forum.<sup>1</sup> On this question there is a comparative unanimity of judicial opinion. If the rules which regulate the conflict of laws are explained on the theory of comity, it is clear that while comity may require the courts of one jurisdiction to recognize the substantive rights which arise under the laws of another jurisdiction, no principle of comity requires the courts to grant remedies upon foreign contracts which they refuse to contracts which are controlled by its own laws. If the rules on the subject of conflict of laws are to be explained on the theory of actual or presumed intention of the parties, covenants by which the parties attempt to regulate the remedies which may be given in case of breach are usually regarded as void;<sup>2</sup> and

<sup>1</sup> *Manufacturers National Bank v. Hall*, 86 Me. 107, 29 Atl. 952; *Blanchard v. Russell*, 13 Mass. 1, 7 Am. Dec. 106; *Stoddard v. Harrington*, 100 Mass. 87, 97 Am. Dec. 80, 1 Am. Rep. 92; *Utica Bank v. Card*, 7 Ohio (2nd pt.) 170.

<sup>2</sup> *Smith v. Buchanan*, 1 East 6; *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 6 L. ed. 606; *Booth v. Clark*, 58 U. S. (17 How.) 322, 15 L. ed. 164; *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491; *Smith v. Smith*, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410.

<sup>1</sup> *United States v. Donnally*, 33 U. S. (8 Pet.) 361, 8 L. ed. 974; *Wilcox v. Hunt*, 38 U. S. (13 Pet.) 378, 10 L. ed. 209.

*Arkansas. Shores-Mueller Co. v. Palmer*, 141 Ark. 64, 216 S. W. 295.

*Connecticut. Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372.

*Illinois. Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.

*Maine. Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127.

*Maryland. Mandru v. Ashby*, 108 Md. 603, 71 Atl. 312.

*Massachusetts. Pearsall v. Dwight*, 2 Mass. 84, 3 Am. Dec. 35.

*Missouri. Fisher v. Davidson*, 271 Mo. 195, L. R. A. 1917F, 692, 195 S. W. 1024.

*New Jersey. Jaqui v. Benjamin*, 80 N. J. L. 10, 77 Atl. 468.

*New York. Reilly v. Steinhart*, 217 N. Y. 549, 112 N. E. 468.

*Oklahoma. Clark v. First National Bank*, — Okla. —, 157 Pac. 96.

*Oregon. Jamieson v. Potts*, 55 Or. 292, 25 L. R. A. (N.S.) 24, 105 Pac. 93.

*Vermont. Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752.

*Virginia. Young v. Hart*, 101 Va. 480, 44 S. E. 703.

<sup>2</sup> See § 1726.

there can be no presumed intention, since such intention would be without legal effect, and the parties are unable to foresee in advance in what jurisdiction the action will be brought. If the rules on the subject of conflict of laws are to be explained on the theory that the courts of each civilized nation will recognize and protect rights which have arisen under any system of laws, it is only the rights that are to be protected. The remedy for the protection of this right is to be left to the law of the forum. The practical difficulties which arise in the application of this principle grow out of the difficulty of determining what is substantive law and what is remedy in a proceeding to enforce a contract upon breach thereof. The question whether an action on an instrument under a scroll seal should be in covenant or in assumpsit is determined by the law of the jurisdiction where the suit was brought.<sup>3</sup> A statute in force in a state in which a chattel mortgage was given and in which the property was situated, to the effect that such mortgage could be enforced only by foreclosure, and that a statement of the expenses of the sale and of the price for which it was sold must be given to the mortgagee, is a matter of the remedy only; and such remedy will not be applied by the court of another jurisdiction in which it is sought to enforce such mortgage.<sup>4</sup> A statute to the effect that a surety is discharged if the grantor refuses to bring an action against the principal debtor within thirty days after the written demand of the surety therefor, deals with the remedy and will be applied by the courts of the forum, if there in force.<sup>5</sup> Whether a statute which provides that the vendor must give a certain written notice of forfeiture of a contract for the sale of land, deals with the remedy or not, no federal question is presented either under the due process clause or under the full faith and credit clause, where the forum applies its own rule on this subject,<sup>6</sup> whether the land is situated in the forum<sup>7</sup> or not.<sup>8</sup>

<sup>3</sup> *Le Roy v. Beard*, 49 U. S. (8 How.) 451, 12 L. ed. 1151; *Woodbury v. United States Casualty Co.*, 284 Ill. 227, 120 N. E. 8.

<sup>4</sup> *Clark v. First National Bank*, — Okla. —, 157 Pac. 96.

<sup>5</sup> *Shores-Mueller Co. v. Palmer*, 141 Ark. 64, 216 S. W. 295.

<sup>6</sup> *Selover v. Walsh*, 226 U. S. 112, 57 L. ed. 146 [affirming, 109 Minn. 136,

123 N. W. 291]; *Kryger v. Wilson*, 242 U. S. 171, 61 L. ed. 229 [affirming, *Wilson v. Kryger*, 29 N. D. 28, 149 N. W. 721].

<sup>7</sup> *Kryger v. Wilson*, 242 U. S. 171, 61 L. ed. 229 [affirming, *Wilson v. Kryger*, 29 N. D. 28, 149 N. W. 721].

<sup>8</sup> *Selover v. Walsh*, 226 U. S. 112, 57 L. ed. 146 [affirming, 109 Minn. 136, 123 N. W. 291].

**§ 3618. Jurisdiction of equity—Specific performance, etc.** Whether relief is to be sought at law or equity is a question of remedy which is determined by the law of the forum.<sup>1</sup> Whether an action against a grantee who has assumed and agreed to pay a mortgage debt,<sup>2</sup> or the remedy of one who has taken a partial assignment,<sup>3</sup> is at law or in equity, is determined by the law of the forum.

A serious problem may arise where it is sought to obtain a decree of specific performance of a contract to convey land in another jurisdiction. If this suit is brought in a jurisdiction in which the vendee is regarded as the equitable owner of the land, and the land is situated in a jurisdiction in which a court of equity powers exists, and the similar view is taken of the effect of such a contract, there is no difficulty in granting specific performance.<sup>4</sup> If, however, the land is situated in a jurisdiction in which the purchaser is not regarded as the owner of the property, or in which specific performance is unknown,<sup>5</sup> or in which land can be conveyed only by an act in a court in whose jurisdiction such land is situated,<sup>6</sup> equity can not grant specific performance, since there is no means of compelling the courts of the jurisdiction in which such land is situated, to recognize such decree.

**§ 3619. Damages and compensation—General theories.** By the great weight of authority, the right to damages and the amount thereof is a substantive right, and not a part of the remedy; and it is therefore not governed by the law of the forum.<sup>1</sup> We find,

<sup>1</sup> Willard v. Wood, 164 U. S. 502, 41 L. ed. 531; Drake v. Rice, 130 Mass. 410; New York Life Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732.

<sup>2</sup> Union Mutual Life Ins. Co. v. Hanford, 143 U. S. 187, 36 L. ed. 118; Willard v. Wood, 164 U. S. 502, 41 L. ed. 531 (s. c., 135 U. S. 309, 34 L. ed. 210); Burchard v. Dunbar, 82 Ill. 450, 25 Am. Rep. 334; New York Life Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732.

<sup>3</sup> Jackson v. Tiernan, 15 La. 485 (also domicile of debtor).

<sup>4</sup> Idaho Gold Mining Co. v. Winchell, 6 Ida. 729, 92 Am. St. Rep. 290; Newton v. Bronson, 13 N. Y. 587, 65 Am. Dec.

80; Burnley v. Stevenson, 24 O. S. 474, 15 Am. St. Rep. 621; Johnson v. Kimbro, 40 Tenn. (3 Head.) 557, 75 Am. Dec. 781.

<sup>5</sup> Fidelity Loan Securities Co. v. Moore, 280 Mo. 315, 217 S. W. 296 (land in Texas: law of Texas not shown: judicial notice that it is not based on common law).

See however, Reilly v. Steinhart, 217 N. Y. 549, 112 N. E. 468 (land in Cuba).

<sup>6</sup> Waterhouse v. Stansfield, 10 Hare 254.

<sup>1</sup> Home Land & Cattle Co. v. McNamara, 145 Fed. 17; Johnson v. Western Union Telegraph Co., 144 N. Car. 410, 119 Am. St. Rep. 961, 10 L. R. A.

however, the usual lack of harmony as to the law by which this question is to be governed. It is said that the amount of damages is to be governed by the law of the place at which the contract is made,<sup>2</sup> although this is sometimes explained on the theory that this is the law which the parties intend.<sup>3</sup> Whether mental suffering for breach of contract to transmit a telegram can be regarded as an item of damages is said to be determined by the law of the place at which such telegram is delivered for transmission.<sup>4</sup> If a telegram is sent from a given state and suit is brought there, the law of that state is held to apply as to the measure of damages.<sup>5</sup> Even where an action against a telegraph company is in tort, it has been said that its liability is governed by the law of the place where the message was delivered to the telegraph company, and not by the law of the place where it was to be delivered,<sup>6</sup> on the theory that the action is founded upon the contract between the sender of the message and the telegraph company. If a contract for the transmission of baggage is made in New York, and if it is to be performed eventually by delivering such baggage in New York, a Pennsylvania restriction as to the limitation as to the amount of recovery is said not to apply, although the accident takes place in Pennsylvania.<sup>7</sup>

In other jurisdictions the law of the place of performance is said to control.<sup>8</sup> If a contract for the adoption of a child is made

(N.S.) 256, 57 S. E. 122; *Brown v. Camden & Atlantic Ry.*, 83 Pa. St. 316.

For the special rule with reference to interest as damages, see Note this section.

<sup>2</sup>*Johnson v. Western Union Telegraph Co.*, 144 N. Car. 410, 119 Am. St. Rep. 961, 10 L. R. A. (N.S.) 256, 57 S. E. 122; *Dyke v. Erie Ry.*, 45 N. Y. 113, 6 Am. Rep. 43 (obiter: as contract made where action is brought).

<sup>3</sup>*Western Union Telegraph Co. v. Favish*, 196 Ala. 4, 71 So. 183; *Dyke v. Erie Ry.*, 45 N. Y. 113, 6 Am. Rep. 43 (also forum).

<sup>4</sup>*Western Union Telegraph Co. v. Favish*, 196 Ala. 4, 71 So. 183; *Johnson v. Western Union Telegraph Co.*, 144 N. Car. 410, 119 Am. St. Rep. 961, 10 L. R. A. (N.S.) 256, 57 S. E. 122 (not forum). See also *Western Union Tele-*

*graph Co. v. Hill*, 163 Ala. 18, 23 L. R. A. (N.S.) 648, 50 So. 248.

<sup>5</sup>*Western Union Telegraph Co. v. Waller*, 96 Tex. 589, 97 Am. St. Rep. 936, 74 S. W. 751. (The question involved being whether damages were recoverable for mental anguish.)

<sup>6</sup>*Stone v. Postal-Telegraph Co.*, 31 R. I. 174, 29 L. R. A. (N.S.) 796, 76 Atl. 762.

<sup>7</sup>*Dyke v. Erie Ry.*, 45 N. Y. 113, 6 Am. Rep. 43.

<sup>8</sup>*Sandham v. Grounds*, 94 Fed. 83 (also forum); *Home Land & Cattle Co. v. McNamara*, 145 Fed. 17 (not forum); *Meyer v. Estes*, 164 Mass. 457, 32 L. R. A. 283, 41 N. E. 683 (also forum); *Brown v. Camden & Atlantic Ry.*, 83 Pa. St. 316 (not forum: but case not brought within foreign law).

in Ireland, and it is to be performed in Pennsylvania, and the estate of the adopting parents is located in Pennsylvania, the law of Pennsylvania is said to control as to the amount of recovery.<sup>9</sup> If a contract to transport baggage is made in Pennsylvania, but it is to be performed entirely in New Jersey, the law of New Jersey controls as to the limitation on the amount of recovery.<sup>10</sup> It is said that the measure of damages in an action against a telegraph company is controlled by the law of the place at which the message was to have been delivered, on the theory that breach takes place there;<sup>11</sup> and the law of the place where the mistake was made will not apply, even if the action is brought there.<sup>12</sup>

The validity of a covenant for liquidated damages is said to be controlled by the law of the place where the contract is performed,<sup>13</sup> and not by the law of the place where the contract is made, even if the action is brought there.<sup>14</sup> This principle has been applied where the place of performance and the forum are the same, and where the court regarded the contract as made in the same jurisdiction, on the theory that the contract was made where the acceptance was received.<sup>15</sup>

In other jurisdictions, damages is treated as a part of procedure and not a part of the performance of the contract, and the law of the forum has been held to control,<sup>16</sup> especially if the contract does not specify any place of performance.<sup>17</sup> In most jurisdictions, a provision in a contract for attorney's fees, in case of default, is regarded as dealing with costs; and as this is a part of procedure, the validity of such contract is accordingly governed by the law of the forum.<sup>18</sup>

<sup>9</sup> *Sandham v. Grounds*, 94 Fed. 83 (also forum; value of services only, and not value of estate, allowed).

<sup>10</sup> *Brown v. Camden & Atlantic Ry.*, 83 Pa. St. 316 (compliance with New Jersey law not shown).

<sup>11</sup> *Western Union Telegraph Co. v. Lacer*, 122 Ky. 839, 5 L. R. A. (N.S.) 751, 93 S. W. 34.

<sup>12</sup> *Western Union Telegraph Co. v. Lacer*, 122 Ky. 839, 5 L. R. A. (N.S.) 751, 93 S. W. 34.

<sup>13</sup> *Home Land & Cattle Co. v. McNamara*, 145 Fed. 17 (not forum).

<sup>14</sup> *Home Land & Cattle Co. v. McNamara*, 145 Fed. 17.

<sup>15</sup> *Meyer v. Estes*, 164 Mass. 457, 32 L. R. A. 283, 41 N. E. 683.

<sup>16</sup> *Goddard v. Foster*, 84 U. S. (17 Wall.) 123, 21 L. ed. 589; *Mather v. Stokely*, 218 Fed. 764; *Equitable Trust Co. v. Western Pacific Ry.*, 244 Fed. 485; *Burrows v. Stryker*, 47 Ia. 477; *Ayer v. Tilden*, 81 Mass. (15 Gray) 178, 77 Am. Dec. 355; *Fisher v. Otis*, 3 Pinn. (Wis.) 78.

<sup>17</sup> *Goddard v. Foster*, 84 U. S. (17 Wall.) 123, 21 L. ed. 589.

<sup>18</sup> *Clark v. Tanner*, 100 Ky. 275, 38 S. W. 11; *Hartford Security Co. v. Eyer*, 38 Neb. 507, 38 Am. St. Rep. 735, 54 N. W. 838; *Exchange Bank v.*

If the Workmen's Compensation Act is regarded as contractual in character, the rights of the parties are controlled as to the amount of recovery, by the law of the place where the contract was made, and not by the law of the place where the accident took place.<sup>19</sup> Furthermore, from the nature of the statutes, relief must ordinarily be sought in the jurisdiction in which the contract was made, and whose Workmen's Compensation Act it is sought to apply. If the Workmen's Compensation Act is not contractual in its character, the law of the place at which the injury is sustained, must control.<sup>20</sup>

**§ 3620. Damages in contracts and covenants relating to realty.**

A breach of a covenant of seizin has been said to be governed by the law of the forum, and not by the law of the place where the land is situated,<sup>1</sup> although the place of making the contract was not shown, and it may have been delivered in the forum.<sup>2</sup> In a later case, the law of the place of making the contract and not the forum or the law of the place where the land was situated, was said to control as to the measure of damages for breach of a contract for the sale of realty.<sup>3</sup> In an action brought in Massachusetts, for breach of a covenant in a conveyance, the Massachusetts measure of damages was applied, which was the amount of the consideration with interest, if the consideration were shown, and

Apalachian Land & Lumber Co., 128 N. Car. 193, 38 S. E. 813; Commercial National Bank v. Davidson, 18 Or. 57.

<sup>19</sup> Colorado. Industrial Commission v. Aetna Life Ins. Co., 64 Colo. 480, 3 A. L. R. 1336, 174 Pac. 589.

Connecticut. Kennerson v. Thames Towboat Co., 89 Conn. 367, L. R. A. 1916A, 436, 94 Atl. 372.

Indiana. Carl Hagenbeck and Great Wallace Shows Co. v. Leppert, 66 Ind. App. 261; sub nomine, Hagenbeck v. Leppert, 117 N. E. 531.

Minnesota. Minnesota v. District Court, 139 Minn. 205, 3 A. L. R. 1347, 166 N. W. 185.

New Jersey. Rounsaville v. Central Ry. Co., 87 N. J. L. 371, 94 Atl. 392.

New York. Post v. Burger & Gohlke, 216 N. Y. 544, 111 N. E. 351.

Rhode Island. Grinnell v. Wilkin-

son, 39 R. I. 447, L. R. A. 1917B, 767, 98 Atl. 103.

West Virginia. Gooding v. Ott, 77 W. Va. 487, L. R. A. 1916D, 637, 87 S. E. 862.

<sup>20</sup> Tomalin v. Pearson [1909], 2 K. B. 61; Schwartz v. India Rubber, Gutta Percha & Telegraph Works Co. [1912], 2 K. B. 299; North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, L. R. A. 1917E, 642, 162 Pac. 93; Gould's Case, 215 Mass. 480, Ann. Cas. 1914D, 372, 102 N. E. 693.

<sup>1</sup> Nichols v. Walter, 8 Mass. 243; Smith v. Strong, 31 Mass. (14 Pick.) 128.

<sup>2</sup> Nichols v. Walter, 8 Mass. 243; Smith v. Strong, 31 Mass. (14 Pick.) 128.

<sup>3</sup> Atwood v. Walker, 179 Mass. 514, 61 N. E. 58.

if not, the value of the land when conveyed, although by the law of the place where the land was situated, substantial damages,<sup>4</sup> or the value of the land at the time of eviction,<sup>5</sup> was allowed. In a contract for the sale of realty, which the vendor was unable to perform by reason of a defect in title which was not known to him, the law of New York, where the contract was made, was applied,<sup>6</sup> with the result that only nominal damages were allowed, in accordance with the law of New York,<sup>7</sup> and not the difference between the market value and the contract price in accordance with the law of Massachusetts. On the other hand, it has been said that the measure of damages for the breach of a covenant of warranty is controlled by the law of the place where the land is situated, and not by the law of the forum.<sup>8</sup>

**§ 3621. Interest as damages.** Whether interest will be allowed as damages, and what rate of interest will be allowed, if any, is held in many cases to be determined by the law of the place of performance.<sup>1</sup> The statutory rate which is fixed by the law of the place of performance is held to control, and not the rate fixed by the contract for interest before maturity.<sup>2</sup>

<sup>4</sup>Smith v. Strong, 31 Mass. (14 Pick.) 128 (land in New York).

<sup>5</sup>Nichols v. Walter, 8 Mass. 243 (land in New Hampshire).

<sup>6</sup>Atwood v. Walker, 179 Mass. 514, 61 N. E. 58.

<sup>7</sup>Baldwin v. Munn, 2 Wend. (N. Y.) 399; Peters v. McKeon, 4 Denio. (N. Y.) 546; Conger v. Weaver, 20 N. Y. 140; Margraf v. Muir, 57 N. Y. 155; Cockcroft v. New York & Harlem Ry., 69 N. Y. 201.

<sup>8</sup>Tillotson v. Prichard, 60 Vt. 94, 6 Am. St. Rep. 95, 14 Atl. 302 (obiter, as no evidence of *lex rei sitae*).

<sup>1</sup>England. Connor v. Bellamont, 2 Atk. 382.

United States. Pana v. Bowler, 107 U. S. 529, 32 L. ed. 752; Scotland County v. Hill, 132 U. S. 107, 33 L. ed. 261; Coghlan v. South Carolina Ry., 142 U. S. 101, 35 L. ed. 951; Mary N. Rourke, 145 Fed. 909; Sloss-Shef-

field Steel & Iron Co. v. Tacony Iron Co., 183 Fed. 645.

Illinois. Morris v. Wibaux, 159 Ill. 627, 43 N. E. 837.

Massachusetts. French v. French, 126 Mass. 360.

Missouri. Bank of Louisville v. Young, 37 Mo. 398.

New York. Smith v. Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410.

Pennsylvania. Clark v. Searight, 135 Pa. St. 173, 20 Am. St. Rep. 868, 19 Atl. 941.

Texas. Whitlock v. Castro, 22 Tex. 108.

Vermont. Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205.

Washington. Bank v. Doherty, 42 Wash. 317, 114 Am. St. Rep. 123, 4 L. R. A. (N.S.) 1191, 84 Pac. 317.

<sup>2</sup>Bank v. Doherty, 42 Wash. 317, 114 Am. St. Rep. 123, 4 L. R. A. (N.S.) 1191, 84 Pac. 872.

§ 3622. **Evidence.** The law of the forum controls as to questions of the evidence by which the truth of the facts in issue may be proved or disproved.<sup>1</sup> While questions of the notice necessary to hold parties secondarily liable are controlled by the law of the place of performance, the question of the evidence by which the notice thus found requisite may be proved, is controlled by the law of the forum.<sup>2</sup> Where the Statute of Frauds is held to be a rule of evidence and not a rule as to the form of the contract itself, the law of the forum controls as to the question of its application.<sup>3</sup> If an unsigned written report as to a matter affecting the credit of another person<sup>4</sup> is actionable where made, but action is brought thereon in another jurisdiction, the law of the forum controls.<sup>5</sup> If the contract is made in the jurisdiction of the forum, the law of such jurisdiction applies as to the admissibility of the evidence of the physician under a contract by which objections to his competency are waived, and not the law of the place where the offer was signed and forwarded for acceptance.<sup>6</sup>

The law of the forum controls as to the presumptions which may be drawn from the evidence.<sup>7</sup> This rule has been applied, however, so as to hold the shipper to be bound by a bill of lading to which he did not assent especially, although by the law of the

<sup>1</sup>England. *Bain v. Whitehaven & Furness Junction Ry.*, 3 H. L. Cas. 1 (obiter, as no proper objection was taken; question of admissibility of stockholder's register in action to recover calls); *Wiedemann v. Walpole* [1891], 2 Q. B. 534.

**United States.** *Bank of the United States v. Donnally*, 33 U. S. (8 Pet.) 361, 8 L. ed. 974; *Wilcox v. Hunt*, 38 U. S. (13 Pet.) 378, 10 L. ed. 209; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104; *Northern Pacific Ry. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958; *Supreme Lodge of Knights of Pythias v. Meyer*, 198 U. S. 508, 49 L. ed. 1146 (obiter, as contract made in jurisdiction of forum).

**Connecticut.** *Downer v. Chesebrough*, 36 Conn. 39, 4 Am. Rep. 29.

**Nebraska.** *Marvel v. Marvel*, 70 Neb. 498, 113 Am. St. Rep. 792, 97 N. W. 640.

**Pennsylvania.** *Musser v. Stauffer*, 192 Pa. St. 398, 43 Atl. 1018.

**Virginia.** *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 64 Am. St. Rep. 715, 36 L. R. A. 271, 26 S. E. 421.

**Wisconsin.** *Second National Bank v. Smith*, 118 Wis. 18, 94 N. W. 664.

<sup>2</sup>*Second National Bank v. Smith*, 118 Wis. 18, 94 N. W. 664.

<sup>3</sup>See § 3587.

As to contracts relating to realty, see § 3586.

<sup>4</sup>See § 288.

<sup>5</sup>*Third National Bank v. Steel*, 129 Mich. 434, 64 L. R. A. 119, 88 N. W. 1050.

<sup>6</sup>*Supreme Lodge Knights of Pythias v. Meyer*, 198 U. S. 508, 49 L. ed. 1146.

<sup>7</sup>*Hoadley v. Northern Transportation Co.*, 115 Mass. 305, 15 Am. Rep. 106.

place where the contract was made, he was not bound unless he assented especially,<sup>8</sup> if, by the law of the forum, his assent could be inferred from his acceptance of the bill of lading.<sup>9</sup> The real difficulty here is whether this is a matter of evidence or of offer and acceptance.

**§ 3623. Parol evidence rule.** The parol evidence rule is not, properly speaking, a rule of evidence, but a rule of substantive law. It deals with what the terms of a contract in law are, and not merely with the evidence by which it is to be proved.<sup>1</sup> Where this view of the parol evidence rule is taken, the law of the forum does not control the admissibility of oral evidence; but this question is to be determined by the law which controls the contract, which is the place of making, or performance, as the case may be.<sup>2</sup> If an action is brought on a contract of indorsement, the question whether an oral agreement limiting liability to the amount collected on certain collateral assigned over for convenience in collection, is admissible as a defense, is determined by the law controlling the contract and not by the law of the forum.<sup>3</sup> By the law of Virginia, a contemporaneous oral contract which is a consideration or inducement for a written contract, can not be shown as a defense to an action on the written contract.<sup>4</sup> By the law of Pennsylvania, such oral contract may be shown in an action upon the written one.<sup>5</sup> A contract was made in Virginia for the sale of

<sup>8</sup> *Adams Express Co. v. Haynes*, 42 Ill. 89; *Illinois Central Ry. v. Frankenberg*, 54 Ill. 88; *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140.

<sup>9</sup> *Hoadley v. Northern Transportation Co.*, 115 Mass. 305, 15 Am. Rep. 106.

See § 188.

<sup>1</sup> See § 2139.

<sup>2</sup> *Baxter National Bank v. Talbot*, 154 Mass. 213, 13 L. R. A. 52, 28 N. E. 163; *Musser v. Stauffer*, 192 Pa. St. 398, 43 Atl. 1018.

<sup>3</sup> *Baxter National Bank v. Talbot*, 154 Mass. 213, 13 L. R. A. 52, 28 N. E. 163.

<sup>4</sup> *Crawford v. Jarrett*, 29 Va. (2 Leigh) 630; *Watson v. Hurt*, 47 Va. (6 Gratt.) 633; *Towner v. Lucas*, 54 Va. (13 Gratt.) 705; *Woodward, Bald-*

*win & Co. v. Foster*, 59 Va. (18 Gratt.) 200; *Sangston v. Gordon & Riely*, 63 Va. (22 Gratt.) 755; *Miller v. Fletcher*, 68 Va. (27 Gratt.) 403; *Colhoun & Cowan v. Wilson*, 68 Va. (27 Gratt.) 639; *Carter v. McArtor*, 69 Va. (28 Gratt.) 356; *Shirley v. Rice*, 79 Va. 442; *Barnett v. Barnett*, 83 Va. 504; *Redd v. Commonwealth*, 85 Va. 648; *Shenandoah Valley Ry. Co. v. Dunlop*, 86 Va. 346; *Bonsack Machine Co. v. Woodrum*, 88 Va. 512.

<sup>5</sup> *Walker v. France*, 112 Pa. St. 203, 5 Atl. 208; *Thomas v. Loose*, 114 Pa. St. 35, 6 Atl. 326; *Cullmans v. Lindsay*, 114 Pa. St. 166, 6 Atl. 332; *Ferguson v. Rafferty*, 128 Pa. St. 337, 6 L. R. A. 33, 18 Atl. 484; *Huckestein v. Kelly*, 152 Pa. St. 631, 25 Atl. 747; *Clinch Valley Coal & Iron Co. v. Willing*, 180 Pa. St.

land in Virginia, and it was to be performed in Virginia. Action on such written contract was brought in Pennsylvania. It was held that Virginia law controlled, on the theory that it related to performance and that the law of the place of performance should govern.<sup>6</sup>

In some jurisdictions, however, it seems to be assumed that the parol evidence rule, as its name implies, is merely a question of evidence, and as such it is to be determined by the law of the forum.<sup>7</sup> A note which was made in New York and was payable there, was indorsed in blank in New York, under an oral agreement which modified the liability which the law would otherwise have imposed. By the law of New York, such modification could not be shown. The action was brought in Connecticut, by whose laws such oral modification of liabilities could be shown. It was held that the law of Connecticut governed.<sup>8</sup> A and B signed and delivered a note in Missouri which was payable in Missouri. It appeared that by the law of Missouri oral evidence was inadmissible, even as between A and B, to show that B was surety. By the law of Minnesota, such evidence was admissible. B was compelled to pay the amount of such note and brought an action against A in Minnesota to recover the amount which B had paid. It was held that the law of Minnesota governed, and that such evidence was admissible.<sup>9</sup>

If a contract to renew notes was made in Massachusetts, and the renewal notes were signed in New Hampshire, and mailed to Massachusetts, it is held, in an action brought in Massachusetts, that the law of Massachusetts governed as to the right of a surety to show his relation to such instrument, at least in equity.<sup>10</sup>

165, 57 Am. St. Rep. 626, 36 Atl. 737; *In re Sutch's Estate*, 201 Pa. St. 305, 50 Atl. 943; *Noel v. Kessler*, 252 Pa. St. 244, 97 Atl. 446.

See § 2165.

<sup>6</sup> *Musser v. Stauffer*, 192 Pa. St. 398, 43 Atl. 1018. (For the facts in full, see *Musser v. Stauffer*, 178 Pa. St. 99, 35 Atl. 709.)

<sup>7</sup> *Downer v. Chesebrough*, 36 Conn. 39; *Kaufman v. Barbour*, 98 Minn. 158, 107 N. W. 1128.

<sup>8</sup> *Downer v. Chesebrough*, 36 Conn. 39. (This was assumed to be a matter

of evidence; and the cases arising under the statute of frauds, in which such statute is held to be a rule of evidence, were regarded as analogies.)

<sup>9</sup> *Kaufman v. Barbour*, 98 Minn. 158, 107 N. W. 1128.

<sup>10</sup> *Jennings v. Moore*, 189 Mass. 197, 75 N. E. 214. (The question of conflict of laws was not discussed on this point, but on the question of usury. With reference to the admissibility of parol evidence, the Massachusetts law was assumed, without discussion, to apply.)

**§ 3624. Statutes of limitation—Rule in absence of specific statute.** The Statute of Limitations is sometimes so worded as to extinguish the right, and sometimes so as to merely withhold the remedy after the lapse of a certain period of time. It has also been claimed that it is merely a statute of presumption, but this rule has generally been abandoned.<sup>1</sup> Where it is regarded as a statute of repose, it is generally held to affect the remedy,<sup>2</sup> and the law of the forum therefore controls,<sup>3</sup> as in the case of other questions involving procedure and remedies. This includes exceptions to statute as well as the general provisions thereof.<sup>4</sup> The law of the forum is applied where the action is barred by such law, although it is not barred where the cause of action arose;<sup>5</sup> and it

<sup>1</sup> See § 3424.

<sup>2</sup> See § 3426.

<sup>3</sup> *England. Williams v. Jones*, 13 East. 439.

*United States. McCluny v. Silliman*, 28 U. S. (3 Pet.) 270, 7 L. ed. 676; *Bank of the United States v. Donnally*, 33 U. S. (8 Pet.) 361, 8 L. ed. 974; *Alabama Bank v. Dalton*, 50 U. S. (9 How.) 522, 13 L. ed. 242; *Bacon v. Howard*, 60 U. S. (20 How.) 22, 15 L. ed. 534; *Amy v. Dubuque*, 98 U. S. 470, 25 L. ed. 228; *Willard v. Wood*, 164 U. S. 502, 41 L. ed. 531; *Hargadine-McKittick Dry Goods Co. v. Hudson*, 122 Fed. 232, 58 C. C. A. 596; *Ramsden v. Knowles*, 151 Fed. 721, 10 L. R. A. (N.S.) 897, 81 C. C. A. 105; *Graham v. Englemann*, 263 Fed. 166.

*Arkansas. Burgett v. Williford*, 56 Ark. 187, 35 Am. St. Rep. 96, 19 S. W. 750.

*Florida. Brown v. Case*, — Fla. —, 86 So. 684.

*Idaho. Canadian Birkbeck Investment & Savings Co. v. Williamson*, 32 Ida. 624, 186 Pac. 916.

*Kentucky. Labatt v. Smith*, 83 Ky. 599.

*Massachusetts. Bulger v. Roche*, 28 Mass. (11 Pick.) 36, 22 Am. Dec. 359.

*Michigan. Home Life Ins. Co. v. Ellwell*, 111 Mich. 689, 70 N. W. 334;

*Millar v. Hilton*, 189 Mich. 635, 155 N. W. 574.

*Mississippi. Wright v. Mordaunt*, 77 Miss. 537, 78 Am. St. Rep. 536, 27 So. 640; *Philp v. Hicks*, 112 Miss. 581, 73 So. 610; *Fisher v. Burk*, 123 Miss. 781, 86 So. 300.

*New Hampshire. Connecticut Valley Lumber Co. v. Maine Central Ry.*, 78 N. H. 553, 103 Atl. 263.

*New York. New York Life Ins. Co. v. Aitkin*, 125 N. Y. 660, 26 N. E. 732.

*Oklahoma. Gaier & Stroh Millinery Co. v. Hilliker*, 52 Okla. 74, 152 Pac. 410; *Shaw v. Dickinson*, — Okla. —, 164 Pac. 1150.

*Rhode Island. Staples v. Waite*, 30 R. I. 516, 30 L. R. A. (N.S.) 895, 76 Atl. 353.

*Tennessee. Barbour v. Erwin*, 82 Tenn. (14 Lea) 716.

*Vermont. Trask v. Karrick*, — Vt. —, 108 Atl. 846.

*West Virginia. Davidson v. Browning*, 73 W. Va. 276, L. R. A. 1915C, 976, 80 S. E. 363.

*Wisconsin. State Bank v. Pease*, 153 Wis. 9, 139 N. W. 767.

<sup>4</sup> *Graham v. Englemann*, 263 Fed. 166.

<sup>5</sup> *Brown v. Case*, — Fla. —, 86 So. 684; *Connecticut Valley Lumber Co. v. Maine Central Ry.*, 78 N. H. 553, 103 Atl. 263; *Staples v. Waite*, 30 R. I. 516, 30 L. R. A. (N.S.) 895, 76 Atl. 353.

is also applied where the cause of action is barred where it arose, but is not barred by the law of the forum.<sup>6</sup> Whether the assumption of a mortgage debt by accepting a deed conveying the mortgaged realty with a clause providing for such assumption is a simple contract or not, for the purpose of determining the period of limitations is controlled by the law of the forum.<sup>7</sup> The effect of a part payment, on the Statute of Limitations, is governed by the law of the place where such payment is made, at least if the debtor makes it there in person.<sup>8</sup> If the debtor leaves the state of his domicile and makes part payment of a number of debts, some of which are already barred by the law of the place where such payments are made, and some of which are not yet barred, by the law of the place where such payments are made, such payment does not revive the debts which are already barred; but it starts the Statute of Limitations running as against the debts which are not yet barred. Such effect will be given to such part payment in an action against the debtor in the courts of his domicile after his return there.<sup>9</sup>

If the statute is held not merely to affect the remedy, but also to extinguish the right, the law of the place controlling the transaction applies, and not the law of the forum.<sup>10</sup> If the statute has run where the cause of action is made and to be performed, and its effect is not merely to bar the remedy but to extinguish the right, it is held that the subsequent removal of the debtor to another state where a longer time is given by limitations can not give to the creditor the right to enforce such contract.<sup>11</sup> Under a Statute of Limitations which extinguishes the right, it is held if a cognovit note is barred in that jurisdiction, while the debtor and creditor are both domiciled there, and a judgment is later taken thereon, in another jurisdiction, by whose statutes such note is not barred, and it is sought to enforce such judgment in the jurisdiction in which the note was barred originally, such judgment is

<sup>6</sup> *Bulger v. Roche*, 28 Mass. (11 Pick.) 36, 22 Am. Dec. 359; *Carson v. Hunter*, 46 Mo. 467, 2 Am. Rep. 529.

<sup>7</sup> *Willard v. Wood*, 164 U. S. 502, 41 L. ed. 531 (held to be a simple contract).

<sup>8</sup> *Sterrett v. Sweeney*, 15 Ida. 416, 20 L. R. A. (N.S.) 963, 98 Pac. 418.

<sup>9</sup> *Sterrett v. Sweeney*, 15 Ida. 416, 20 L. R. A. (N.S.) 963, 98 Pac. 418.

<sup>10</sup> *Davis v. Mills*, 194 U. S. 451, 48

L. ed. 1067; *Brown v. Parker*, 28 Wis. 21.

<sup>11</sup> *Rathbone v. Coe*, 6 Dak. 91, 50 N. W. 620; *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; *Berkley v. Tootle*, 163 Mo. 584, 85 Am. St. Rep. 587, 63 S. W. 681; *Brown v. Parker*, 28 Wis. 21; *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433.

of no effect and equity will enjoin the judgment creditor from attempting to enforce it.<sup>12</sup> The theory underlying this general doctrine is that by the running of the Statute of Limitations a property right has been acquired by the debtor, of which he is not divested by his removal to another state. The difficulty in applying it lies in the fact that as similar statutes are treated sometimes as extinguishing the right and sometimes as barring the remedy, the practical result is often a conflict of judicial opinion and not the recognition of two consistent and distinguishable principles.

The fact that the claim has been reduced to judgment in a foreign jurisdiction starts the Statute of Limitations to running anew in any state where suit may be brought on such judgment, and makes the time fixed by such statute, expressly or by construction, for suing on foreign judgments, control. It does not, however, prevent the action on such judgment in another state from being barred by such lapse of time as is fixed by the jurisdiction of the forum, even if such judgment would not be barred in the state in which it was rendered.<sup>13</sup> Accordingly, the revivor of a judgment in the state in which it was rendered by proceedings in which no personal service was had on the judgment debtor, does not prevent limitations from running against such judgment in another state.<sup>14</sup>

### § 3625. Statutes of limitation—Specific statutory provisions.

It is provided by statute in many states, in substance that if a cause of action is barred where it arose, it shall be barred in such states, although it would not have been barred if the cause of action had arisen in such states.<sup>1</sup> Full effect is given to such

<sup>12</sup> *Brown v. Parker*, 28 Wis. 21.

<sup>13</sup> *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841; *Rice v. Moore*, 48 Kan. 590, 30 Am. St. Rep. 318, 16 L. R. A. 198, 30 Pac. 10.

<sup>14</sup> *Rice v. Moore*, 48 Kan. 590, 30 Am. St. Rep. 318, 16 L. R. A. 198, 30 Pac. 10; *Hepler v. Davis*, 32 Neb. 556, 20 Am. St. Rep. 457, 13 L. R. A. 565, 49 N. W. 458.

<sup>1</sup> *Iowa. Moran v. Moran*, 144 Ia. 451, 30 L. R. A. (N.S.) 898, 123 N. W. 202. *Kansas. Bruner v. Martin*, 76 Kan. 862, 14 L. R. A. (N.S.) 775, 93 Pac.

165; *Perry v. Robertson*, 93 Kan. 703, 150 Pac. 223.

*Minnesota. Kamper v. Hunter Land Co.*, — Minn. —, 178 N. W. 747.

*Missouri. Thompson v. Lyons*, 281 Mo. 430, 220 S. W. 942 (fraud).

*New York. Klotz v. Angle*, 220 N. Y. 347, 116 N. E. 24 (fraud).

*Ohio. Hunter v. Niagara Falls Insurance Co.*, 73 O. S. 110, 3 L. R. A. (N.S.) 1187, 76 N. E. 563.

*West Virginia. Davidson v. Brown*, 73 W. Va. 276, L. R. A. 1915C, 976, 80 S. E. 363.

statutes.<sup>2</sup> If a contract is made in one state, by an agent of a foreign corporation, it is barred under such a statute, in the jurisdiction of the domicile of the principal corporation, when it is barred in the jurisdiction in which it was made.<sup>3</sup>

Such statutes are not extended by construction, however.<sup>4</sup> If the right of action is not barred where the cause of action arose, it is not barred in the courts of a state in which such a statute is in force, although it may have been barred in another jurisdiction in which action could have been brought.<sup>5</sup> If the cause of action arises in one state, and the debtor thereupon removes to another, an action is brought in a third state in which such statute is in force, the action may be maintained if it is not barred by the law of the state where the cause of action arose, although it is barred by the law of the state to which the debtor removed.<sup>6</sup> If, by the law of the state in which the cause of action arose, the absence of the debtor suspends the operation of the Statute of Limitations, the fact that the debtor is domiciled in another state until the cause of action is barred there, is not a defense to him, on his removal into a third state, in which such statute is in force.<sup>7</sup> Such statute does not apply where the defendant is a non-resident of the state where the cause of action arose, as the right of action is not barred there;<sup>8</sup> nor does it apply to an obligation which is payable within the jurisdiction of the forum;<sup>9</sup> nor to an obligation which is payable to a creditor who is domiciled in the jurisdiction of the forum, and which does not specify any place of payment by

<sup>2</sup> *Kamper v. Hunter Land Co.*, — Minn. —, 178 N. W. 747; *Hunter v. Niagara Falls Insurance Co.*, 73 O. S. 110, 3 L. R. A. (N.S.) 1187, 76 N. E. 563.

<sup>3</sup> *Kamper v. Hunter Land Co.*, — Minn. —, 178 N. W. 747.

<sup>4</sup> *West v. Theis*, 15 Ida. 167, 17 L. R. A. (N.S.) 472, 96 Pac. 932; *Moran v. Moran*, 144 Ia. 451, 30 L. R. A. (N.S.) 898, 123 N. W. 202; *Davidson v. Browning*, 73 W. Va. 276, L. R. A. 1915C, 976, 80 S. E. 363.

<sup>5</sup> *West v. Theis*, 15 Ida. 167, 17 L. R. A. (N.S.) 472, 96 Pac. 932; *Janeway v. Burton*, 201 Ill. 78, 66 N. E. 337 [affirming, 102 Ill. App. 403]; *Hays Land & Investment Co. v. Bassett*, 85 Kan.

48, 116 Pac. 475; *McCann v. Randall*, 147 Mass. 81, 9 Am. St. Rep. 666, 17 N. E. 75.

<sup>6</sup> *West v. Theis*, 15 Ida. 167, 17 L. R. A. (N.S.) 472, 96 Pac. 932; *Hays Land & Investment Co. v. Bassett*, 85 Kan. 48, 116 Pac. 475; *McCann v. Randall*, 147 Mass. 81, 9 Am. St. Rep. 666, 17 N. E. 75; *Doughty v. Funk*, 15 Okla. 643, 4 L. R. A. (N.S.) 1029, 84 Pac. 484.

<sup>7</sup> *West v. Theis*, 15 Ida. 167, 17 L. R. A. (N.S.) 472, 96 Pac. 932; *McCann v. Randall*, 147 Mass. 81, 9 Am. St. Rep. 666, 17 N. E. 75.

<sup>8</sup> *Martin v. Wilson*, 120 Fed. 202, 58 C. C. A. 181.

<sup>9</sup> *Moran v. Moran*, 144 Ia. 451, 30 L. R. A. (N.S.) 898, 123 N. W. 202.

its terms.<sup>10</sup> If the statute is enacted to protect residents in the jurisdiction of the forum, it can not be applied to protect non-residents.<sup>11</sup>

This statute was not intended to adopt the law of the place in which the contract arose for all purposes, but to add an additional bar to an action which was barred where the cause of action arose; and if such cause of action is barred by the law of the forum it can not be maintained there, although it was not barred where it arose.<sup>12</sup> Under such statutes the debtor gets the benefit of the shorter period.<sup>13</sup>

Within the meaning of this statute, a cause of action has been said to arise where the contract was made,<sup>14</sup> and if it is not barred by such statute, or by the law of the forum, an action can be maintained, although it is barred by the law of the state to which the debtor removed after the obligation was incurred, but before it became due,<sup>15</sup> or by the law of the place at which such obligation was payable.<sup>16</sup> Under such statute, a cause of action not barred in the state where suit is brought is not barred if the creditor can enforce it by any form of action or procedure there given to him.<sup>17</sup> If a judgment is so barred by lapse of time that it can in no way be enforced where rendered, it can not be enforced in another state where a statute of this type is in force; but if, though dormant, it could be revived, an action can be brought

<sup>10</sup> Davidson v. Browning, 73 W. Va. 276, L. R. A. 1915C, 976, 80 S. E. 363 (under a statute restricting its application to a contract "made and \* \* \* to be performed in another state or country").

<sup>11</sup> Fisher v. Burk, 123 Miss. 781, 86 So. 300.

<sup>12</sup> Brown v. Case, — Fla. —, 86 So. 684; Perry v. Robertson, 93 Kan. 703, 150 Pac. 223; Brown v. Hathaway, 73 W. Va. 605, 51 L. R. A. (N.S.) 95, 80 S. E. 959.

Under a statute which provides that "upon a contract which was made and was to be performed in another state or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such state or country," the right to bring an action

upon a contract which has been entered into in another state is barred by the lex loci contractus, if the period of that law is less than the period of the lex fori; but if such action is barred by the lex fori, it can not be maintained even though it is not yet barred by the lex loci contractus. Brown v. Hathaway, 73 W. Va. 605, 51 L. R. A. (N.S.) 95, 80 S. E. 959.

<sup>13</sup> Brown v. Case, — Fla. —, 86 So. 684.

<sup>14</sup> Jarl v. Pritchett, — Ia. —, 179 N. W. 945; Doughty v. Funk, 15 Okla. 643, 4 L. R. A. (N.S.) 1029, 84 Pac. 484.

<sup>15</sup> Doughty v. Funk, 15 Okla. 643, 4 L. R. A. (N.S.) 1029, 84 Pac. 484.

<sup>16</sup> Jarl v. Pritchett, — Ia. —, 179 N. W. 945.

<sup>17</sup> Berkley v. Tootle, 163 Mo. 584, 85 Am. St. Rep. 587, 63 S. W. 681.

thereon in another state if not barred by the laws of such state.<sup>18</sup>

Under a statute which provides for a special period of limitations in actions between non-residents, a foreign corporation is a non-resident,<sup>19</sup> although it is authorized to do business within the state of the forum.<sup>20</sup>

**§ 3626. Contractual provision limiting period for bringing action.** Whether a contract which fixes the time within which an action must be brought at a period less than the period fixed by the Statute of Limitations, is controlled, on the one hand, by the law of the place where the contract is made, or to be performed, or both; or, on the other hand, by the law of the jurisdiction in which the action is brought, depends on whether it is regarded as a special period of limitations or whether it is regarded as a contractual provision, which is invalid, if at all, because of an improper or defective subject-matter. If the latter view is taken, the validity of such provision is not determined by the law of the forum,<sup>1</sup> and if it is made and to be performed in a jurisdiction in which it is valid,<sup>2</sup> or if it is made in one jurisdiction and to be performed in another, and it is valid in both,<sup>3</sup> such provision will apply, although it is invalid by the law of the forum.<sup>4</sup> If, on the other hand, it is regarded as a special period of limitations, the law of the forum applies.<sup>5</sup>

**§ 3627. Law controlling as to liability in quasi-contract.** The nature and extent of liability in quasi-contract is determined by the law of the place where the acts are done which form the basis of such liability.<sup>1</sup> A statute which permits the recovery of money

<sup>18</sup> Berkley v. Tootle, 163 Mo. 584, 85 Am. St. Rep. 587, 63 S. W. 681.

<sup>19</sup> Hamilton v. North Pacific Steamship Co., 84 Or. 71, 164 Pac. 579.

<sup>20</sup> Hamilton v. North Pacific Steamship Co., 84 Or. 71, 164 Pac. 579.

<sup>1</sup> Clarey v. Union Central Life Insurance Co., 143 Ky. 540, 33 L. R. A. (N.S.) 881, 136 S. W. 1014; Travelers' Insurance Co. v. California Insurance Co., 1 N. D. 151, 8 L. R. A. 769, 45 N. W. 703.

<sup>2</sup> Travelers' Insurance Co. v. California Insurance Co., 1 N. D. 151, 8 L. R. A. 769, 45 N. W. 703.

<sup>3</sup> Clarey v. Union Central Life Insurance Co., 143 Ky. 540, 33 L. R. A. (N.S.) 881, 136 S. W. 1014.

<sup>4</sup> Clarey v. Union Central Life Insurance Co., 143 Ky. 540, 33 L. R. A. (N.S.) 881, 136 S. W. 1014; Travelers' Insurance Co. v. California Insurance Co., 1 N. D. 151, 8 L. R. A. 769, 45 N. W. 703.

<sup>5</sup> Adams Express Co. v. Walker, 119 Ky. 121, 67 L. R. A. 412, 83 S. W. 106 (also place of ultimate performance of contract for transporting goods).

<sup>1</sup> Lamson v. Bane, 206 Fed. 253, 46 L. R. A. (N.S.) 650; Warten v. Brown, 249 Fed. 48; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Hamilton v. Schlitz Brewing Co., 129 Ia. 172, 2 L. R. A. (N.S.) 1078, 105 N. W. 438.

which is paid on wagers does not apply to wagers which are made in another jurisdiction; and such payments can not be recovered in an action which is brought in the former jurisdiction.<sup>2</sup> A like principle applies to statutes which authorize the recovery of money paid for intoxicating liquor.<sup>3</sup>

A different view has been taken of the effect of a statute which makes a wife liable jointly with her husband for all goods which are sold to him for family expenses; and it has been held that a married woman who is not liable by the law of her domicile is not liable for purchases made by the husband while he and his wife were in a state in which such statute was in force.<sup>4</sup> While it was said to be doubtful whether such statute was intended to apply to citizens of other states who were temporarily within such state, it was said that even if it were the intention to make it apply to such citizens, other states would not enforce such liability.<sup>5</sup>

**§ 3628. Estoppel.** The operation of estoppel is said to be governed by the law of the place where the contract is made, or to be performed, as opposed to the law of the forum.<sup>1</sup> Whether an insurance company is estopped to allege that the insured was not in good health by the act of its medical examiner in declaring that he was in good health, is not determined by the law of the forum.<sup>2</sup> On the other hand, estoppel to deny liability as a partner, seems to be controlled by the law of the forum.<sup>3</sup> Due notice of dissolution had been published in Montreal where the partnership was engaged in business, but one of the partners permitted the continued use of his name. These facts were notorious in Montreal. A, who was domiciled in Vermont, went to Montreal and made a contract, believing that such partner who had withdrawn was still a member of the firm. It was held in an action brought in Vermont, that such retiring partner was liable on such transaction, it being assumed that the Canadian statute could not affect the legal rights or liabilities of the parties.<sup>4</sup>

<sup>2</sup> *Warten v. Brown*, 249 Fed. 48; *Lamson v. Bane*, 206 Fed. 253, 46 L. R. A. (N.S.) 650.

<sup>3</sup> *Hamilton v. Schlitz Brewing Co.*, 129 Ia. 172, 2 L. R. A. (N.S.) 1078, 105 N. W. 438.

<sup>4</sup> *Mandell Brothers v. Fogg*, 182 Mass. 582, 17 L. R. A. (N.S.) 426, 66 N. E. 198 (action brought at her domicile).

<sup>5</sup> *Mandell Brothers v. Fogg*, 182 Mass. 582, 17 L. R. A. (N.S.) 426, 66 N. E. 198.

<sup>1</sup> *McKnelly v. Brotherhood of American Yeoman*, 160 Wis. 514, 152 N. W. 169.

<sup>2</sup> *McKnelly v. American Yeoman*, 160 Wis. 514, 152 N. W. 169 (insurance issued by an Iowa corporation to persons then domiciled in Kansas; action in Wisconsin).

<sup>3</sup> *Wait v. Brewster*, 31 Vt. 516.

<sup>4</sup> *Wait v. Brewster*, 31 Vt. 516.

## II

## CONFLICT BETWEEN FEDERAL AND STATE LAW

§ 3629. Federal and state law—Written law—Subject-matter within scope of power of state—State decision before rights are fixed. A special branch of the subject of conflict of laws involves the question of the law which controls when a cause of action on a contract arises within a state of the 'Union, and the action is brought before a federal court, and not before a state court. It is generally said that the law of the state in which the cause of action arose controls.<sup>1</sup> An express reference in a contract to the law of a given state, has been held to make it obligatory upon the federal courts to recognize and apply the state statute which governs such case.<sup>2</sup> A state statute which provides that suicide shall not be a defense to an insurance policy unless it was contemplated when the insurance was taken out, is a declaration of a policy which the federal courts are bound to follow in a case which arises within such state.<sup>3</sup>

This rule, however, both in its wording and in its application by the courts leaves open for discussion the vital question whether this means the law of the state as its own courts pronounce it, or the law of the state as the federal courts may pronounce it, ignoring the decisions of the state courts. In passing upon this question, the courts distinguish between written and unwritten law. If the rights of the parties are determined by state statute or constitution, the federal courts follow the construction placed upon such written law by the state courts.<sup>4</sup> Whether a state stat-

<sup>1</sup> *Wheaton v. Peters*, 33 U. S. (8 Pet.) 591, 8 L. ed. 1055; *Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry.*, 175 U. S. 91, 44 L. ed. 84 [affirming, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193]; *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 45 L. ed. 785; *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489, 51 L. ed. 895 [reversing, 144 Fed. 356].

<sup>2</sup> *United States Mortgage Co. v. Sperry*, 138 U. S. 313, 34 L. ed. 969.

<sup>3</sup> *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489, 51 L. ed. 895 [reversing, 144 Fed. 356].

<sup>4</sup> *Morgan v. Curtenius*, 61 U. S. (20

How.) 1, 15 L. ed. 823; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316; *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047; *Sioux City Terminal Ry. & Warehouse Co. v. Trust Co.*, 173 U. S. 99, 43 L. ed. 628; *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060; *Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry.*, 175 U. S. 91, 44 L. ed. 84 [affirming, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193]; *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. ed. 151 [affirming, *In re Pittsburgh*, 217 Pa. St. 227, 120

ute is intended to render enforceable contracts which up to that time had been unenforceable in that state, is a question for the state courts, on which their decision is final.<sup>5</sup> A railroad company leased land in Iowa by its track by a lease which contained a stipulation releasing the lessor from all liability by reason of fire caused by lessor. The Iowa statute forbade such provision in contracts between carrier and shipper. It was first held that such provision in a lease was invalid,<sup>6</sup> but on rehearing, the provision was held to be valid.<sup>7</sup> A second rehearing resulted in the same decision as the first rehearing. It was held proper for the federal court to follow the final decision of the state court.<sup>8</sup> It must be noted, however, that the opinion of the court in this last case indicates a very limited range for the operation of state law.<sup>9</sup> The decision of a state court of last resort has been held to control as to the meaning of a state statute, prescribing the terms on which foreign insurance companies may do business in the state, and giving the right under certain circumstances, to paid-up policies, extended insurance, and the like,<sup>10</sup> as to the necessity of demand before commencing suit,<sup>11</sup> and as to the effect of the state statute

*Am. St. Rep.* 845, 66 *Atl.* 348]; *Memphis St. Ry. v. Moore*, 243 U. S. 299, 61 L. ed. 733; *Pennsylvania Ry. v. Towers*, 245 U. S. 6, 62 L. ed. 117; *Hendrickson v. Apperson*, 245 U. S. 105, 62 L. ed. 178; *New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 62 L. ed. 337; *Palmer v. Ohio*, 248 U. S. 32, 63 L. ed. 108; *Withnell v. Ruecking Construction Co.*, 249 U. S. 63, 63 L. ed. 479.

See also, *Whitfield v. Aetna Life Insurance Co.*, 205 U. S. 489, 51 L. ed. 895 [reversing, 144 *Fed.* 356].

<sup>5</sup> *Munday v. Wisconsin Trust Co.*, 252 U. S. 499, 64 L. ed. 684.

<sup>6</sup> *Griswold v. Illinois Central Ry. Co.* (Ia.), 53 N. W. 295.

<sup>7</sup> *Griswold v. Illinois Central Ry. Co.*, 90 Ia. 265, 24 L. R. A. 647, 57 N. W. 843.

<sup>8</sup> *Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry.*, 175 U. S. 91, 44 L. ed. 84 [affirming, 70 *Fed.* 201, 17 C. C. A. 62, 30 L. R. A. 193].

<sup>9</sup> "Questions of public policy as affecting the liability for acts done or upon contracts made and to be performed within one of the states of the Union, —when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application,—are governed by the law of the state as expressed in its own constitution and statutes, or declared by its highest court." *Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 175 U. S. 91, 100, 44 L. ed. 84 [affirming, 70 *Fed.* 201, 17 C. C. A. 62, 30 L. R. A. 193].

<sup>10</sup> *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116 [affirming, *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 *Am. St. Rep.* 628, 53 L. R. A. 305, 50 S. W. 519].

<sup>11</sup> *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 47 L. ed. 205.

concerning usury.<sup>12</sup> The decision of a state court is "at least most persuasive,"<sup>13</sup> on the question whether under a state statute a trustee of a corporation became liable by reason of a failure to file a report as required by law, upon notes indorsed by the corporation, acting through another officer without the notice of the trustee sought to be held, and for the accommodation of such other officer.<sup>14</sup>

**§ 3630. State decision after rights are fixed.** If the rights of the parties are fixed before the decision of the state court is rendered, "the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt";<sup>1</sup> but if the question seems a clear one they "claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."<sup>2</sup> A decision of a state court declaring certain bonds to be invalid, which is rendered after bonds have been transferred to bona fide holders,<sup>3</sup> will not necessarily be followed by a federal court.<sup>4</sup> The courts of the United States are not bound by the decisions of a state court which is attempting to apply the law of another state.<sup>5</sup> A note which was given and payable in Missouri, contained a provision

<sup>12</sup> *Scudder v. Union National Bank*, 91 U. S. 406, 23 L. ed. 245; *Missouri, Kansas & Texas Trust Co. v. Krumseig*, 172 U. S. 351, 43 L. ed. 474.

"Usury is, of course, merely a statutory offense, and Federal courts in dealing with such a question must look to the laws of the state where the transaction took place, and follow the construction put upon such laws by the state courts." *Missouri, Kansas & Texas Trust Co. v. Krumseig*, 172 U. S. 351, 355, 43 L. ed. 474.

<sup>13</sup> *Park Bank v. Remsen*, 158 U. S. 337, 342, 39 L. ed. 1008.

<sup>14</sup> *Park Bank v. Remsen*, 158 U. S. 337, 39 L. ed. 1008 (following *Park Bank v. Security Co.*, 116 N. Y. 281, 5 L. R. A. 673, 22 N. E. 567, in holding that the trustee was not liable).

<sup>1</sup> *Burgess v. Seligman*, 107 U. S. 20, 34, 27 L. ed. 359.

<sup>2</sup> *Burgess v. Seligman*, 107 U. S. 20, 34, 27 L. ed. 359.

See to the same effect, *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517; *Anderson v. Santa Anna*, 116 U. S. 356, 29 L. ed. 633; *Pleasant Township v. Aetna Life Ins. Co.*, 138 U. S. 67, 34 L. ed. 864; *Barnum v. Okolona*, 148 U. S. 393, 37 L. ed. 495; *Stanley County v. Coler*, 190 U. S. 437, 47 L. ed. 1126; *Great Southern Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778; *Kobey v. Hoffman*, 229 Fed. 486, 143 C. C. A. 554; *Newbern v. National Bank of Barnesville*, 234 Fed. 209, L. R. A. 1917B, 1019.

<sup>3</sup> *Weil v. Newbern*, 126 Tenn. 223, L. R. A. 1915A, 1009, 148 S. W. 680.

<sup>4</sup> *Newbern v. National Bank of Barnesville*, 234 Fed. 209, L. R. A. 1917B, 1019.

<sup>5</sup> *Kobey v. Hoffman*, 229 Fed. 486.

for the acceleration of its maturity if the security should become insufficient. In an action on this note in Kansas it was held that such provision rendered the note non-negotiable;<sup>6</sup> and the judgment of the trial court was reversed. An action was then begun in the federal court. The federal court refused to follow the decision of the Kansas court on the ground that the case was controlled by the law of Missouri, although the Negotiable Instruments Law was the same in each state.<sup>7</sup> It also refused to follow an earlier decision of the same federal court,<sup>8</sup> on the theory that the Missouri statute, was declaratory of the law merchant, and that the federal court had overlooked an earlier decision of the United States supreme court holding that such instrument was negotiable.<sup>9</sup> The instrument was therefore held to be negotiable.<sup>10</sup>

**§ 3631. Constitutionality of state statutes.** Decisions of a state court as to whether a state statute is in conformity to the state constitution are very generally followed by the federal courts.<sup>1</sup> One well-recognized exception to the general rule that federal courts follow state decisions as to the construction of the state constitution and the consequent validity of state statutes, is found where the statute in question is claimed to constitute a contract. In this case, while the federal courts will pay much respect to the decisions of the state courts,<sup>2</sup> they will apply their own views if

<sup>6</sup> *Holliday State Bank v. Hoffman*, 85 Kan. 71, 35 L. R. A. (N.S.) 390, 116 Pac. 239.

<sup>7</sup> *Kobey v. Hoffman*, 229 Fed. 486.

<sup>8</sup> *Lincoln National Bank v. Perry*, 66 Fed. 887.

<sup>9</sup> *Chicago Railway Equipment Co. v. Merchants' National Bank*, 136 U. S. 268, 34 L. ed. 349.

<sup>10</sup> *Kobey v. Hoffman*, 229 Fed. 486 (following *Kennedy v. Broderick*, 216 Fed. 137, L. R. A. 1915B, 472).

<sup>1</sup> *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 38 L. ed. 953; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 41 L. ed. 72; *Illinois Central Ry. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107; *Oakes v. Mase*, 165 U. S. 363, 41 L. ed. 746; *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165; *Merchants' & Mechanics'*

*National Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236; *St. Anthony Falls Water Power Co. v. Water Commissioners*, 168 U. S. 349, 42 L. ed. 497; *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 42 L. ed. 853; *Southern Pacific Co. v. Campbell*, 230 U. S. 537, 57 L. ed. 1610; *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U. S. 441, 60 L. ed. 372; *Long Sault Development Co. v. Call*, 242 U. S. 272, 61 L. ed. 294; *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 61 L. ed. 472; *Goodnow v. Wells*, 67 Ia. 654, 25 N. W. 864.

<sup>2</sup> *Interborough Rapid Transit Co. v. Sohmer*, 237 U. S. 276, 50 L. ed. 951; *Milwaukee Electric Ry. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254; *Seton Hall College v. South Orange*, 242 U. S. 100, 61 L. ed. 170.

they feel that the state courts are clearly wrong.<sup>3</sup> If the original statute which is claimed to form the contract is held to be unconstitutional as in violation of the state constitution, the federal courts will follow the decision of the state courts,<sup>4</sup> although they will examine the record carefully to see if the state court is not giving effect to subsequent legislation which repeals such prior legislation.<sup>5</sup>

The validity of a statute under which bonds were issued refunding a prior debt, which provided that coupons should be received for taxes, is a question upon which the United States courts will decide for themselves, and having held such a statute valid,<sup>6</sup> before the rendition of a decision of a state court holding such statute void,<sup>7</sup> the supreme court of the United States will follow its prior decisions on this point and not those of the state court.<sup>8</sup> In deciding the constitutionality of statutes authorizing the issuing of bonds for public improvements the federal courts will in cases coming before them for trial follow the decision of the state courts rendered prior to the issuing of the bonds, ignoring later contrary decisions.<sup>9</sup> If no specific adjudication as to the constitutionality of a statute has been made at the time that the contract in question is entered into and the rights of the parties are fixed, the federal courts are not bound to follow a subsequent decision of the state supreme court, rendered after the contract is entered into but

<sup>3</sup> *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U. S. (16 How.) 416, 14 L. ed. 997; *Mobile & Ohio Ry. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162; *Northern Pacific Ry. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630; *Seton Hall College v. South Orange*, 242 U. S. 100, 61 L. ed. 170; *Detroit United Ry. v. Michigan*, 242 U. S. 238, 61 L. ed. 268; *Milwaukee Electric Railway & Light Co. v. Wisconsin*, 252 U. S. 100, 10 A. L. R. 892, 64 L. ed. 476.

"This court has always held that the competency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract were matters which in discharging its duty under the Federal

constitution it must determine for itself; and while the leaning is towards the interpretation placed by the state court, such leaning can not relieve us from the duty of an independent judgment upon the question of contract or no contract." *Stearns v. Minnesota*, 179 U. S. 223, 232, 233, 45 L. ed. 162.

<sup>4</sup> *Long Sault Development Co. v. Call*, 242 U. S. 272, 61 L. ed. 294.

<sup>5</sup> *Long Sault Development Co. v. Call*, 242 U. S. 272, 61 L. ed. 294.

<sup>6</sup> *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304.

<sup>7</sup> *Commonwealth v. McCullough*, 90 Va. 597, 19 S. E. 114.

<sup>8</sup> *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382.

<sup>9</sup> *Loeb v. Columbia Township*, 179 U. S. 472, 45 L. ed. 280.

before suit is brought thereon, but may exercise their independent judgment.<sup>10</sup> An exception to this last rule has been said to arise "when the question is whether a particular statute was passed by the legislature in the manner prescribed by the state constitution so as to become a law of the state,"<sup>11</sup> in which case the federal courts are bound to follow the ultimate decision of the state court.<sup>12</sup>

The federal courts tend to follow the construction which the state courts place upon a statute or ordinance, even if it constitutes a contract, unless such construction is clearly wrong.<sup>13</sup>

**§ 3632. Unwritten law—General principles.** If the rights of the parties are controlled by the unwritten or common law, we find that the courts often repeat that "there is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes."<sup>1</sup> In accordance with this principle, the courts of the United States will follow the decision of a state court on the question of the construction of a contract,<sup>2</sup> and on the question of the liability of a surety for interest, if the total amount of the recovery against him exceeds the penalty fixed in the bond.<sup>3</sup> Whether a provision that a contract of

<sup>10</sup> *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778.

To the same effect, see *Folsom v. Ninety-Six*, 159 U. S. 611, 40 L. ed. 278.

<sup>11</sup> *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 546, 48 L. ed. 778.

<sup>12</sup> *Wilkes County v. Coler*, 180 U. S. 506, 45 L. ed. 642; *Post v. Supervisors*, 105 U. S. 667, 26 L. ed. 1204; (*Town of*) *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154.

<sup>13</sup> *Tampa Water Works Co. v. Tampa*, 199 U. S. 241, 50 L. ed. 172; *Fisher v. New Orleans*, 218 U. S. 438, 54 L. ed. 1099; *Southern Wisconsin Ry. v. Madison*, 240 U. S. 457, 60 L. ed. 739; *Milwaukee Electric Ry. & Light Co. v. Wisconsin*, 252 U. S. 100, 64 L. ed. 476; *New York v. Mealy*, 254 U. S. 47, 65 L. ed. —.

<sup>1</sup> Summary of holding in *Wheaton v. Peters*, 33 U. S. (8 Pet.) 591, 8 L. ed. 1055, made in *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. ed. 508; and quoted in *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, 101, 45 L. ed. 765.

See to the same effect, *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Bucher v. Cheshire Ry.*, 125 U. S. 555, 31 L. ed. 795; *Dale v. Pattison*, 234 U. S. 399, 58 L. ed. 1370; *United States v. United States Fidelity Co.*, 236 U. S. 512, 59 L. ed. 696; *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 61 L. ed. 1206; *Northwestern Mutual Life Insurance Co. v. Johnson*, 254 U. S. 96, 65 L. ed. —.

<sup>2</sup> *Seattle & Renton Ry. v. Linhoff*, 231 U. S. 568, 58 L. ed. 372.

<sup>3</sup> *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 61 L. ed. 1206.

insurance shall be incontestable after a certain period, includes death by suicide, is a matter for the different states to determine; and the supreme court of the United States will not undertake to apply any theory of general law.<sup>4</sup>

If the case is one in which the federal courts will follow the state courts, on questions of unwritten law, and the rule of the state law which is applicable, can not be determined from the decisions of that state, the federal courts may apply the rule which is enforced generally throughout the states;<sup>5</sup> or it may apply their own rules;<sup>6</sup> or they may resort to trade customs and usages as showing the general understanding as to the law of that state.<sup>7</sup>

**§ 3633. Unwritten law—Theory of general law.** While, in the general terms in which it is stated, this rule might seem to indicate that the federal courts follow the state decisions, it is to be qualified by the proposition that “a determination in a particular case of what that law (i. e., that of a given state) is, may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state.”<sup>1</sup> The courts of the United States thus recognize the existence of a general law, uniform throughout the United States, based on state law as expressed in the decisions of state courts, but a law which the United States courts are building up for themselves. If a case involving a question of this general law comes before the federal courts for adjudication they will give great weight to the decisions of courts of the state whose law controls,<sup>2</sup> but will not follow these decisions if contrary to the view of the federal courts as to what that general law is.<sup>3</sup> As applied to contracts, commercial law is the chief

<sup>4</sup>Northwestern Mutual Life Insurance Co. v. Johnson, 254 U. S. 96, 65 L. ed.—.

<sup>5</sup>Northwestern Mutual Life Insurance Co. v. Johnson, 254 U. S. 96, 65 L. ed.—.

<sup>6</sup>United States v. United States Fidelity Co., 236 U. S. 512, 59 L. ed. 696.

<sup>7</sup>Gibson v. Stevens, 49 U. S. (8 How.) 384, 12 L. ed. 1123; Dale v. Pattison, 234 U. S. 399, 58 L. ed. 1370.

<sup>1</sup>Smith v. Alabama, 124 U. S. 465 (478), 31 L. ed. 508 [quoted in Western

Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, 101, 45 L. ed. 765].

<sup>2</sup>Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359; Seattle & Renton Ry. v. Linhoff, 231 U. S. 568, 58 L. ed. 372; Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 61 L. ed. 1206; Farmers' National Bank v. Sutton Mfg. Co., 52 Fed. 191, 17 L. R. A. 595.

<sup>3</sup>Swift v. Tyson, 41 U. S. (16 Pet.) 1, 10 L. ed. 865; Railroad v. Lockwood, 84 U. S. (17 Wall.) 357, 21 L. ed. 627; Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 58 L. ed. 356; Farmers' National

example of that law which is general in its nature and upon which the decisions of the state courts are not controlling.<sup>4</sup> In the leading case on this point,<sup>5</sup> the supreme court of the United States said that the rule that federal courts should follow decisions of state courts "does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon this subject are entitled to, and will receive, the most deliberate attention and respect of this court, but they can not furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed." Examples of this principle are found in cases involving negotiable instruments.<sup>6</sup> The New York courts held that one who took a negotiable instrument in payment of a pre-

*Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 17 L. R. A. 595; *Hudson Furniture Co. v. Harding*, 70 Fed. 468, 30 L. R. A. 513; *Guernsey v. Imperial Bank*, 188 Fed. 300, 40 L. R. A. (N.S.) 377, 110 C. C. A. 278; *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, L. R. A. 1916C, 620; *In re Jarmulowsky*, 249 Fed. 319, L. R. A. 1918E, 634.

<sup>4</sup> *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 10 L. ed. 865; *Railroad v. Lockwood*, 84 U. S. (17 Wall.) 357, 21 L. ed. 627; *Railroad v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; *Aetna Life Ins. Co. v. Moore*, 231 U. S. 543, 58 L. ed. 356; *Hudson Furniture Co. v. Harding*, 70 Fed. 468, 30 L. R. A. 513; *Independent School District v. Rew*, 111 Fed. 1, 55 L. R. A. 364; *Guernsey v. Imperial Bank*, 188 Fed. 300, 40 L. R. A. (N.S.) 377, 110 C. C. A. 278; *Downey v. Gooch*, 240 Fed. 527; *In re Jarmulowsky*, 249 Fed. 319, L. R. A. 1918E, 634.

"On a question of general commercial law, the Federal courts administering justice in New York have equal and co-ordinate jurisdiction with the courts of that state." *Railroad v. Lockwood*,

84 U. S. (17 Wall.) 357, 367, 368, 21 L. ed. 627.

"The question is one of commercial law upon which the decisions of the state courts, though persuasive, are not controlling, in the national courts. It is a duty of the Federal courts which they may not renounce, to form independent opinions and to render independent judgments upon questions of commercial law, of general law, and of right under the Constitution and laws of the nation. Every citizen of the United States who has the right to prosecute his suit in a Federal court has also the right to the independent opinion and decision of that court upon every determining question of commercial or general law which he presents for its consideration." *Guernsey v. Imperial Bank*, 188 Fed. 300, 40 L. R. A. (N.S.) 377.

<sup>5</sup> *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 10 L. ed. 865.

<sup>6</sup> *Farmers' National Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 17 L. R. A. 595; *Hudson Furniture Co. v. Harding*, 70 Fed. 468, 30 L. R. A. 513; *In re Jarmulowsky*, 249 Fed. 319, L. R. A. 1918E, 634.

existing debt could not be a bona fide holder.<sup>7</sup> In a case arising in New York, the United States courts refused to follow the New York decisions and held that such a holder might be bona fide.<sup>8</sup>

The same principle applies to contracts of common carriers. The New York courts held that a carrier may by contract relieve himself from liability even for his own negligence.<sup>9</sup> In a case arising in New York the federal courts held that such a provision in a drover's pass was invalid.<sup>10</sup>

Policies of insurance, if not controlled by state statutes, belong in this class.<sup>11</sup> The Massachusetts courts held that insurers were liable on memorandum articles, even if there was not a total loss.<sup>12</sup> The federal courts refused to follow this rule in a Massachusetts contract, holding that there could be no recovery except for a total loss.<sup>13</sup> Even if, by the law of Georgia, representations to the agent of the insurance company are, in legal effect, representations to the insurance company,<sup>14</sup> the federal courts will treat this question as a matter of general jurisprudence and they will not follow the decision of the Georgia courts in a case arising in Georgia, if they think it is contrary to the true rule.<sup>15</sup> The same principle has been applied to the validity of contracts in restraint of trade.<sup>16</sup> By the law of Wisconsin, a contract in restraint of trade, which extends over the entire area of the state, is void, even though the

<sup>7</sup> *Roosa v. Brotherson*, 10 Wend. (N. Y.) 86; *Ontario Bank v. Worthington*, 12 Wend. (N. Y.) 593; *Payne v. Cutler*, 13 Wend. (N. Y.) 605.

<sup>8</sup> *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 10 L. ed. 865.

<sup>9</sup> Persons traveling on drovers' passes. *Poucher v. New York Central Ry.*, 49 N. Y. 263, 10 Am. Rep. 364; *Bissell v. New York Central Ry.*, 25 N. Y. 442, 82 Am. Dec. 369 [reversing, 29 Barb. (N. Y.) 602]; *Smith v. New York Central Ry.*, 24 N. Y. 222 [affirming, 29 Barb. (N. Y.) 132].

<sup>10</sup> *Railroad v. Lockwood*, 84 U. S. (17 Wall.) 357, 21 L. ed. 627.

<sup>11</sup> *Aetna Life Ins. Co. v. Moore*, 231 U. S. 543, 58 L. ed. 356.

"The policy was a Massachusetts contract, it is true, but its construction depended upon questions of general commercial law in respect of which the

courts of the United States are at liberty to exercise their own judgment and are not bound to accept the state decisions as in matters of purely local law." *Washburn & Moen Manufacturing Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 15, 45 L. ed. 49.

<sup>12</sup> *Mayo v. Indiana Mutual Ins. Co.*, 152 Mass. 172, 23 Am. St. Rep. 814, 9 L. R. A. 831, 25 N. E. 80; *Kettell v. Alliance Ins. Co.*, 76 Mass. (10 Gray) 144.

<sup>13</sup> *Washburn & Moen Manufacturing Co. v. Reliance Marine Ins. Co.*, 179 U. S. 1, 45 L. ed. 49.

<sup>14</sup> *German-American Life Association v. Farley*, 102 Ga. 720, 29 S. E. 615.

<sup>15</sup> *Aetna Life Ins. Co. v. Moore*, 231 U. S. 543, 58 L. ed. 356.

<sup>16</sup> *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, L. R. A. 1916C, 620.

area of restraint is not wider than the area of competition.<sup>17</sup> In a case which arose in Wisconsin and which was tried before the federal court, the court refused to apply the Wisconsin rule and held such contract to be valid.<sup>18</sup>

This principle has also been applied in cases in which the question involved was as to the law by which the contract was controlled.<sup>19</sup> A question of the law which governs as to the form of protest, is a question of general commercial law; and the federal courts will apply the rule of that law, and not necessarily the law of the place of making such contract.<sup>20</sup>

In view of this mass of federal authority, and of the fact that the federal courts are beyond the control of the state courts in their own peculiar jurisdiction, it is vain for an indignant state court to declare that "general commercial law" is "mythical,"<sup>21</sup> though it may of course refuse, in deciding cases within its own exclusive jurisdiction, to recognize or enforce such general commercial law. It is to be regretted that on so many important and oft-recurring subjects the rights of the parties depend upon the accident, remote from the merits of the case, of whether they can bring their case before the federal courts, or whether they must abide by the decisions of the state courts. Since the federal courts are not charged with the duty of expounding the law of the various states, in the first instance, but either apply that law as they conceive it to be or apply the principles of the so-called general commercial law and jurisprudence, a state court is not bound to treat the decisions of the federal courts as precedents even if rendered in cases which arise in such state.<sup>22</sup>

<sup>17</sup> *Berlin Machine Works v. Perry*, 71 Wis. 495, 5 Am. St. Rep. 236, 38 N. W. 82; *Richards v. American Desk & Seating Co.*, 87 Wis. 503, 58 N. W. 787; *Palmer v. Toms*, 96 Wis. 367, 71 N. W. 654; *Tecktonius v. Scott*, 110 Wis. 441, 86 N. W. 672; *My Laundry Co. v. Schmeling*, 129 Wis. 597, 109 N. W. 540; *Eureka Laundry Co. v. Long*, 146 Wis. 205, 35 L. R. A. (N.S.) 119, 131 N. W. 412; *Ruhland v. King*, 154 Wis. 545, 143 N. W. 681.

<sup>18</sup> *Hall Mfg. Co. v. Western Steel & Iron Works*, 227 Fed. 588, L. R. A. 1916C, 620.

<sup>19</sup> *Guernsey v. Imperial Bank*, 188 Fed. 300, 40 L. R. A. (N.S.) 377.

<sup>20</sup> *Guernsey v. Imperial Bank*, 188 Fed. 300, 40 L. R. A. (N.S.) 377.

<sup>21</sup> *Forepaugh v. Delaware, Lackawanna & Western Ry.*, 128 Pa. St. 217, 15 Am. St. Rep. 672, 5 L. R. A. 508, 18 Atl. 503.

<sup>22</sup> *Rothschild v. Steger & Sons Piano Mfg. Co.*, 256 Ill. 196, 42 L. R. A. (N.S.) 793, 99 N. E. 920; *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 40 L. R. A. (N.S.) 314, 89 N. E. 193.

**§ 3634. Subject-matter within exclusive jurisdiction of United States.** If the subject-matter of the contract is one which is controlled by federal law, the United States court will not regard the provisions of state statutes, or the common-law rules of the state in which the cause of action arose.<sup>1</sup> If the subject-matter of the contract is governed by the interstate commerce act, the statutory or common-law rules of the state in which the cause of action arose, have no application, as the rights of the parties will be determined by United States law.<sup>2</sup> If a telegram is sent from one state to another, federal law controls as to the measure of damages,<sup>3</sup> even if the place from which it is sent, and the place to which it is sent, are in the same state, and it is sent by way of a station in another state, to avoid the rules of the state law on such subject.<sup>4</sup> If a passenger is traveling on a pass, good between two points in the same state, his secret intention to pay his fare and to continue his journey into another state does not prevent his contract of transportation from being subject to the law of such state.<sup>5</sup>

A maritime contract is not controlled by the statutes of the state in which it is made.<sup>6</sup> An oral contract for services as a sailor, or officer at sea, for a period exceeding one year, is not

<sup>1</sup> *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314; *Missouri, Kansas & Texas Ry. v. Harriman*, 227 U. S. 657, 57 L. ed. 690; *Boston & Maine Ry. v. Hooker*, 233 U. S. 97, 58 L. ed. 868; *Atchison, Topeka & Santa Fe Ry. v. Robinson*, 233 U. S. 173, 58 L. ed. 901; *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, 60 L. ed. 453; *Georgia, Florida & Alabama Ry. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. 948; *Atchison, Topeka & Santa Fe Ry. v. Harold*, 241 U. S. 371, 60 L. ed. 1050; *Union Fish Co. v. Erickson*, 248 U. S. 308, 63 L. ed. 261; *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 61 L. ed. 1086 [reversing, 215 N. Y. 514]; *Western Union Telegraph Co. v. Speight*, 254 U. S. 17, 65 L. ed. —; *Gilliland v. Southern Ry.*, 85 S. Car. 27, 27 L. R. A. (N.S.) 1106, 67 S. E. 20.

<sup>2</sup> *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314; *Missouri, Kansas & Texas Ry. v. Harriman*, 227

U. S. 657, 57 L. ed. 690; *Boston & Maine Ry. v. Hooker*, 233 U. S. 97, 58 L. ed. 868; *Atchison, Topeka & Santa Fe Ry. v. Robinson*, 233 U. S. 173, 58 L. ed. 901; *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, 60 L. ed. 453; *Georgia, Florida & Alabama Ry. v. Blish Milling Co.*, 241 U. S. 190, 60 L. ed. 948; *Atchison, Topeka & Santa Fe Ry. v. Harold*, 241 U. S. 371, 60 L. ed. 1050; *Gilliland v. Southern Ry.*, 85 S. Car. 27, 27 L. R. A. (N.S.) 1106, 67 S. E. 20.

<sup>3</sup> *Western Union Telegraph Co. v. Speight*, 254 U. S. 17, 65 L. ed. —.

<sup>4</sup> *Western Union Telegraph Co. v. Speight*, 254 U. S. 17, 65 L. ed. —.

<sup>5</sup> *New York Central Ry. v. Mohney*, 252 U. S. 152, 64 L. ed. 502.

<sup>6</sup> *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 61 L. ed. 1086 [reversing, 215 N. Y. 514]; *Union Fish Co. v. Erickson*, 248 U. S. 308, 63 L. ed. 261.

within the Statute of Frauds of the state in which the contract is made.<sup>7</sup> Before the amendment of 1917,<sup>8</sup> a contract of employment as a stevedore in loading a vessel in maritime waters for foreign commerce was not controlled by the workmen's compensation law of the state in which such vessel is loading.<sup>9</sup> Such amendment, which attempts to adopt the workmen's compensation laws of the respective states, has been held to be unconstitutional.<sup>10</sup>

<sup>7</sup> *Union Fish Co. v. Erickson*, 248 U. S. 308, 63 L. ed. 261.

<sup>8</sup> 40 Stats. at L. 395 c. 97, act of Oct. 6, 1917.

<sup>9</sup> *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. ed. 1208; *Southern*

*Pacific Co. v. Jenson*, 244 U. S. 205, 61 L. ed. 1086 [reversing, 215 N. Y. 514]; *Peters v. Veasey*, 251 U. S. 121, 64 L. ed. 180.

<sup>10</sup> *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, — L. ed. —.

# **PART X**

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## **CONSTITUTIONAL LIMITATIONS**



## CHAPTER XCV

### IMPAIRMENT OF OBLIGATION OF CONTRACT

#### I. GENERAL SCOPE

- § 3635. History and general scope.

#### II. WHAT GOVERNMENTS LIMITED

- § 3636. To what government this clause applies—United States, territories, etc.
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#### III. LAW

- § 3639. To what laws this clause applies—Written laws.
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#### IV. CONTRACT

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#### IX. WHO CAN RAISE OBJECTION

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### I

#### GENERAL SCOPE

**§ 3635. History and general scope.** "No state shall pass any law impairing the obligation of contracts."<sup>1</sup> This provision was inserted in the constitution with but little debate, and undoubtedly for the purpose of preventing the states from passing laws repudiating private debts—a form of legislation which had proved popular in some of the states in the period of quasi-anarchy that followed the revolution. Its effects have been very wide reaching and many questions of contract law have thus been brought within the jurisdiction of the federal courts.

In such cases it is the duty of the supreme court of the United States "to determine for itself the existence, construction and validity of the alleged contract and also to determine whether as construed by this court it has been impaired by any subsequent state legislation to which effect has been given by the court below."<sup>2</sup> Even the construction of the state constitution by the

<sup>1</sup> Constitution of the United States, Article I., § 10.

See *Impairment of the Obligation of Contract*, by W. F. Dodd, 4 *Illinois Law Review* 155, 327; and *Legislation Impairing the Obligation of Contracts* by H. Campbell Black, 25 *American Law Register* (N.S.) 81.

<sup>2</sup> *Houston & Texas Central Ry. v. Texas*, 177 U. S. 66, 77, 44 L. ed. 673.

See, to the same effect, *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 31 L. ed. 607; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382; *Wilson v. Standefer*, 184 U. S. 399, 46 L. ed. 612; *Waggoner v. Flack*, 188 U. S. 595, 47 L. ed. 609; *Muhlker v. New*

state courts is not binding on the federal courts in such questions.<sup>3</sup> At the same time, the supreme court of the United States will be slow to differ from the state courts on the questions of the existence of the contract;<sup>4</sup> and if the state court holds that a contract exists, the supreme court of the United States will follow that decision.<sup>5</sup> This provision may render a statute unconstitutional in part, without rendering it invalid as to its remaining provisions.<sup>6</sup> This provision, it may be added, does not forbid retroactive laws in general, but only such as impair the obligation of contracts.<sup>7</sup> The term "contract" has, as a result, been stretched to include many vested property rights.<sup>8</sup>

Similar clauses have been inserted in state constitutions. They, of course, can bind only the state legislature and public corporations created by the state. From their identity with the clause in the constitution of the United States, cases decided under one of these clauses are precedents for determining the scope and meaning of the other clauses, and will be cited accordingly.

## II

### WHAT GOVERNMENTS LIMITED

**§ 3636. To what governments this clause applies — United States, territories, etc.** By its terms this clause of the constitution provides that "no state" shall pass the laws in question. It does not, therefore, restrict the power of the United States government.<sup>1</sup>

York & Harlem Ry. Co., 197 U. S. 544, 49 L. ed. 872; *Kies v. Lowrey*, 199 U. S. 233, 50 L. ed. 167; *Powers v. Detroit & Grand Haven Ry.*, 201 U. S. 543, 50 L. ed. 860; *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, L. R. A. 1918E, 874, 59 L. ed. 184; *Detroit United Ry. v. Michigan*, 242 U. S. 238, 61 L. ed. 238; *Northern Ohio Traction & Light Co. v. State*, 245 U. S. 574, L. R. A. 1918E, 865, 62 L. ed. 481; *Milwaukee Electric Railway & Light Co. v. Wisconsin*, 252 U. S. 100, 10 A. L. R. 892, 64 L. ed. 476; *New York v. Mealy*, 254 U. S. 47, 65 L. ed. —.

See § 3634.

<sup>3</sup> *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162.

<sup>4</sup> *Southern Wisconsin Ry. v. Madison*,

240 U. S. 457, 60 L. ed. 739; *New York v. Mealy*, 254 U. S. 47, 65 L. ed. —.

As where a grant of a franchise is held not to contain a contract with reference to paving material. *Southern Wisconsin Ry. v. Madison*, 240 U. S. 457, 60 L. ed. 739.

As where the state court hold that no contract giving exemption from taxation has been made. *New York v. Mealy*, 254 U. S. 47, 65 L. ed. —.

<sup>5</sup> *Powers v. Detroit & Grand Haven Ry.*, 201 U. S. 543, 50 L. ed. 860.

<sup>6</sup> *Brady v. Mattern*, 125 Ia. 158, 106 Am. St. Rep. 291, 100 N. W. 358.

<sup>7</sup> *Callahan v. Callahan*, 36 S. Car. 454, 15 S. E. 727.

<sup>8</sup> See §§ 3644 et seq.

<sup>1</sup> *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, 20 L. ed. 287; *Juilliard v.*

If in the exercise of its authority the United States passes an act otherwise constitutional which impairs the obligation of contracts, such act is not on that account objectionable. A federal bankrupt act which discharges debts existing before its passage,<sup>2</sup> an act affecting the medium of payment of past debts,<sup>3</sup> or an act regulating interstate commerce, which avoids pre-existing contracts,<sup>4</sup> are each valid.

Whether this clause applies to territories or the District of Columbia is a question still in doubt.<sup>5</sup> On the one hand, it seems that Congress, having itself power to pass laws impairing the obligation of contracts and having power to create territorial governments instead of legislating for the territories directly, could bestow such power upon the territory if it pleased. On the other hand, it seems absurd to hold that a territory has in this regard greater power than a state.<sup>6</sup>

This clause does not apply to Porto Rico.<sup>7</sup> The admission of a territory as a state does not impair vested rights which arose under territorial law,<sup>8</sup> although this question does not necessarily involve the impairment of the obligation of the contract. A decree

Greenman, 110 U. S. 421, 28 L. ed. 204; Serralles v. Esbri, 200 U. S. 103, 50 L. ed. 391; Louisville & Nashville Ry. v. Mottley, 219 U. S. 467, 34 L. R. A. (N.S.) 671, 55 L. ed. 297; Evans-Snyder-Buel Co. v. McFadden, 105 Fed. 293, 58 L. R. A. 900; Baltimore & Ohio Ry. v. Miller, 183 Ind. 323, 107 N. E. 545; Ansley v. Ainsworth, 4 Ind. Ter. 308, 69 S. W. 884; Hopkins v. Jones, 22 Ind. 310; Fitzgerald v. Grand Trunk Ry., 63 Vt. 169, 13 L. R. A. 70, 22 Atl. 76.

<sup>2</sup>In re Herrman, 106 Fed. 987, 46 C. C. A. 77 [affirming, 102 Fed. 753]; Loud v. Pierce, 25 Me. 233; Cutter v. Folsom, 17 N. H. 139.

<sup>3</sup>Legal Tender Cases, 79 U. S. (12 Wall.) 457, 20 L. ed. 287.

See The "Legal Tender" Decision of 1884, by D. H. Chamberlain, 18 American Law Review 410; and The "Legal Tender" Decision of 1884; Reply to Gov. D. H. Chamberlain, by Thomas H. Talbot, 18 American Law Review 618.

<sup>4</sup>Louisville & Nashville Ry. v. Mottley, 219 U. S. 467, 34 L. R. A. (N.S.) 671, 55 L. ed. 297; Fitzgerald v. Grand

Trunk Ry., 63 Vt. 169, 13 L. R. A. 70, 22 Atl. 76.

<sup>5</sup>Thus in Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, the court held that "even if it were assumed that the constitutional provision in question applied to the legislative enactments of a territory," the judgment of a territorial court was not a "law" in this sense.

<sup>6</sup>Ruggles v. Washington County, 3 Mo. 496.

<sup>7</sup>Cintron v. Blanco, 15 Porto Rico 495.

<sup>8</sup>Caldwell v. Carrington, 34 U. S. (9 Pet.) 86, 9 L. ed. 60; Turner v. Trail, 24 Okla. 135, 103 Pac. 575; Purcell v. Barnett, 30 Okla. 605, 121 Pac. 231; Barnes v. American Soda Fountain Co., 32 Okla. 81, 121 Pac. 250; Carroll v. Durant National Bank, 38 Okla. 267, 133 Pac. 179; Marx v. Hefner, 46 Okla. 453, 149 Pac. 207; Patterson v. Rousney, 58 Okla. 185, 159 Pac. 636; Davis v. Foley, 60 Okla. 87, L. R. A. 1917A, 187, 159 Pac. 646; Riddle v. Hudson, — Okla. —, 172 Pac. 921.

of specific performance rendered in the courts of Virginia, before the separation of Kentucky, and with reference to land which was within the territorial limits of Kentucky, after its admission, will be recognized in Kentucky, although such decree would not have been rendered by the courts of Kentucky.<sup>6</sup>

**§ 3637. States, municipalities, etc.** This clause undoubtedly applies to the states of the Union while members of the Union,<sup>1</sup> even if they are actually in a state of rebellion,<sup>2</sup> and it applies to territories;<sup>3</sup> but it does not apply to the states of the Union before the formation of the Union,<sup>4</sup> nor to independent states before their admission to the Union.<sup>5</sup>

It also applies to public corporations, such as municipalities created by the states for governmental purposes, and acting within the authority conferred upon them by the legislature,<sup>6</sup> or to counties.<sup>7</sup>

<sup>1</sup> *Caldwell v. Carrington*, 34 U. S. (9 Pet.) 86, 9 L. ed. 60.

<sup>2</sup> *Bier v. McGehee*, 148 U. S. 137, 37 L. ed. 397; *Mobile & Ohio Ry. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793; *Houston & Texas Central Ry. v. Texas*, 170 U. S. 243, 42 L. ed. 1023; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886; *Kies v. Lowrey*, 199 U. S. 233, 50 L. ed. 167; *Deneen v. Deneen*, 293 Ill. 454, 127 N. E. 700; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 12 L. R. A. (N.S.) 707, 79 N. E. 836; *Boswell v. Security Mutual Life Insurance Co.*, 193 N. Y. 465, 19 L. R. A. (N.S.) 946, 86 N. E. 532; *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512.

<sup>2</sup> *White v. Hart*, 80 U. S. (13 Wall.) 646, 20 L. ed. 685; *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716.

<sup>3</sup> *National Bank of Commerce v. Jones*, 18 Okla. 555, 12 L. R. A. (N.S.) 310, 91 Pac. 191.

<sup>4</sup> *Owings v. Speed*, 18 U. S. (5 Wheat.) 420, 5 L. ed. 124.

<sup>5</sup> *Herman v. Phalen*, 55 U. S. (14 How.) 79, 14 L. ed. 335 [following *League v. De Young*, 52 U. S. (11 How.) 185, 13 L. ed. 657].

<sup>6</sup> *Mercantile Trust & Deposit Co. v. Columbus*, 203 U. S. 311, 51 L. ed. 198; *Northern Pacific Ry. v. Minnesota*, 208 U. S. 583, 52 L. ed. 603; *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, L. R. A. 1918E, 874, 59 L. ed. 184; *Iron Mountain Ry. Co. v. Memphis*, 96 Fed. 113, 37 C. C. A. 410; *Mercantile Trust & Deposit Co. v. Collins Park & Belt Ry.*, 99 Fed. 812; *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 23; *Sinclair v. Brightman*, 198 Mass. 248, 84 N. E. 453; *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460; *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 50 L. R. A. 142, 35 S. E. 994.

An ordinance which does not rest on legislative authority may amount to a breach of an existing contract, but it is not a law impairing its obligation.

See § 3675.

<sup>7</sup> *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S. 574, L. R. A. 1918E, 865, 62 L. ed. 481; *First National Bank v. Terry*, 203 Ala. 401, 83 So. 170; *Rhodes v. Marengo County Bank*, — Ala. —, 88 So. 850.

**§ 3638. Foreign governments.** This clause has no application to foreign governments. If their laws determine the validity of a contract upon which an action is brought in our courts,<sup>1</sup> effect must be given even to statutes which impair the obligation of contracts.<sup>2</sup> An act of the Parliament of Canada is not made invalid by this clause of the federal constitution.<sup>3</sup>

### III

### LAW

**§ 3639. To what laws this clause applies—Written laws.** By its terms, this clause of the constitution forbids "any law" of the kind specified. "Law" as used in this sense undoubtedly includes written laws of every class, such as state constitutions,<sup>1</sup> state statutes,<sup>2</sup> and city ordinances,<sup>3</sup> or resolutions of a board of county commissioners.<sup>4</sup>

An order of a board or commission which has the effect of legislation is a "law" within the meaning of this provision,<sup>5</sup> but not its administrative orders.<sup>6</sup> Still less is an order of a commission

<sup>1</sup> See ch. XCIV.

<sup>2</sup> *Canada Southern Ry. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020.

<sup>3</sup> *Canada Southern Ry. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020.

<sup>4</sup> *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. ed. 516; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64, 30 L. ed. 563; *Bier v. McGehee*, 148 U. S. 137, 37 L. ed. 397; *Houston & Texas Central Ry. v. Texas*, 170 U. S. 243, 42 L. ed. 1023; *City of Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886; *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860; *Winchester v. Winchester Water Works Co.*, 149 Ky. 177, 148 S. W. 1; *Smith v. Walker*, 74 S. Car. 519, 54 S. E. 779.

<sup>5</sup> *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084; *Mobile & Ohio Ry. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793.

<sup>6</sup> *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, L. R. A. 1918E, 874, 59 L. ed. 184; *Iron Mountain Ry. v. Memphis*, 96 Fed. 113, 37 C. C. A. 410; *Mercantile Trust & Deposit Co. v. Collins Park & Belt Ry.*, 99 Fed. 812; *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 23; *Neill v. Gates*, 152 Mo. 585, 54 S. W. 460.

<sup>7</sup> *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S. 574, L. R. A. 1918E, 865, 62 L. ed. 481.

<sup>8</sup> *Prentiss v. Atlantic Coast Ry. Line Co.*, 211 U. S. 210, 53 L. ed. 150; *Grand Trunk Ry. v. Indiana Railroad Commission*, 221 U. S. 400, 55 L. ed. 786.

As a rule, the orders of boards and commissions are intended to regulate public utilities; and as such are a valid exercise of the police power, and not within this clause of the Constitution.

See § 3691.

<sup>9</sup> *New Orleans Water Works Co. v. Louisiana Sugar Co.*, 125 U. S. 18, 31 L. ed. 407.

which does not affect the contract directly, a "law" which impairs its obligation.<sup>7</sup>

A by-law of a corporation,<sup>8</sup> such as an incorporated board of trade,<sup>9</sup> is not a "law" within the meaning of this constitutional provision.

**§ 3640. Change of judicial decision—Case originating in federal court.** There were strongly marked tendencies in early equity, apart from any constitutional provisions, toward holding that rights which had vested under a line of judicial decisions could not be altered by a subsequent change of opinion on the part of the court of chancery.<sup>1</sup>

Whether a change of judicial decision, making invalid a contract which under prior decisions was valid, amounts to a "law" within the meaning of this clause of the statute, is a question which can not be answered either by a simple affirmative or negative. Since the validity of a law impairing the obligation of a contract is affected by a clause in the constitution of the United States, the supreme court of the United States is the final arbiter as to the validity of such law. Accordingly, the question of the validity of a change of judicial decision, affecting prior contracts, necessarily involves the extent to which federal courts follow the decisions of state courts. It is at this point that a distinction, too often ignored, must be insisted upon. Cases of this sort are divided into two classes. If the case originates in or is removed to an inferior federal court and is taken from such court to the supreme court of the United States on error or appeal, the supreme court of the United States will, indeed, in some cases, apply the law of the state in which the cause of action arose,<sup>2</sup> but will not necessarily follow the latest decision of such state. Leaving for discussion elsewhere<sup>3</sup> the question of what state decision in case of conflict will be followed when the cause of action arises after the later decision, we find that if the action is brought to enforce contract rights which were acquired before the later decision was promulgated, the supreme court will follow the rule as laid down

<sup>7</sup> Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U. S. 388, 64 L. ed. 626.

<sup>8</sup> Thomson v. Thomson, 293 Ill. 584, 127 N. E. 882.

<sup>9</sup> Thomson v. Thomson, 293 Ill. 584, 127 N. E. 882.

<sup>1</sup> Kerly, History of Equity, 104 (citing Campbell Vol. 2, p. 421 n. order 6).

<sup>2</sup> See §§ 3629 et seq.

<sup>3</sup> See §§ 3629 et seq.

by the courts and existing when the contract was entered into.<sup>4</sup> The inferior federal courts, before which such cases are heard, follow the decisions of the supreme court of the United States as a matter of course, and apply the rule of law as recognized by the state courts when the contract was made.<sup>5</sup> If contract rights are acquired before the question of law has been decided by the state supreme court, the federal courts will not necessarily follow a decision of the state court rendered thereafter. A building contract was entered into and a sub-contractor's lien for material was taken before the state supreme court had passed upon the question of the validity of the sub-contractor's mechanic's lien law under which such lien was taken. Subsequently the state supreme court held such law to be unconstitutional.<sup>6</sup> Suit was brought to enforce such lien after such decision was rendered. The United States courts refused to follow the decision of the state court; but in accordance with the weight of authority preferred the view that such statute was constitutional.<sup>7</sup>

**§ 3641. Change of judicial decision—Error to state court—Theory that judicial decision is not a "law."** If the case comes to the supreme court of the United States on error to the court of a state, a change of judicial opinion alone, which is not based on any change in the written law, is not a law impairing the obligation of

<sup>4</sup>Rowan v. Runnels, 46 U. S. (5 How.) 134, 12 L. ed. 85; Ohio Life Insurance & Trust Co. v. Debolt, 57 U. S. (16 How.) 416, 14 L. ed. 997; Havemeyer v. Iowa County, 70 U. S. (3 Wall.) 294, 18 L. ed. 38; Chicago v. Sheldon, 76 U. S. (9 Wall.) 50, 19 L. ed. 504; Olcott v. Supervisors, 83 U. S. (16 Wall.) 678, 21 L. ed. 382; Douglass v. Pike County, 101 U. S. 677, 25 L. ed. 968; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. ed. 1090; Anderson v. Santa Anna Township, 116 U. S. 356, 29 L. ed. 633; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382; Los Angeles v. Los Angeles City Water Co., 177 U. S. 558, 44 L. ed. 886; Moore-Mansfield Co. v. Electrical Installation Co., 234 U. S. 619, 58 L. ed. 1503.

<sup>5</sup>Union Bank v. Oxford, 90 Fed. 7. (The validity of the bonds in question

in this case depended upon the validity of the construction of the state statute under which they were issued. The decision of the Supreme Court of North Carolina as to the validity of the statute, in Carr v. Coke, 116 N. Car. 223, 47 Am. St. Rep. 801, 28 L. R. A. 737, 22 S. E. 16, and as to the validity of the bonds thereunder in Union Bank v. Commissioners, 116 N. Car. 339, 21 S. E. 410, was followed, ignoring subsequent decisions); Southern Ry. Co. v. North Carolina Ry., 81 Fed. 595.

<sup>6</sup>Palmer v. Tingle, 55 O. S. 423, 45 N. E. 313.

See § 3743.

<sup>7</sup>Great Southern Fireproof Hotel Co. v. Jones, 193 U. S. 532, 48 L. ed. 778 [affirming, 116 Fed. 793, 54 C. C. A. 165].

contracts within the meaning of this clause.<sup>1</sup> The fact that there

<sup>1</sup> *Ohio & Mississippi R. R. v. McClure*, 77 U. S. (10 Wall.) 511, 19 L. ed. 997 (this rule applies to error to Supreme Court of a territory); *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059; *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 31 L. ed. 607; *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132; *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157; *National Mutual Building & Loan Association v. Brahan*, 193 U. S. 635, 48 L. ed. 823 [affirming, 80 Miss. 407, 57 L. R. A. 793, 31 So. 840].

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the constitution, so as to give this court jurisdiction on a writ of error to a state court by some subsequent statute of the state which has been upheld or effect given to it by the state court." *Bacon v. Texas*, 163 U. S. 207, 216, 41 L. ed. 132; quoted in *National Mutual Building & Loan Association v. Brahan*, 193 U. S. 635, 647, 48 L. ed. 823; *Missouri & Kansas Interurban Ry. v. Olathe*, 222 U. S. 187, 56 L. ed. 156; *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 56 L. ed. 924; *Ross v. Oregon*, 227 U. S. 150, 57 L. ed. 458 [dismissing writ of error to review, 55 Or. 450, 104 Pac. 596, 106 Pac. 1022]; *Moore-Mansfield Co. v. Electrical Co.*, 234 U. S. 619, 58 L. ed. 1503.

"This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere errors

committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a federal question. But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law. But if there be no such law, or if no effect to be given to it by the state court, we can not take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired." *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 56 L. ed. 924.

On this question, see *Impairment of the Obligation of Contract by State Judicial Decisions*, by W. F. Dodd, 4 *Illinois Law Review*, 155, 327; *The Protection Afforded Against the Retroactive Operation of Overruling Decisions*, by Robert Hill Freeman, 18 *Columbia Law Review*, 230; *Retrospective Decisions*, by Joseph B. Heiskell, 22 *American Law Review*, 523;; *Impairment of Contracts by Change of Judicial Opinion*, by Conrad Reno, 23 *American Law Review*, 190, and *The Effect of Overruling Opinion of Court of Last Resort on Rights Acquired on Opinion Overruled*, by James E. Babb, 45 *American Law Review* 750.

has been a subsequent statute which might have affected the rights of the parties, does not amount to an impairment of the obligation of the contract, if the decision of the state court is not based thereon.<sup>2</sup> Since error will not lie from the decision of a state court, to the United States supreme court, because of a change in judicial decision, appeal will not lie directly from the district court of the United States to the supreme court of the United States.<sup>3</sup> The state courts had, at one time, assumed that the mechanics' lien act included contractors and sub-contractors.<sup>4</sup> If the rights in question had vested, it was held that such law did not include contractors or sub-contractors.<sup>5</sup> This change of judicial decision did not impair the obligation of the contract,<sup>6</sup> even though the state court subsequently adopted their original theory.<sup>7</sup> A contract and conveyance of realty by a married woman, which is valid as the statute concerning conveyances by married women, is then construed, but which is invalid under the construction subsequently given to the same statute, there being no intervening change in the statute, does not present an example of a law impairing the obligation of contracts.<sup>8</sup> The distinction indicated in the text is clearly made in *Central Land Co. v. Laidley*,<sup>9</sup> in which case the court points out that the distinction is an old one. The supreme court of Iowa had once held bonds issued by a municipality in aid of a railroad to be valid, but had subsequently overruled its earlier decision and held them invalid. Bonds were issued before the second line of decisions was promulgated. In a case coming before an inferior federal court and thence taken to the United States supreme court, it was held that the earlier line of decisions must be followed, ignoring the later ones,<sup>10</sup> while a

<sup>2</sup> *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 56 L. ed. 924.

<sup>3</sup> *Moore-Mansfield Co. v. Electrical Co.*, 234 U. S. 619, 58 L. ed. 1503 (under § 247 of the Judicial Code).

<sup>4</sup> *McKinney v. Springer*, 6 Blackf. (Ind.) 511; *Colter v. Frese*, 45 Ind. 96; *Hamilton v. Naylor*, 72 Ind. 171.

<sup>5</sup> *Indianapolis Northern Traction Co. v. Brennan*, 174 Ind. 1, 30 L. R. A. (N. S.) 85, 91 N. E. 503.

<sup>6</sup> *Moore-Mansfield Construction Co. v. Electrical Installation Co.*, 234 U. S. 619, 58 L. ed. 1503.

<sup>7</sup> *Moore-Mansfield Construction Co. v. Indianapolis Ry.*, 179 Ind. 356, 101 N. E. 206.

<sup>8</sup> *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91.

<sup>9</sup> 159 U. S. 103, 40 L. ed. 91.

<sup>10</sup> *Gelpcke v. Dubuque*, 68 U. S. (1 Wall.) 175, 17 L. ed. 520.

For a discussion of this case, see *The Case of Gelpcke v. Dubuque*, by James B. Thayer, 4 *Harvard Law Review*, 311; *Swift v. Tyson versus Gelpcke v. Dubuque*, by William H. Rand, Jr., 8

writ of error to the state supreme court was refused in a case which presented the same question and in which the state supreme court had followed the later line of decisions.<sup>11</sup> The supreme court of Texas<sup>12</sup> has endeavored to tabulate the decisions of the United States supreme court, a summary of which is here given, though the applicability of the cases to the propositions under which they are cited may be questioned in some instances.<sup>13</sup> The explanation of this doctrine is found in the theory of the relation of judicial decisions to the law. They are said not to be law, but merely the evidence of what the law is.<sup>14</sup> A change in judicial decision is

Harvard Law Review, 328; Some Recent Criticism of *Gelpcke v. Dubuque*, by Thomas Raeburn White, 38 American Law Register (N.S.), 473, 529, 593, 657; and The Rule in *Gelpcke v. Dubuque*, 9 American Law Review, 381.

<sup>11</sup> *Ohio & Mississippi Ry. v. McClure*, 77 U. S. (10 Wall.) 511, 19 L. ed. 997.

<sup>12</sup> *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154.

<sup>13</sup> Error to a Court of the United States: (1) Where the validity of the statute on which the contract depends was recognized by the State Supreme Court when the contract was made. *Pine Grove Township v. Talcott*, 86 U. S. (19 Wall.) 666, 22 L. ed. 227; *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U. S. (16 How.) 416, 14 L. ed. 997; *Olcott v. Supervisors*, 83 U. S. (16 Wall.) 678, 21 L. ed. 382. (2) Where prior decisions of a state court have been relied on in making a contract, and subsequently a statute impairs the obligation of such contract. *Ralls County v. Douglass*, 105 U. S. 728, 26 L. ed. 957; *The City (of Kenosha) v. Lamson*, 76 U. S. (9 Wall.) 477, 19 L. ed. 725; *Gelpcke v. Dubuque*, 68 U. S. (1 Wall.) 175, 17 L. ed. 520. (3) Where there has been a conflict in state decisions and the United States Supreme Court is free to follow which it pleases.

Error to a state court, when a change in judicial decision is not a law impairing the obligation of contracts.

*Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91; *Ohio & Mississippi Ry. v. McClure*, 77 U. S. (10 Wall.) 511, 19 L. ed. 997; *Knox v. Exchange Bank*, 79 U. S. (12 Wall.) 379, 20 L. ed. 414; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059.

<sup>14</sup> "A decision of a court is not in fact a law and if erroneously made can not make a law; it is simply the declaration of a court as to what the law is in the opinion of the judges." *Storrie v. Cortes*, 90 Tex. 283, 291, 35 L. R. A. 666, 38 S. W. 154.

"Laws are not made by judicial decisions. The court simply determines the rights of the parties to the action in that particular controversy. It is no part of its purpose even to declare the law. It simply applies to the controversy the law as it exists when the alleged rights or liabilities accrued. The decision has never been thought to have the force and effect of law except in that special controversy. In other suits it is authority more or less persuasive, according to its reasonableness. Courts have never thought themselves bound by it, as they are by a valid statute. And if it is manifestly wrong, the community does not act upon it. A lawyer who would have advised a client to rely upon the *Berson* case in making a loan would show his incapacity." *Alferitz v. Borgwardt*, 126 Cal. 201, 208, 58 Pac. 460.

not in theory the promulgation of a new rule, but is the abandonment of a rule erroneously thought to be law in favor of a rule which is law. Accordingly, this clause of the constitution is held not to apply to decisions of the courts nor to the acts of boards or officers construing the law.<sup>15</sup> An adjudication of insolvency,<sup>16</sup> or a decree ordering an executor to sell realty to pay taxes,<sup>17</sup> or a decision that a deposit was a special one,<sup>18</sup> does not impair the obligation of contracts if decided under statutes in force when the contractual right arose, even if the supreme court of the United States may think such decree erroneous.

Strong practical reasons make this view almost imperative. The decision of a court, on a question of unwritten law, is retroactive, not prospective. If any other theory were adopted the supreme court of the United States could review every judgment of a state court holding a contract invalid; and if the state court had reached its conclusion from principles of common law which had not been recognized before in that state by judicial decision, could reverse the judgment of the state court. This, of course, is not the law. The supreme court of the United States has no power to reverse the judgment of a state court merely because such judgment holds a contract to be invalid and the supreme court of the United States thinks that such judgment is erroneous and inconsistent with the pre-existing law of such state.<sup>19</sup> The result of the doctrine last enunciated is that if state courts change their minds on questions

See also, *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

<sup>15</sup> "The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts or the acts of administrative or executive boards, or officers, or the doings of corporations or individuals." *New Orleans Water Works Co. v. La. Sugar Refining Co.*, 125 U. S. 18, 30, 31 L. ed. 607 [quoted in *Ray v. Western Pennsylvania Natural Gas Co.*, 138 Pa. St. 576, 591, 21 Am. St. Rep. 922, 12 L. R. A. 290, 20 Atl. 1065].

See also, *Ross v. Oregon*, 227 U. S. 150, 57 L. ed. 458 [dismissing writ of error to review, 55 Or. 450, 106 Pac. 1022].

<sup>16</sup> *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773.

<sup>17</sup> *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157 [affirming, 51 F.d. 258].

<sup>18</sup> *Ross v. Oregon*, 227 U. S. 150, 57 L. ed. 458 [dismissing writ of error to review, 55 Or. 450, 106 Pac. 1022].

<sup>19</sup> *Commercial Bank v. Buckingham*, 46 U. S. (5 How.) 317, 12 L. ed. 169; *Lawler v. Walker*, 55 U. S. (14 How.) 149, 14 L. ed. 364; *Knox v. Exchange Bank*, 79 U. S. (12 Wall.) 379, 20 L. ed. 414; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059; *Wood v. Brady*, 150 U. S. 18, 37 L. ed. 981; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91; *Dunbar v. New York*, 251 U. S. 516, 64 L. ed. 384.

either of constitutional construction,<sup>20</sup> as of the conclusive effect of the signature of a bill by the presiding officers of the legislature,<sup>21</sup> or of the constitutionality of statutes,<sup>22</sup> or of statutory construction,<sup>23</sup> or of common law,<sup>24</sup> they may apply the new rule to contracts made in reliance upon earlier decisions, before the new rule was enunciated,<sup>25</sup> without danger of reversal by the supreme court of the United States.<sup>26</sup> As is indicated by some of the cases which have already been cited, some of the state courts have followed the supreme court of the United States, and have held that a change of judicial decision was not a law impairing the obligation of a contract.<sup>27</sup> The state of Kansas had provided by statute that no orders for intoxicating liquors should be taken in Kansas; but this statute was held to be unconstitutional as attempting to regulate interstate commerce.<sup>28</sup> The United States supreme court, however, subsequently held a similar statute to be constitutional.<sup>29</sup> In an action upon a contract for the employment of an agent to solicit orders for intoxicating liquors in Kansas, which was entered into after the original decision of the supreme court of Kansas, it was held that the Kansas court might follow the decision of the United States supreme court and hold such contract to be illegal,

<sup>20</sup> *Graves v. Moore County*, 135 N. Car. 49, 47 S. E. 134; *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154.

<sup>21</sup> *Graves v. Moore County*, 135 N. Car. 49, 47 S. E. 134.

<sup>22</sup> *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154.

<sup>23</sup> *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91; *National Mutual Building & Loan Association v. Braham*, 193 U. S. 635, 48 L. ed. 823 [affirming, 80 Miss. 407, 57 L. R. A. 793, 31 So. 840; *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *Duane v. Merchants' Legal Stamp Co.*, 231 Mass. 113, 120 N. E. 370 (monopoly); *Sedalia v. Donohue*, 190 Mo. 407, 89 S. W. 386.

<sup>24</sup> *Ray v. Western Pennsylvania Natural Gas Co.*, 138 Pa. St. 576, 21 Am. St. Rep. 922, 12 L. R. A. 290, 20 Atl. 1065, 21 Atl. 202.

<sup>25</sup> *Allen v. Allen*, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213.

<sup>26</sup> *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91.

<sup>27</sup> *California*. *Allen v. Allen*, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213.

*Iowa*. *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

*Kansas*. *Crigler v. Shepler*, 79 Kan. 834, 23 L. R. A. (N.S.) 500, 101 Pac. 619.

*Massachusetts*. *Duane v. Merchants' Legal Stamp Co.*, 231 Mass. 113, 120 N. E. 370.

*Missouri*. *Sedalia v. Donohue*, 190 Mo. 407, 89 S. W. 386.

*Texas*. *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154.

*Pennsylvania*. *Ray v. Western Pennsylvania Natural Gas Co.*, 138 Pa. St. 576, 21 Am. St. Rep. 922, 12 L. R. A. 290, 20 Atl. 1065.

<sup>28</sup> *State v. Hickox*, 64 Kan. 650, 68 Pac. 35.

<sup>29</sup> *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724.

without impairing the obligation thereof.<sup>30</sup> The supreme court of Iowa at one time had seemed to favor the view that power to a municipal corporation to incur indebtedness implied power to issue a negotiable bond therefor.<sup>31</sup> Bonds were issued by a municipal corporation for a debt which it had authority to incur but for which it had no express authority to issue bonds. Subsequently, the supreme court of Iowa held that power to incur indebtedness did not confer power to issue bonds therefor.<sup>32</sup> It was held that the bonds issued before the later decisions were not protected by the provision against impairing the obligation of contracts.<sup>33</sup> The

<sup>30</sup> *Crigler v. Shepler*, 79 Kan. 834, 23 L. R. A. (N.S.) 500, 101 Pac. 619.

<sup>31</sup> *Hull v. Marshall County*, 12 Ia. 142; *Sioux City v. Weare*, 59 Ia. 95, 12 N. W. 786.

<sup>32</sup> *Heins v. Lincoln*, 102 Ia. 60, 71 N. W. 189; *Witter v. Board of Supervisors*, 112 Ia. 380, 83 N. W. 1041.

<sup>33</sup> *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9. (It was, however, pointed out that the earlier decisions were obiter, and that the actual adjudications had been opposed to such view.)

"In analyzing the various cases on this subject, regard must be had to the tribunal in which they arose. If the case originated in, or was removed to the federal court, that court was at liberty to follow such decision of the state court as it saw fit to adopt, and might, of course, consider the equities of the particular case in adopting its rule. The Federal Supreme Court has, in many cases where there has been a change of view by the state court, followed the first decision of that court; and, if the action was to enforce contract rights, the United States courts have often followed the law as it was declared by the state court when the contract was entered into. In other words, federal courts, on questions of general law, are not bound by state court decisions, and may adopt such rules as they think best, sustained by reason and authority. They have

also at times applied a sort of equitable doctrine, and held to a rule which sustains a contract legal when entered into according to the then existing decisions of the state court, but which afterwards, on further reflection, were held illegal by the state court. *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Great Southern Fire-proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; *National Mut. Bldg. & L. Assn. v. Brahan*, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532, and cases cited. Vide also *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715. If the case goes directly from a state court to the Supreme Court of the United States, no such question as is here presented arises, for a change of judicial decision is not a law impairing the obligations of contracts. *National Mut. Bldg. & L. Assn. v. Brahan*, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532; affirming, 80 Miss. 431, 57 L. R. A. 793, 31 So. 840. This distinction is clearly pointed out in *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80. See also, *Mississippi & M. R. Co. v. McClure*, 10 Wall. 511, 19 L. ed. 997.

"A judicial decision is not a law. It is merely evidence of what the law is, and a change of decision is not the promulgation of a new law. Hence the

supreme court of Oklahoma had held that an oil lease, which contained a surrender clause, could be terminated at any given rental period by the lessor, as well as by the lessee.<sup>34</sup> Subsequently, the earlier case was overruled, and it was held that such lease could not be terminated by the lessor, if there had been a cash payment therefor.<sup>35</sup> It was held that a lease which was made after the earlier decision was rendered, and before the later decision, was not protected from the operation of the rule laid down in the later cases by the doctrine of the impairment of the obligation of a contract.<sup>36</sup> The court of appeals of Missouri had decided that the council might authorize the city clerk to levy a special assessment for an improvement and to issue special tax bills therefor.<sup>37</sup> Subsequently, the supreme court of Missouri took the opposite view, holding that such tax bills were invalid.<sup>38</sup> One who purchased tax bills after the first decision was rendered and before the second decision was rendered, was not protected by this constitutional provision.<sup>39</sup> The supreme court of Texas held that a homestead could be sold for assessments.<sup>40</sup> Subsequently this decision was overruled.<sup>41</sup> It was held that assessment made and taken by a contractor in the interval between these two decisions must be governed by the rule ultimately held to be correct.<sup>42</sup> While the same result has been reached in Indiana, special stress has been placed there on the fact that the change in judicial decision af-

constitutional provision does not apply to judicial decisions. *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154; *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460; *Ray v. Western Pennsylvania Natural Gas Co.*, 138 Pa. 576, 12 L. R. A. 290, 21 Am. St. Rep. 922, 20 Atl. 1065. We are inclined to the view that there is nothing in the constitution which forbids a change of judicial opinion, except it be with reference to a particular statute; although we must confess that there are some strong cases to the contrary. As supporting our view, see *Storrie v. Cortes*, *supra*; *Center School Twp. v. State*, 150 Ind. 168, 49 N. E. 961; *Shepard's Point Land Co. v. Atlantic Hotel*, 134 N. C. 397, 46 S. E. 748." *Swanson v. Ottumwa*, 131 Ia. 540, 5 L. R. A. (N.S.) 860, 106 N. W. 9.

<sup>34</sup> *Brown v. Wilson*, 58 Okla. 392, L. R. A. 1917B, 1184, 160 Pac. 94.

<sup>35</sup> *Northwestern Oil & Gas Co. v. Branine*, — Okla. —, 175 Pac. 533; *Rich v. Donaghey*, — Okla. —, 3 A. L. R. 352, 177 Pac. 86; *Magnolia Petroleum Co. v. Saylor*, — Okla. —, 180 Pac. 861; *Maud Oil & Gas Co. v. Bodkin*, 75 Okla. 6, 180 Pac. 959.

<sup>36</sup> *McCray v. Miller*, 78 Okla. 16, 184 Pac. 781.

<sup>37</sup> *Nevada v. Morris*, 43 Mo. App. 586.

<sup>38</sup> *Nevada v. Eddy*, 123 Mo. 546, 27 S. W. 471.

<sup>39</sup> *Sedalia v. Donohue*, 190 Mo. 407, 89 S. W. 386.

<sup>40</sup> *Lufkin v. Galveston*, 58 Tex. 545.

<sup>41</sup> *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803.

<sup>42</sup> *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154.

affected the relative rights of a school corporation and a school township to the surplus of a dog-tax fund, the court holding that the control of the legislature over public corporations was not limited by this clause of the constitution.<sup>43</sup>

**§ 3642. Theory that judicial decision is a "law."** The distinction made in the preceding sections is not recognized in some states and in many text books. A dictum by Judge Taney, in *Ohio Life Ins. Co. v. DeBolt*,<sup>1</sup> gave rise to the proposition that "where a statute has received a settled exposition, then a contract has been made under it which is good, there is created an 'obligation' which can not be overturned by decisions overruling the earlier exposition."<sup>2</sup> This proposition, erroneous as applied to cases coming to the supreme court of the United States from state courts, finds support in the broad language used in some cases in which error proceedings to inferior federal courts were brought,<sup>3</sup> and has been adopted by some of the state courts.<sup>4</sup> The supreme court of Ohio had upheld an act for employing persons to discover property omitted from the tax duplicate, although such act was not of uniform operation throughout the state.<sup>5</sup> Subsequently, acts of this sort were held to be invalid, if not of uniform operation.<sup>6</sup> It was held that a contract entered into under such unconstitutional legislation was so far valid that the party who had rendered such services was entitled to compensation at the contract rate up to the time of filing the petition in the action which attacked the validity of his contract.<sup>7</sup> A mortgage was given by

<sup>43</sup> *Center School Township v. State*, 150 Ind. 168, 49 N. E. 961.

<sup>1</sup> 157 U. S. (16 How.) 416, 14 L. ed. 997.

<sup>2</sup> Bishop on Contracts (enlarged edition), § 569. The author's acceptance of this rule as law is the more remarkable because he demonstrates its unsoundness.

<sup>3</sup> *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968; *Taylor v. Ypsilanti*, 105 U. S. 60, 26 L. ed. 1008.

<sup>4</sup> *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 12 L. R. A. 856, 9 So. 532; *Willoughby v. Holderness*, 62 N. H. 227; *Thomas v. State*,

76 O. S. 341, 118 Am. St. Rep. 884, 10 L. R. A. (N.S.) 1112, 81 N. E. 437; *Galey v. Guffey*, 248 Pa. St. 523, 94 Atl. 238; *Philadelphia Trust Co. v. Northumberland County Traction Co.*, 258 Pa. St. 152, 101 Atl. 970; *Columbia & Montour Electric Co. v. North Branch Transit Co.*, 258 Pa. St. 447, 102 Atl. 214 (see obiter in *Lewis v. Symmes*, 61 O. S. 471, 76 Am. St. Rep. 428, 56 N. E. 194).

<sup>5</sup> *State v. Crites*, 48 O. S. 142, 26 N. E. 1052, 28 N. E. 178.

<sup>6</sup> *State v. Buckley*, 60 O. S. 273, 54 N. E. 272.

<sup>7</sup> *Thomas v. State*, 76 O. S. 341, 118 Am. St. Rep. 884, 10 L. R. A. (N.S.) 1112, 81 N. E. 437.

a married woman. The decisions of the state courts then rendered held such mortgages to be valid on the ground that her statutory separate estate was converted into her equitable separate estate. This decision was subsequently overruled. It was held that the mortgage, being given before the later decision was rendered, though suit was brought thereon afterwards, must be governed by the early though erroneous construction of the statute.<sup>8</sup> A note given by a public corporation in payment for a bounty for enlistment at a time when the decisions construing the constitution held such notes to be valid, was held to be valid though such construction was held incorrect when action was brought on such note.<sup>9</sup> This limitation upon the powers of state courts is self-imposed, valid where recognized, but not required by the decisions of the federal courts. It is recognized indirectly even in cases in which it was held that no question of statutory construction existed. The supreme court of California held that a chattel mortgage passed the legal title to the mortgagee.<sup>10</sup> In rendering this decision section 2888 of the Civil Code was entirely overlooked. In a subsequent case it was held that the former decision was not one construing a statute, and that accordingly a contract made in reliance upon the prior decision was not governed thereby, and that it was not impairing the obligation of a contract to overrule the earlier decision.<sup>11</sup>

This doctrine has been recognized in cases in which it was not necessary to the result which actually was reached.<sup>12</sup> It has been

The question is discussed as though constitutionality of legislation were itself a matter of contract. "The court of last resort in the state having in the most authoritative manner affirmed the validity of this legislation, the assurance so given could be withdrawn only by a contrary decision with respect to the same legislation or like legislation upon the same subject. The doctrine recognized as necessary to preserve the obligation of contracts does not permit the denial of compensation to the plaintiffs in error until their right thereto was challenged by the original petitions filed in the court of common pleas in cases, which resulted in the judgments here reviewed." *Thomas v. State*, 76 O. S. 341, 118 Am. St. Rep.

884, 10 L. R. A. (N.S.) 1112, 81 N. E. 437.

<sup>8</sup> *Farrior v. New England Mortgage Security Co.*, 92 Ala. 176, 12 L. R. A. 856, 9 So. 532.

<sup>9</sup> *Willoughby v. Holderness*, 62 N. H. 227.

<sup>10</sup> *Berson v. Nunan*, 63 Cal. 550.

<sup>11</sup> *Alferitz v. Borgwardt*, 126 Cal. 201, 58 Pac. 460.

<sup>12</sup> *Oliver County v. Louisville Realty Association*, 156 Ky. 628, 51 L. R. A. (N.S.) 293, 161 S. W. 570; *Philadelphia Trust Co. v. Northumberland County Traction Co.*, 258 Pa. St. 152, 101 Atl. 970; *Columbia & Montour Electric Co. v. North Branch Transit Co.*, 258 Pa. St. 447, 102 Atl. 214.

recognized as the proper rule applicable to contracts made in compliance with law, but it has been said that it does not apply to contracts made in violation of the law, even where there has been a change of judicial decisions as to the legal consequences of such contract.<sup>13</sup> The court of appeals of Kentucky decided that a person who made a contract with a foreign corporation, which had not complied with the provisions of a statute requiring the filing of a specified certificate, and the appointment of an agent upon whom summons could be served, was estopped to deny the validity of such contract.<sup>14</sup> In a later case, the earlier cases were overruled in effect, and it was held that estoppel did not exist in such cases.<sup>15</sup> In a subsequent case,<sup>16</sup> it was held that reference to a transaction which arose after the decisions in the earlier cases,<sup>17</sup> and before the decision in the later case,<sup>18</sup> that no estoppel existed, and that the change of judicial decision with reference to the construction and effect of such statute did not impair the obligation of such contract, since such contract was entered into in violation of law. The theory of impairing the obligation of a contract has been invoked to prevent a court from enjoining creditors from proceeding to enforce valid obligations,<sup>19</sup> or to prevent it from divesting prior

<sup>13</sup> *Oliver County v. Louisville Realty Association*, 156 Ky. 628, 51 L. R. A. (N.S.) 293, 161 S. W. 570.

<sup>14</sup> *Johnson v. Mason Lodge*, 106 Ky. 838, 51 S. W. 620; *Aultman & Taylor Co. v. Mead*, 109 Ky. 583, 60 S. W. 294; *Hallam v. Ashford* (Ky.), 70 S. W. 197.

<sup>15</sup> *Fruin-Colnon Contracting Co. v. Chatterson*, 146 Ky. 504, 40 L. R. A. (N.S.) 857, 143 S. W. 6.

<sup>16</sup> *Oliver County v. Louisville Realty Association*, 156 Ky. 628, 51 L. R. A. (N.S.) 293, 161 S. W. 570.

<sup>17</sup> *Johnson v. Mason Lodge*, 106 Ky. 838, 51 S. W. 620; *Aultman & Taylor Co. v. Mead*, 109 Ky. 583, 60 S. W. 294; *Hallam v. Ashford* (Ky.), 70 S. W. 197.

<sup>18</sup> *Fruin-Colnon Contracting Co. v. Chatterson*, 146 Ky. 504, 40 L. R. A. (N.S.) 857, 143 S. W. 6.

<sup>19</sup> *Galey v. Guffey*, 248 Pa. St. 523, 94 Atl. 238.

"To state the question—having in mind the constitutional inhibitions, national and state, against legislative

impairment of contracts, and the repeated decisions of this court with regard thereto—is, we think, to answer it. It is true that what is prohibited is legislative action the effect of which would be the impairment of a contract; but what the legislature may not do in this regard certainly the courts may not do. The power that is here denied the legislature was not reserved to the courts. Great as are the equity powers of the court, it is yet to be suggested that included in these powers is the power to nullify or impair a legal contract solemnly and intelligently entered into between competent parties. Here we have a contract between the parties evidenced by bond and mortgage, wherein it is provided that in case the obligor makes default in payment of the principal or any installment of interest on the principal for a given period after the same shall have been due, the creditor shall have the right forthwith to proceed at law

liens so as to sell certain property as a unit.<sup>20</sup> To have refused to enforce these contracts would probably have been erroneous; but the question of impairing their obligation does not seem to be presented. A decree of specific performance rendered by the courts of Virginia, with reference to land which was subsequently included within the limits of Kentucky, will be given effect in Kentucky, although the Kentucky courts would not have given such relief upon such contract.<sup>21</sup>

### § 3643. Distinction between judicial decision and written law.

It thus appears that a written law is a "law" within the meaning of this clause of the constitution, while in many jurisdictions a judicial decision is not. It is, therefore, a necessary question and often a difficult one, to determine whether a judicial decision is based on a written law or not. A recent decision of the supreme court of the United States illustrates what it holds to be a decision based on a statute. A Texas statute provided that railroads indebted to the state should pay interest and a certain amount of the principal annually upon so much of the loan as was due on May 1, 1870, and provided to what extent the property of roads which made default in such payments might be held therefor. By statute during the Civil War treasury warrants had been issued to the creditors of the state. The railroads had been obliged to accept these in payment of their accounts, and in turn had paid them over to the state as credits upon the amounts due from them to the state. The Houston and Texas Central Railroad had paid the amount of indebtedness due to the state if credit were given for the state warrants thus paid over. The state insisted that no credit should be given for such warrants and sued to enforce payment of the amount due. The trial court found in favor of the state. The case was then taken to the court of civil appeals, which held that no credit should be given for such warrants; but in other

to enforce collection of the whole principal debt, the debtor waiving the benefit of all laws that might entitle him to a longer stay. That the action of the court in restraining the creditor from proceeding to collect the debt due in such case contravenes the expressed provisions of the contract is apparent; that it materially impairs the creditors' rights and interests is no less

so." *Galey v. Guffey*, 248 Pa. St. 523, 94 Atl. 238.

<sup>20</sup> *Philadelphia Trust Co. v. Northumberland County Traction Co.*, 258 Pa. St. 152, 101 Atl. 970; *Columbia & Montour Electric Co. v. North Branch Transit Co.*, 258 Pa. St. 447, 102 Atl. 214.

<sup>21</sup> *Caldwell v. Carrington*, 34 U. S. (9 Pet.) 86, 9 L. ed. 60.

respects modified the judgment of the lower court so as to give exactly the relief prescribed by the state statute first referred to. That part of the decision holding that payment in state warrants should not be credited, since they were bills of credit and in aid of rebellion, was reached independent of this statute, and no part of the decision of the court of civil appeals was expressly based thereon. A writ of error was refused by the supreme court of Texas. Error proceedings in the supreme court of the United States resulted in a reversal of the judgment of the Texas court of civil appeals on the theory that the judgment of the court gave effect to the statute and thus there was a "law" impairing the obligation of contracts.<sup>1</sup> Clearly a decision construing a contract, even if erroneous, is not a law impairing the obligation of the contract.<sup>2</sup>

#### IV CONTRACT

**§ 3644. What is meant by "contracts"—General principles.** The context of this clause shows that it is intended to protect only obligations which originate in agreement.<sup>1</sup>

<sup>1</sup> *Houston & Texas Central Ry. v. Texas*, 177 U. S. 66, 44 L. ed. 673.

<sup>2</sup> Construing a grant of a tract of land in a navigable harbor, and holding it to pass only an easement to build wharves. *Land Co. v. Atlantic Hotel*, 134 N. Car. 397 [sub nomine, *Shepherd's Point Land Co. v. Atlantic Hotel*, 46 S. E. 748].

Construing a mining lease adversely to the contention of the lessee, does not impair the obligation of his contract. *State v. Hobart Iron Co.*, — Minn. —, 176 N. W. 758.

<sup>1</sup> *United States. Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Morley v. Lake Shore & Michigan Southern Ry.* 146 U. S. 162, 36 L. ed. 925; *Grand Rapids & Indiana Ry. v. Osborn*, 193 U. S. 17, 48 L. ed. 598; *Worcester v. Worcester Consolidated Street Ry. Co.*, 196 U. S. 539, 49 L. ed. 591; *Dubuque Electric Co. v.*

*Dubuque*, 260 Fed. 353, 10 A. L. R. 495.  
**Arkansas.** *Earle Road Improvement District v. Johnson*, 145 Ark. 438, 224 S. W. 965.

**California.** *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 27 L. R. A. (N.S.) 260, 93 Pac. 70.

**Florida.** *Coe v. Muller*, 74 Fla. 399, 77 So. 88; *State v. Burr*, — Fla. —, 84 So. 61; *Everglades Drainage District v. Forbes Pioneer Boat Line*, — Fla. —, 86 So. 199.

**Georgia.** *Davis v. Savannah*, 147 Ga. 605, 95 S. E. 6.

**Idaho.** *Tarr v. Western Loan & Savings Co.*, 15 Ida. 741, 21 L. R. A. (N.S.) 707, 99 Pac. 1049.

**Kansas.** *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915B, 797, 119 Pac. 74.

**Kentucky.** *Oster's Executor v. Ohlman*, 187 Ky. 341, 219 S. W. 187.

**Missouri.** *Collins v. A. Jaicks Co.*, 279 Mo. 404, 214 S. W. 391.

**Nevada.** *Worthington v. District*

The term "contract" does not include gratuitous promises,<sup>2</sup> or unaccepted offers,<sup>3</sup> or the hope of making contracts in the future,<sup>4</sup> or customs and usages which do not form a part of a contract.<sup>5</sup>

The term "contracts" in this clause means genuine contracts.<sup>6</sup> These may be either express<sup>7</sup> or implied.<sup>8</sup> A contract for furnishing a water supply which is a part of a contract for the sale of land is protected by this clause.<sup>9</sup> An enlistment in the militia has been held to be a contract in this sense, so that additional burdens can not be imposed after an enlistment.<sup>10</sup>

Since a contract between a bank and a depositor does not provide that the deposit shall belong to the bank unless claimed by the depositor, a statute which is passed after such deposit is made, which provides that if a deposit is unclaimed for a specified period of time, it shall be paid to the state,<sup>11</sup> or to the administrator of the depositor in case of his absence,<sup>12</sup> does not impair the obligation of the contract as against the bank. A contract made in another state is protected by this clause of the constitution.<sup>13</sup>

Court, 37 Nev. 212, L. R. A. 1916A, 696, 142 Pac. 230.

**North Carolina.** *Spencer v. Seaboard Air Line Ry. Co.*, 137 N. Car. 107, 1 L. R. A. (N.S.) 604, 49 S. E. 96.

**Ohio.** *State v. Rendigs*, 98 O. S. 251, 120 N. E. 836.

**Oklahoma.** *Love v. Cavett*, 26 Okla. 179, 109 Pac. 553.

**Oregon.** *Colby v. Medford*, 85 Or. 485, 167 Pac. 487; *Brown v. Silverton*, 97 Or. 441, 190 Pac. 971.

**Washington.** *Everett v. Adamson*, 106 Wash. 355, 180 Pac. 144; *Security Savings Society v. Spokane*, 111 Wash. 35, 189 Pac. 260.

**Wyoming.** *Littleton v. Burgess*, 14 Wyom. 173, 2 L. R. A. (N.S.) 631, 82 Pac. 864.

<sup>2</sup> *In re McKelway*, 221 N. Y. 15, L. R. A. 1917E, 1143, 116 N. E. 348.

<sup>3</sup> *Frellsen v. Crandell*, 217 U. S. 71, 54 L. ed. 670; *State, ex rel. v. Clausen*, 110 Wash. 112, 186 Pac. 319.

<sup>4</sup> *Rast v. Ven Deman Co.*, 240 U. S. 342, L. R. A. 1917A, 421, 60 L. ed. 679.

<sup>5</sup> *Farkas v. Albany*, 141 Ga. 833, L. R. A. 1915A, 320, 82 S. E. 144.

<sup>6</sup> See §§ 56 et seq. and 1434 et seq.

<sup>7</sup> *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840; *Allen v. Railroad Commission*, 179 Cal. 68, 8 A. L. R. 249, 175 Pac. 466; *Gilpatrick v. National Surety Co.*, — Conn. —, 110 Atl. 545; *Title Guaranty & Surety Co. v. Coffman*, 97 Wash. 211, 166 Pac. 620.

<sup>8</sup> *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587.

<sup>9</sup> *Allen v. Railroad Commission*, 179 Cal. 68, 8 A. L. R. 249, 175 Pac. 466.

<sup>10</sup> *State v. Long*, 136 La. 1, L. R. A. 1915E, 235, 66 So. 377.

<sup>11</sup> *Provident Institution for Savings v. Malone*, 221 U. S. 660, 34 L. R. A. (N.S.) 1129, 55 L. ed. 899 [affirming, 201 Mass. 23, 86 N. E. 912 (thirty years)]; *Germantown Trust Co. v. Powell*, 265 Pa. St. 71, 108 Atl. 441.

<sup>12</sup> *Savings Bank v. Weeks*, 110 Md. 78, 22 L. R. A. (N.S.) 221, 72 Atl. 475 (year).

<sup>13</sup> *Western National Bank v. Reckless*, 96 Fed. 70 [distinguishing, *State v. Rahway*, 43 N. J. L. 338; *Rahway Tax Assessors v. State*, 44 N. J. L. 415].

## 6315 IMPAIRMENT OF OBLIGATION OF CONTRACT § 3645

This provision applies to valid and subsisting contracts entered into by a state,<sup>14</sup> or by a public corporation,<sup>15</sup> as well as by individuals.

**§ 3645. Rights given by law not dependent on agreement.** Rights which arise at positive law and which are not contractual in their nature are not protected by this clause,<sup>1</sup> whatever other clauses of the constitution may be invoked to protect them. A license,<sup>2</sup> such as a license to carry on a profession,<sup>3</sup> or to operate

<sup>14</sup> *Beverly Hills v. Los Angeles*, 175 Cal. 311, 165 Pac. 924; *Deneen v. Deneen*, 293 Ill. 454, 127 N. E. 700 (obiter); *Central Union Telephone Co. v. Indianapolis Telephone Co.*, — Ind. —, 126 N. E. 628; *Jones Hollow Ware Co. v. Crane*, 134 Md. 103, 106 Atl. 274; *People v. Mealy*, 224 N. Y. 187, 120 N. E. 165; *In re Assessment of First National Bank*, — Okla. —, L. R. A. 1917B, 294, 160 Pac. 469.

<sup>15</sup> *Northern Ohio Traction & Light Co. v. State*, 245 U. S. 574, L. R. A. 1918E, 865, 62 L. ed. 481; *Louisiana Western Ry. Co. v. Crowley*, 142 La. 640, 77 So. 486; *Kennon v. Hilburn*, 144 La. 131, 80 So. 224; *Edwards v. Helena*, 58 Mont. 292, 191 Pac. 387; *Interurban Ry. & Terminal Co. v. Public Utilities Commission*, 98 O. S. 287, 120 N. E. 831; *Hillsboro v. Public Service Commission*, 97 Or. 320, 187 Pac. 617.

<sup>1</sup> *United States. Dubuque Electric Co. v. Dubuque*, 260 Fed. 353, 10 A. L. R. 495.

*Arkansas. Earle Road Improvement District v. Johnson*, 145 Ark. 438, 224 S. W. 965.

*California. Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 27 L. R. A. (N.S.) 260, 93 Pac. 70.

*Florida. Coe v. Muller*, 74 Fla. 399, 77 So. 88; *State v. Burr*, — Fla. —, 84 So. 61; *Everglades Drainage District v. Forbes Pioneer Boat Line*, — Fla. —, 86 So. 199.

*Georgia. Davis v. Savannah*, 147 Ga. 606, 95 S. E. 6.

*Idaho. Tarr v. Western Loan & Savings Co.*, 15 Ida. 741, 21 L. R. A. (N.S.) 707, 99 Pac. 1049.

*Kentucky. Oster's Executor v. Ohlman*, 187 Ky. 341, 219 S. W. 187.

*Missouri. Collins v. A. Jaicks Co.*, 279 Mo. 404, 214 S. W. 391.

*Nevada. Worthington v. District Court*, 37 Nev. 212, L. R. A. 1916A, 696, 142 Pac. 230.

*North Carolina. Spencer v. Seaboard Air Line Ry. Co.*, 137 N. Car. 107, 1 L. R. A. (N.S.) 604, 49 S. E. 96.

*Ohio. State v. Rendigs*, 98 O. S. 251, 120 N. E. 836.

*Oregon. Brown v. Silverton*, 97 Or. 441, 190 Pac. 971.

*Washington. Everett v. Adamson*, 106 Wash. 355, 180 Pac. 144; *Security Savings Society v. Spokane*, 111 Wash. 35, 189 Pac. 260.

*Wyoming. Littleton v. Burgess*, 14 Wyom. 173, 2 L. R. A. (N.S.) 631, 82 Pac. 864.

<sup>2</sup> *United States. Williams v. Wingo*, 177 U. S. 601, 44 L. ed. 906.

*Maryland. Ruggles v. State*, 120 Md. 553, 87 Atl. 1080.

*Ohio. State v. Gazlay*, 5 Ohio 14.

*Oregon. Portland v. Cook*, 48 Or. 550, 9 L. R. A. (N.S.) 733, 87 Pac. 772.

*Wyoming. Littleton v. Burgess*, 14 Wyom. 173, 2 L. R. A. (N.S.) 631, 82 Pac. 864.

Even if licenses were construed to be contracts, they would, as a rule, be subject to the police power.

See §§ 3600 et seq.

<sup>3</sup> *State v. Gazlay*, 5 Ohio 14.

a motor vehicle,<sup>4</sup> or a ferry,<sup>5</sup> or a slaughter house,<sup>6</sup> or a game of chance,<sup>7</sup> is a permission but not a contract. A permit to construct a building for certain purposes,<sup>8</sup> or implied permission to use a certain tract of land for a cemetery,<sup>9</sup> is not a contract. Permission to a foreign corporation to do business upon certain terms is not a contract that such terms will not be altered.<sup>10</sup> Where A began the study of law when certain requirements for admission to the bar were in force and before he applied for admission such requirements were changed, it was held that A had no contractual right to admission under the old requirements; but that to be admitted he must comply with the new requirements.<sup>11</sup> A statute providing that a by-law of a beneficial society is not a part of its contract of insurance unless in the certificate of insurance or attached thereto, does not impair the obligation of such contracts as far as concerns by-laws passed after such statute.<sup>12</sup> A statute providing that purchasers of a railway at a foreclosure sale may incorporate, is not a contract, and may be repealed by the state.<sup>13</sup> A grant of a franchise is frequently construed as a permission rather than a contract;<sup>14</sup> and, if a contract, it is frequently subject to the police power of the state.<sup>15</sup>

**§ 3646. Quasi-contracts.** Since the word "contract" in this clause imports a genuine agreement, an obligation which is imposed by law without the assent of the parties is not a "contract" within the meaning of this provision even though it is classed as a quasi-contract.<sup>1</sup> A right to recover money paid under

<sup>4</sup> *Ruggles v. State*, 120 Md. 553, 87 Atl. 1080.

<sup>5</sup> *Williams v. Wingo*, 177 U. S. 601, 44 L. ed. 906.

<sup>6</sup> *Portland v. Cook*, 48 Or. 550, 9 L. R. A. (N.S.) 733, 87 Pac. 772.

<sup>7</sup> *Littleton v. Burgess*, 14 Wyom. 173, 2 L. R. A. (N.S.) 631, 82 Pac. 864.

<sup>8</sup> *State v. Rendigs*, 98 O. S. 251, 120 N. E. 836.

<sup>9</sup> *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 27 L. R. A. (N.S.) 260, 93 Pac. 70.

<sup>10</sup> *Tarr v. Western Loan & Savings Co.*, 15 Ida. 741, 21 L. R. A. (N.S.) 707, 99 Pac. 1049.

<sup>11</sup> *In re Day*, 181 Ill. 73, 50 L. R. A. 519, 64 N. E. 646.

<sup>12</sup> *Hunziker v. Supreme Lodge*, 117 Ky. 418, 78 S. W. 201.

<sup>13</sup> *Grand Rapids & Indiana Ry. v. Osborn*, 193 U. S. 17, 48 L. ed. 598 [affirming, 130 Mich. 248, 89 N. W. 967]; *People v. Cook*, 148 U. S. 397, 37 L. ed. 498 [affirming, 110 N. Y. 443, 18 N. E. 113].

<sup>14</sup> See § 3663.

<sup>15</sup> See §§ 3690 et seq.

<sup>1</sup> *United States. Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Morley v. Lake Shore & Michigan Southern Ry.*, 146 U. S. 162, 36 L. ed. 925.

*Connecticut. State v. Romme*, 93 Conn. 571, 107 At. 519.

*Florida. Everglades Drainage District v. Forbes Pioneer Boat Line*, — Fla. —, 86 So. 199.

As to prior voluntary payment, see *obiter* in *Mason City Brick & Tile Co.*

duress,<sup>2</sup> or by mistake,<sup>3</sup> is a right resting in quasi-contract and not in contract, and may therefore be taken away by subsequent statute. A statute which permits the state to recover from the estate of an insane person, for support rendered before such statute was passed, does not impair the obligation of a contract.<sup>4</sup>

**§ 3647. Penalties.** A penal liability created by statute may be abolished at any time before judgment, even if an action is pending.<sup>1</sup> A subsequent statute may take away the right to recover money lost at gambling.<sup>2</sup> The repeal of a statute which imposes a penalty for usury, prevents such defense from being interposed as to contracts made before such statute was passed.<sup>3</sup> However, the repeal of a statute declaring a forfeiture of all interest where usurious interest is contracted for or received is said not to affect the right to recover the excess of usurious interest over the legal rate, in an action for money had and received.<sup>4</sup>

**§ 3648. Judgments—Nature of cause of action.** A judgment was originally classed with contracts, since, in many cases, it could be enforced by an action *ex contractu*.<sup>1</sup> It is not necessarily based upon any agreement of the parties, however.<sup>2</sup> Whether a judgment is protected by the clause with reference to impairing the obligation of contracts, depends, therefore, on whether this clause is regarded as limited to genuine agreements or whether it is regarded as applicable to all rights which could be enforced at common law by actions *ex contractu*. On this question there has been some conflict in principle, and much more in reasoning and in obiter.

In some cases, an attempt is made to classify judgments according to the original right of action on which they were rendered. It is said that a judgment which is rendered upon a contract is as

v. Lamson, — Ia. —, 180 N. W. 314.

Oklahoma. Love v. Cavett, 26 Okla. 179, 109 Pac. 553.

Oregon. Nottage v. Portland, 35 Or. 539, 76 Am. St. Rep. 883.

<sup>2</sup> Nottage v. Portland, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883 (an invalid assessment paid under protest).

<sup>3</sup> State v. New Orleans, 38 La. Ann. 119, 58 Am. Rep. 168.

<sup>4</sup> State v. Romme, 93 Conn. 571, 107 Atl. 519.

<sup>1</sup> Coe v. Muller, 74 Fla. 399, 77 So. 88; Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Wells, 65 O. S. 313, 58 L. R. A. 651, 62 N. E. 332.

<sup>2</sup> Wilson v. Head, 184 Mass. 515, 69 N. E. 317.

<sup>3</sup> Coe v. Muller, 74 Fla. 399, 77 So. 88.

<sup>4</sup> Wilson v. Selbie, 7 S. D. 494, 64 N. W. 537.

<sup>1</sup> See §§ 1131 et seq.

<sup>2</sup> See § 1135.

much protected against impairment of obligation as the original contract, not because it is a judgment, but because the original right is to be protected.<sup>3</sup> The same principle has been applied to a judgment based upon a cause of action in quasi-contract,<sup>4</sup> as where a tort was waived and an action in contract was brought.<sup>5</sup> A judgment which is based on a tort is said not to be a contract within the protection of this clause.<sup>6</sup>

**§ 3649. Subsequent statute setting judgment aside, etc.** A judgment can not be so modified by a subsequent statute as to be made unenforceable.<sup>1</sup> This is because it is a vested right and as such is protected by another constitutional provision,<sup>2</sup> or because the legislature can not invade the province of the judiciary,<sup>3</sup> and not because it is a contract.<sup>4</sup> Congress can not set aside a prior judgment of the United States court, although this constitutional provision does not apply to federal legislation.<sup>5</sup> Still less can a state legislature set aside a judgment of a United States court.<sup>6</sup>

<sup>3</sup> *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587; *Bettman v. Cowley*, 19 Wash. 207, 40 L. R. A. 815, 53 Pac. 53.

<sup>4</sup> *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915B, 797, 119 Pac. 74.

<sup>5</sup> *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915B, 797, 119 Pac. 74.

<sup>6</sup> *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Louisiana v. Police Jury*, 111 U. S. 716, 28 L. ed. 574; *Chase v. Curtis*, 113 U. S. 452, 28 L. ed. 1038; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193; *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518; *Sherman v. Langham*, 92 Tex. 13, 39 L. R. A. 258, 42 S. W. 961 [reversing on rehearing, 40 S. W. 140]; *Peerce v. Kitzmiller*, 19 W. Va. 564.

<sup>1</sup> *Connecticut*. This question was avoided in *State v. New York, New Haven & Hartford Ry.*, 71 Conn. 43, 40 Atl. 925, by construing the statute as prospective only.

*Illinois*. *Chicago & Eastern Illinois Ry. v. People*, 219 Ill. 408, 76 N. E. 571.

*New York*. *People v. Buffalo*, 140 N.

Y. 300, 37 Am. St. Rep. 563, 35 N. E. 485.

*South Dakota*. *Skinner v. Holt*, 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595.

*Virginia*. *Ratliffe v. Anderson*, 72 Va. (31 Gratt.) 105, 31 Am. Rep. 716; *Griffin's Executor v. Cunningham*, 61 Va. (20 Gratt.) 31.

<sup>2</sup> *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382; *Livingston v. Livingston*, 173 N. Y. 377, 93 Am. St. Rep. 600, 61 L. R. A. 800, 66 N. E. 123.

<sup>3</sup> *People v. Owen*, 286 Ill. 638, 3 A. L. R. 447, 122 N. E. 132; *Denny v. Mattoon*, 84 Mass. (2 All.) 361, 79 Am. Dec. 784; *State v. Wildes*, 34 Nev. 94, 116 Pac. 595.

<sup>4</sup> Both reasons for this result have been given. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

This result has also been reached on the theory of collateral attack. *Ex parte Low*, 24 W. Va. 620.

<sup>5</sup> *United States v. Klein*, 80 U. S. (13 Wall.) 128, 20 L. ed. 519.

<sup>6</sup> *United States v. Peters*, 9 U. S. (5 Cranch) 115, 3 L. ed. 53.

After the rendition of a judgment against a corporation, based on a quasi-contractual right, the legislature can not deprive the judgment creditor of prior rights against the stockholders.<sup>7</sup> A judgment based on a stock liability can not be changed as to its scope and legal effect by a subsequent statute.<sup>8</sup> The report made by commissioners appointed under a statute which empowered them to determine the existence and amount of a claim against the city, is regarded after confirmation by the court as a judgment, so that the subsequent repeal of the statute under which the report was made can not deprive the injured party of his interest in the amount so fixed.<sup>9</sup> A statute which attempts to provide that a judgment shall cease to be a lien or charge after a certain time, is not a statute of limitation, since even bringing suit on the judgment within the time limited will not prevent it, under the terms of the statute, from ceasing to be a lien or a charge at the end of such time, and so is invalid as to pre-existing judgments.<sup>10</sup> A statute passed after a judgment as to the validity of a title bought at an execution sale providing that the prevailing party can not enforce such judgment unless he compensates the purchaser, is invalid.<sup>11</sup> So a decree for alimony rendered when the court had no power to modify it subsequently, can not be modified under a subsequent statute conferring such power.<sup>12</sup> A judgment is not avoided by the subsequent division of the state, although by the law which the new state adopts, such judgment would not have been rendered by its own courts.<sup>13</sup>

In some cases, however, the courts have recognized subsequent legislation as affecting prior judgments. A judgment restraining the collection of an inheritance tax may, on appeal, be reversed because of a retroactive law, passed while such appeal was pending curing defects in the original act.<sup>14</sup> After a judgment has been rendered for a tort committed during the Civil War, the

<sup>7</sup> *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915B, 797, 119 Pac. 74.

<sup>8</sup> *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

<sup>9</sup> *People v. Buffalo*, 140 N. Y. 300, 37 Am. St. Rep. 563, 35 N. E. 485.

<sup>10</sup> *Bettman v. Cowley*, 19 Wash. 207, 40 L. R. A. 815, 53 Pac. 53; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Raught v. Lewis*, 24 Wash. 47, 63 Pac. 1104.

<sup>11</sup> *Gilman v. Tucker*, 128 N. Y. 190,

26 Am. St. Rep. 464, 13 L. R. A. 304, 28 N. E. 1040.

<sup>12</sup> *Livingston v. Livingston*, 173 N. Y. 377, 93 Am. St. Rep. 600, 61 L. R. A. 800, 66 N. E. 123.

<sup>13</sup> *Caldwell v. Carrington*, 34 U. S. (9 Pet.) 86, 9 L. ed. 60 (judgment rendered in Virginia for specific performance; land within boundaries of Kentucky).

<sup>14</sup> *Ferry v. Campbell*, 110 Ia. 290, 50 L. R. A. 92, 81 N. W. 604.

legislature may provide that such judgment is not to be enforced if it was shown that the wrong was committed in accordance with civilized warfare,<sup>15</sup> although the legislature could not set aside the judgment directly and grant a new trial, as this would not be due process of law.<sup>16</sup> If a judgment in tort has been rendered against a municipal corporation, a statute which changes the tax rate so that such judgment can not be collected, does not impair the obligation of the contract.<sup>17</sup>

**§ 3650. Judgment held not to be contract—Interest, etc.** Since a judgment does not rest upon the voluntary assent of the parties, it is frequently said that it is not a contract within the protection of this constitutional provision.<sup>1</sup> In many of these cases, this holding is not necessary to the result. A judgment is due and payable at once; and, whatever its nature, the rate of interest which it bears is a matter of statute and not a matter of contract; and it is generally held that such rate of interest may be changed at any time as to interest which accrues after the passage of the act.<sup>2</sup>

<sup>15</sup> *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193.

<sup>16</sup> *Peerce v. Kitzmiller*, 19 W. Va. 564.

<sup>17</sup> *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *State v. New Orleans*, 38 La. Ann. 119, 58 Am. Rep. 168.

<sup>1</sup> *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Louisiana v. Police Jury*, 111 U. S. 716, 28 L. ed. 574; *Morley v. Lake Shore & Michigan Southern Ry.*, 146 U. S. 162, 36 L. ed. 925; *Swift v. McPherson*, 232 U. S. 51, 58 L. ed. 499; *Evans-Snider-Buel Co. v. McFadden*, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900; *Ferry v. Campbell*, 110 Ia. 290, 50 L. R. A. 92, 81 N. W. 604; *Sherman v. Langham*, 92 Tex. 13, 39 L. R. A. 258, 42 S. W. 961 [reversing on rehearing, 92 Tex. 13, 39 L. R. A. 258, 40 S. W. 140]; *Wyoming National Bank v. Brown*, 9 Wyom. 153, 50 L. R. A. 747, 61 Pac. 465 [denying rehearing, 7 Wyom. 494, 75 Am. St. Rep. 935, 53 Pac. 291].

"Such duty (i. e., to pay a judg-

ment) is created by the statute and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*." *Morley v. Lake Shore & Michigan Southern Ry.*, 146 U. S. 162, 169, 36 L. ed. 925 [affirming, *Prouty v. Lake Shore & Michigan Southern Ry.*, 95 N. Y. 667, which was decided without report on the authority of *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64].

<sup>2</sup> *Morley v. Lake Shore & Michigan Southern Ry.*, 146 U. S. 162, 36 L. ed. 925 [affirming, *Prouty v. Lake Shore & Michigan Southern Ry.*, 95 N. Y. 667, which was decided without report on the authority of *O'Brien v. Young*, 95 N. Y. 428, 667, 47 Am. Rep. 64]; *Read v. Mississippi County*, 69 Ark. 365, 86 Am. St. Rep. 202, 63 S. W. 807; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Wyoming National Bank v. Brown*, 9 Wyom. 153, 50 L. R. A. 747, 61 Pac.

On this point, however, there is a conflict of authority, and some courts have held that a statute which modifies the rate of interest is prospective only, and applies only to judgments rendered thereafter.<sup>3</sup> A judgment rendered on a contract under a statute providing that such a judgment should bear the contract rate of interest, has been held so far a contract that the rate of interest can not thereafter be changed.<sup>4</sup>

If a judgment is based on a tort, interest thereon is not a contract within the meaning of this clause.<sup>5</sup>

**§ 3651. Judgment held to be contract.** While it is not necessary to invoke the provision with reference to impairing the obligation of a contract, in order to protect an existing judgment against subsequent legislation, some courts have explained this rule on the theory that for this purpose at least, a judgment is, in the language of Blackstone,<sup>1</sup> "a contract of the highest nature."<sup>2</sup> If a contract has been made by which the debtor is to confess

<sup>465</sup> [denying rehearing of 7 Wyom. 494, 75 Am. St. Rep. 935, 53 Pac. 291].

Contra, *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454.

Such a statute is, if possible, construed to apply only to judgments thereafter rendered. *Texas & Pacific Ry. v. Anderson*, 149 U. S. 237, 37 L. ed. 717.

<sup>3</sup> *Texas & Pacific Ry. Co. v. Anderson*, 149 U. S. 237, 37 L. ed. 717; *Sharpe v. Morgan*, 44 Ill. App. 346; *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454; *Brauer v. Portland*, 35 Or. 471, 58 Pac. 861, 59 Pac. 117, 60 Pac. 378.

"It is unquestionably true that a judgment partakes of the nature of a contract sufficiently to supersede the original contract or cause of action both as to principal and interest. The original contract or cause of action becomes merged, and the judgment constitutes a new and liquidated debt. This debt and the liabilities for interest thereon, as provided by statute at the date of the judgment, are obligations binding upon the debtor till the judgment is reversed or satisfied."

*Butler v. Rockwell*, 17 Colo. 290, 295, 29 Pac. 458 [sub nomine, *Rockwell v. Butler*, 17 L. R. A. 611].

<sup>4</sup> *Getto v. Friend*, 46 Kan. 24, 26 Pac. 473; *Bond v. Dolby*, 17 Neb. 491, 23 N. W. 351.

<sup>5</sup> *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Louisiana v. Police Jury*, 111 U. S. 716, 28 L. ed. 575; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193; *Sherman v. Langham*, 92 Tex. 13, 39 L. R. A. 258, 42 S. W. 961 [reversing on rehearing, 40 S. W. 140].

<sup>1</sup> II Black. Com. 465.

<sup>2</sup> *Weaver v. Lapsley*, 43 Ala. 224; *People v. Buffalo*, 140 N. Y. 300, 37 Am. St. Rep. 563, 35 N. E. 485; *Briggs v. Hubbard*, 19 Vt. 86; *Bettman v. Cowley*, 19 Wash. 207, 40 L. R. A. 815, 53 Pac. 53.

"Immediately upon the rendition of a judgment or decree for money, there arises a contract against the party adjudged to pay in favor of him for whose benefit it is awarded which the legislature has no power to impair." *Martin v. South Salem Land Co.*, 94 Va. 28, 36, 26 S. E. 591.

judgment as security, such contract can not be affected by a subsequent statute giving additional dower to the debtor's widow,<sup>3</sup> even if such statute is passed before judgment is actually entered.<sup>4</sup>

**§ 3652. Marriage and divorce.** Although marriage originates in contract, it is a status and not a contract within the meaning of this clause.<sup>1</sup> Hence, a pre-existing marriage may be dissolved by a legislative divorce where valid otherwise,<sup>2</sup> or by a divorce rendered under general laws passed after the marriage,<sup>3</sup> or for a ground which arose before such statute was passed.<sup>4</sup> A statute which increases the period during which the plaintiff in a divorce proceeding must live within the state before bringing an action is not invalid under this provision, by reason of the fact that it applies to pre-existing causes for divorce.<sup>5</sup>

**§ 3653. Public corporations.** Public corporations and public quasi-corporations are agencies created by the state for the performance of public functions. No contractual relation exists between the state and such public corporation by reason of its creation alone; and the legislature may therefore change existing gov-

<sup>3</sup> Davidson v. Richardson, 50 Or. 323, 17 L. R. A. (N.S.) 319, 91 Pac. 1080.

<sup>4</sup> Davidson v. Richardson, 50 Or. 323, 17 L. R. A. (N.S.) 319, 91 Pac. 1080.

<sup>1</sup> United States. Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654; Georgia v. Tutty, 41 Fed. 753, 7 L. R. A. 50.

Kentucky. Berthelemy v. Johnson, 42 Ky. (3 B. Mon.) 90, 38 Am. Dec. 179.

Louisiana. Hava v. Chavigny, 143 La. 365, 78 So. 594; Hurry v. Hurry, 144 La. 877, 81 So. 378; Lepenser v. Griffin, 146 La. 584, 83 So. 839.

Nevada. Worthington v. District Court, 36 Nev. 212, L. R. A. 1916A, 696, 142 Pac. 230.

Ohio. Baughman v. Baughman, 7 Ohio Dec. 433.

South Carolina. Grant v. Grant, 12 S. Car. 29, 32 Am. Rep. 506.

Wisconsin. State v. Duket, 90 Wis. 272, 48 Am. St. Rep. 928, 31 L. R. A. 515, 63 N. W. 83.

<sup>2</sup> Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654; Noel v. Ewing, 9 Ind. 37;

Maguire v. Maguire, 37 Ky. (7 Dana) 181.

<sup>3</sup> Iowa. McCraney v. McCraney, 5 Ia. 232, 68 Am. Dec. 702.

Massachusetts. Wales v. Wales, 119 Mass. 89.

New Hampshire. Clark v. Clark, 10 N. H. 380, 34 Am. Dec. 165.

Ohio. Bingham v. Miller, 17 Ohio 445, 49 Am. Dec. 471.

South Carolina. Grant v. Grant, 12 S. Car. 29, 32 Am. Rep. 506.

Wisconsin. State v. Duket, 90 Wis. 272, 48 Am. St. Rep. 928, 31 L. R. A. 515, 63 N. W. 83.

<sup>4</sup> Hava v. Chavigny, 143 La. 365, 78 So. 594; Lepenser v. Griffin, 146 La. 584, 83 So. 839.

Such statute which does not affect the property rights of the parties is valid. Hurry v. Hurry, 144 La. 877, 81 So. 378.

<sup>5</sup> Worthington v. District Court, 37 Nev. 212, L. R. A. 1916A, 696, 142 Pac. 230.

ernmental powers of a public corporation,<sup>1</sup> or it may consolidate such corporations, or change the boundaries and so forth,<sup>2</sup> without impairing the obligation of any contract. In case of consolidation or change of boundary, the legislature may apportion existing obligations between the new corporations, as long as this does not interfere substantially with the right of creditors. The legislature can not deprive a public corporation of property which it owns in its private capacity, nor can it impair existing contracts which a public corporation has made with third persons.<sup>3</sup> This does not, however, prevent the legislature from withdrawing from a public corporation the power to make contracts after an offer has been made and before it has been accepted.<sup>4</sup> The legislature may require a public corporation to perform a moral duty, although it does not amount to a legal obligation.<sup>5</sup>

**§ 3654. Public offices.** A public officer has no property right to future tenure of his office, and does not hold it by contract with the state. Accordingly, a statute which abolishes an office or

<sup>1</sup> **United States.** *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679.

**Arkansas.** *Krause v. Thompson*, 138 Ark. 571, 211 S. W. 925.

**Delaware.** In re School Code of 1919, — Del. —, 108 Atl. 39.

**Idaho.** *Highway District No. 1 v. Fremont Co.*, — Ida. —, 185 Pac. 66.

**Illinois.** *Chalstram v. Board of Education*, 244 Ill. 470, 91 N. E. 712.

**Indiana.** *Marion School City v. Forrest*, 168 Ind. 94, 78 N. E. 187.

**Michigan.** *Saginaw County v. Hubinger*, 137 Mich. 72, 100 N. W. 261.

**Missouri.** *State v. Hackmann*, 277 Mo. 56, 209 S. W. 92.

**Tennessee.** *Putnam County v. White County*, 140 Tenn. 19, 203 S. W. 334.

**Vermont.** *Sargent v. Clark*, 83 Vt. 523, 77 Atl. 337.

<sup>2</sup> **United States.** *Attorney-General v. Lowrey*, 199 U. S. 233, 50 L. ed. 167.

**Arkansas.** *Krause v. Thompson*, 138 Ark. 571, 211 S. W. 925.

**Delaware.** In re School Code of 1919, 30 Del. (7 Boyce) 406, 108 Atl. 39.

**Missouri.** *State v. Hackmann*, 277 Mo. 56, 209 S. W. 92.

**New York.** *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248.

**Tennessee.** *Putnam County v. White County*, 140 Tenn. 19, 203 S. W. 334.

<sup>3</sup> **United States.** *Terrett v. Taylor*, 13 U. S. (9 Cranch.) 43, 3 L. ed. 650.

**Illinois.** *Deneen v. Deneen*, 293 Ill. 454, 127 N. E. 700.

**Kentucky.** *Louisville v. Commonwealth*, 62 Ky. (1 Duv.) 295, 85 Am. Dec. 624.

**Massachusetts.** *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485.

**Montana.** *Edwards v. Helena*, 58 Mont. 292, 191 Pac. 387.

**New York.** *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480.

**Wisconsin.** *State v. Haben*, 22 Wis. 660.

<sup>4</sup> *State, ex rel. v. Clausen*, 110 Wash. 112, 186 Pac. 319.

<sup>5</sup> See § 3656.

reduces its term does not impair the obligation of contracts.<sup>1</sup> The office of mayor,<sup>2</sup> or state pomologist,<sup>3</sup> may be abolished.

In North Carolina a public office was once held to be so far property that a statute abolishing it impaired the obligation of contracts.<sup>4</sup> Even in this state if the statute creating the office provided for a suspension of the officer under certain facts, a suspension under such facts did not impair the obligation of contracts.<sup>5</sup> The earlier decisions have finally been overruled, and North Carolina has adopted the rule held by other states, that a public officer has no contractual right to his office.<sup>6</sup>

As far as his salary has been earned, however, he has a contract right therein, which is protected by this clause.<sup>7</sup> The right of an officer to a pension out of a public fund, is not a contract right, even if such fund is formed, in part, by deductions from his salary.<sup>8</sup> His right under certain circumstances by reason of length of service to share in a pension fund created in part by deductions from his salary is, if a property or contract right, not destroyed by a subsequent statute abolishing his office. Hence, such statute is not unconstitutional.<sup>9</sup>

Persons who have contracts with the state have no property

<sup>1</sup> *United States. Butler v. Commonwealth*, 51 U. S. (10 How.) 402, 13 L. ed. 472; *Wilson v. North Carolina*, 169 U. S. 586, 42 L. ed. 865; *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187.

*Arkansas. Vincenheller v. Reagan*, 69 Ark. 460, 64 S. W. 278.

*Georgia. Wall v. Morris*, 149 Ga. 632, 101 S. E. 683.

*Indiana. Coffin v. State*, 15 Ind. 157; *Tucker v. State*, 163 Ind. 403, 71 N. E. 140.

*Massachusetts. Donaghy v. Macy*, 167 Mass. 178, 45 N. E. 87.

*New Jersey. Hoboken v. Gear*, 27 N. J. L. 265.

*Pennsylvania. Commonwealth v. Moir*, 199 Pa. St. 534, 85 Am. St. Rep. 801, 53 L. R. A. 837, 49 Atl. 351.

*Wisconsin. State v. Trustees of Policemen's Pension Fund*, 121 Wis. 44, 98 N. W. 954.

In many states such statutes are unconstitutional because of other provisions of state constitutions. These questions are of course not discussed here.

<sup>2</sup> *Commonwealth v. Moir*, 199 Pa. St. 534, 85 Am. St. Rep. 801, 53 L. R. A. 837, 49 Atl. 351.

<sup>3</sup> *Vincenheller v. Reagan*, 69 Ark. 460, 64 S. W. 278.

<sup>4</sup> *Hoke v. Henderson*, 15 N. Car. 1, 25 Am. Dec. 677; *State's Prison v. Day*, 124 N. Car. 362, 46 L. R. A. 295, 32 S. E. 748.

<sup>5</sup> *State v. Wilson*, 121 N. Car. 425, 480, 61 Am. St. Rep. 672 (opinion in 61 Am. St. Rep. 672 not on this point), 28 N. E. 554.

<sup>6</sup> *Mial v. Ellington*, 131 N. Car. 134, 65 L. R. A. 697, 46 S. E. 961.

<sup>7</sup> *Butler v. Commonwealth*, 51 U. S. (10 How.) 402, 13 L. ed. 472; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587; *Perry County v. Lindeman*, 165 Ind. 186, 73 N. E. 912; *Moore v. State*, 67 Neb. 535, 93 N. W. 733; *Ex parte Lawrence*, 1 O. S. 431.

<sup>8</sup> *Penny v. Reis*, 132 U. S. 464, 33 L. ed. 426; *State v. Trustees of Policemen's Pension Fund*, 121 Wis. 44, 98 N. W. 954.

<sup>9</sup> *People v. Coler*, 173 N. Y. 103, 65 N. E. 956.

rights in the state agencies with which they deal. Hence, statutes changing such state agencies do not impair the obligation of contracts.<sup>10</sup>

**§ 3655. Invalid contracts.** An invalid contract is not protected by this clause.<sup>1</sup> A contract which is illegal,<sup>2</sup> or without consideration,<sup>3</sup> or indefinite,<sup>4</sup> or ultra vires,<sup>5</sup> as where a public cor-

<sup>10</sup> *New York v. Squire*, 145 U. S. 175, 36 L. ed. 666; *Isenberg v. Selvage*, 103 Ky. 200, 44 S. W. 974; *Atchafalaya Land Co. v. F. B. Williams Cypress Co.*, 146 La. 1047, 84 So. 351; *Shotwell v. Louisville, New Orleans & Texas Ry.*, 69 Miss. 541, 11 So. 455; *Nye v. Ross*, 17 R. I. 733, 16 L. R. A. 798, 24 Atl. 777.

<sup>1</sup> *United States. Bryan v. Board of Education*, 151 U. S. 639, 38 L. ed. 297; *Frellsen v. Crandell*, 217 U. S. 71, 54 L. ed. 670; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 9 A. L. R. 1420, 63 L. ed. 309; *Folsom v. Ninety-Six Township*, 59 Fed. 67.

**Alabama.** *Stevens v. Thames*, 204 Ala. 487, 86 So. 77.

**Georgia.** *Railroad Commission v. Louisville & Nashville Ry. Co.*, 140 Ga. 817, L. R. A. 1915E, 902, 80 S. E. 327.

**Louisiana.** *Louisiana Western Ry. Co. v. Crowley*, 142 La. 640, 77 So. 486.

**Montana.** *State v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799.

**Oregon.** *Woodburn v. Public Service Commission*, 82 Or. 114, L. R. A. 1917C, 98, 161 Pac. 391.

**Virginia.** *Richmond v. Chesapeake & Potomac Telephone Co.*, 127 Va. 612, 105 S. E. 127.

**Washington.** *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash. 330, L. R. A. 1917C, 574, 150 Pac. 133.

**West Virginia.** *Benwood v. Public Service Commission*, 75 W. Va. 127, L. R. A. 1915C, 261, 83 S. E. 295; *Charleston v. Public Service Commission*, 86 W. Va. 536, 103 S. E. 673.

**Wisconsin.** *Milwaukee Electric Railway & Light Co. v. Railroad Commis-*

*sion*, 153 Wis. 592, L. R. A. 1915F, 744, 142 N. W. 491; *Minneapolis, St. Paul & Sault St. Marie Ry. Co. v. Menasha Wooden Ware Co.*, 159 Wis. 130, L. R. A. 1915F, 732, 150 N. W. 411.

<sup>2</sup> *Zane v. Hamilton County*, 189 U. S. 370, 47 L. ed. 858; *Griffith v. Connecticut*, 218 U. S. 563, 54 L. ed. 1155 [affirming, 83 Conn. 1, 74 Atl. 1068]; *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340, 40 N. E. 626; *Noble v. Davison*, 177 Ind. 10, 96 N. E. 325.

As where it is usurious. *Hardin v. Trimmier*, 27 S. Car. 110, 3 S. E. 46.

Or where an assignment to evade exemption laws is forbidden by statute. *Bishop v. Middleton*, 43 Neb. 10, 26 L. R. A. 445, 61 N. W. 129.

<sup>3</sup> *United States. Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229.

**Connecticut.** *Lord v. Litchfield*, 36 Conn. 116, 4 Am. Rep. 41.

**Massachusetts.** *Hardy v. Waltham*, 24 Mass. (7 Pick.) 110.

**Missouri.** *State v. Gilmore*, 141 Mo. 506, 42 S. W. 817.

**New York.** *People v. Commissioners*, 47 N. Y. 501.

**North Dakota.** *Synod of Dakota v. State*, 2 S. D. 366, 14 L. R. A. 418, 50 N. W. 632.

So with promises to exempt from taxation. *Lord v. Litchfield*, 36 Conn. 116, 4 Am. Rep. 41 [overruling, *Atwater v. Woodbridge*, 6 Conn. 223, 16 Am. Dec. 46]; *Bradley v. McAtee*, 70 Ky. (7 Bush) 667, 3 Am. Rep. 309.

<sup>4</sup> *Tacoma Land Co. v. Young*, 18 Wash. 495, 52 Pac. 244.

<sup>5</sup> *United States. New Orleans Water-*

poration attempts to grant a franchise in excess of its powers,<sup>6</sup> or where conditions precedent have not been complied with, as where certain franchises were to vest when electric light works were put into successful operation and this was never done,<sup>7</sup> or where the necessary consent of the city authorities was never obtained,<sup>8</sup> or where the ordinance was not approved by a majority of the tax payers as required by statute,<sup>9</sup> is not protected against impairment by subsequent legislation.

An unconstitutional statute,<sup>10</sup> or ordinance,<sup>11</sup> can not confer contract rights within the protection of this clause.<sup>12</sup>

If a contract is forbidden by law when made, the parties thereto have no vested interest in the consequences which follow therefrom;<sup>13</sup> and the obligation of such contract is said not to be affected by a change of judicial decision.<sup>14</sup>

works Co. v. Rivers, 115 U. S. 674, 29 L. ed. 525; New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 L. ed. 943; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. ed. 341.

Alabama. Stevens v. Thames, 204 Ala. 487, 86 So. 77.

California. Pinney v. Los Angeles Gas & Electric Corporation, 168 Cal. 12, L. R. A. 1915C, 282, 141 Pac. 620.

Florida. State v. Burr, — Fla. —, 84 So. 61.

Idaho. Sandpoint Water & Light Co. v. Sandpoint, 31 Ida. 498, L. R. A. 1918F, 1106, 173 Pac. 972.

Maryland. Westminster Water Co. v. Westminster, 98 Md. 551, 56 Atl. 990.

Oregon. Woodburn v. Public Service Commission, 82 Or. 114, L. R. A. 1917C, 98, 161 Pac. 391.

Utah. Salt Lake City v. Utah Light & Traction Co., 52 Utah 210, 3 A. L. R. 715, 173 Pac. 556.

Washington. State v. Superior Court, 67 Wash. 37, L. R. A. 1915C, 287, 120 Pac. 861.

West Virginia. Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739, 50 L. R. A. 142, 35 S. E. 994; Baltimore & Ohio Ry. v. Public Service Commission, 81 W. Va. 457, L. R. A. 1918D, 268, 94 S. E. 545; Charleston v. Public

Service Commission, 86 W. Va. 536, 103 S. E. 673.

Wisconsin. Milwaukee Electric Railway & Light Co. v. Railroad Commission, 153 Wis. 592, L. R. A. 1915F, 744, 142 N. W. 491; Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Menasha Wooden Ware Co., 159 Wis. 130, L. R. A. 1915F, 732, 150 N. W. 411.

<sup>6</sup> See § 3664.

<sup>7</sup> Capitol City Light & Fuel Co. v. Tallahassee, 42 Fla. 462, 28 So. 810.

<sup>8</sup> Underground Ry. v. New York, 116 Fed. 952.

<sup>9</sup> Louisiana Western Ry. Co. v. Crowley, 142 La. 640, 77 So. 486.

<sup>10</sup> State v. Stearns, 72 Minn. 200, 75 N. W. 210 [reversed on another point in Stearns v. Minnesota, 179 U. S. 223, 45 L. ed. 162].

<sup>11</sup> Covington v. Commonwealth (Ky.), 39 S. W. 836.

<sup>12</sup> A common illustration of this rule is the statute purporting to bargain away the police power.

See §§ 3690 et seq.

<sup>13</sup> Oliver County v. Louisville Realty Association, 156 Ky. 628, 51 L. R. A. (N.S.) 293, 161 S. W. 570.

<sup>14</sup> Oliver County v. Louisville Realty Association, 156 Ky. 628, 51 L. R. A. (N.S.) 293, 161 S. W. 570.

**§ 3656. Statutes validating invalid contracts—Moral obligations.** The right to avoid a contract under which the party avoiding it has received a valuable consideration is not a contract right, and therefore a subsequent statute which destroys this right to avoid the contract does not impair the obligation of contracts.<sup>1</sup> As far as this provision is concerned, the legislature may require a public corporation to recognize moral obligations, although they were not originally enforceable legally,<sup>2</sup> even if such original claims have been declared by the courts to be invalid.<sup>3</sup> In some cases, however, such statutes have been held to be invalid as an exercise

The court had originally held that such contract was enforceable in spite of the violation of the statute; but by change of decision it held that such contract was unenforceable. The court seemed to assume that a change of judicial decision might be a law impairing the obligation of the contract; although this is contrary to the weight of authority.

See § 3641.

<sup>1</sup> **United States.** *Satterlee v. Mathewson*, 27 U. S. (2 Pet.) 380, 7 L. ed. 458 [affirming, 16 S. & R. (Pa.) 169]; *Watson v. Mercer*, 33 U. S. (8 Pet.) 88, 8 L. ed. 876; *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 43 L. ed. 796.

**Illinois.** *Steger v. Traveling Men's Building & Loan Association*, 208 Ill. 236, 100 Am. St. Rep. 225, 70 N. E. 236.

**Indiana.** *Burget v. Merritt*, 155 Ind. 143, 57 N. E. 714.

**Minnesota.** *Wistar v. Foster*, 46 Minn. 484, 24 Am. St. Rep. 241, 49 N. W. 247; *Farnsworth Loan & Realty Co. v. Commonwealth Title Insurance & Trust Co.*, 84 Minn. 62, 86 N. W. 877.

**Montana.** *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446.

**Pennsylvania.** *Bleakney v. Farmers' & Mechanics' Bank*, 17 S. & R. (Pa.) 64, 17 Am. Dec. 635.

**Tennessee.** *Swope v. Jordan*, 107 Tenn. 166, 64 S. W. 52; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 45

Am. St. Rep. 700, 26 L. R. A. 509, 28 S. W. 668.

**Washington.** *Romaine v. State*, 7 Wash. 215, 34 Pac. 924.

"It can not be said that such legislation, though retrospective in its nature, impaired the obligation of the contract. It rather enables the parties to enforce the contract that they intended to make." *Gross v. United States Mortgage Co.*, 108 U. S. 477, 488, 27 L. ed. 795 [quoted in *Butler v. United States Building & Loan Association*, 97 Tenn. 670, 687, 37 S. W. 385]; *Atchafalaya Land Co. v. F. B. Williams Cypress Co.*, 146 La. 1047, 84 So. 351; *Bennington County Savings Bank v. Lowry*, 160 Wis. 659, 152 N. W. 463.

<sup>2</sup> **United States.** *Jefferson City Gaslight Co. v. Clark*, 95 U. S. 644, 24 L. ed. 521.

**New Jersey.** *Cleveland v. Jersey City Board of Finance*, 38 N. J. L. 259.

**Nebraska.** *Gibson v. Sherman County*, 97 Neb. 79, 149 N. W. 107.

**New York.** *Wrought Iron Bridge Co. v. Attica*, 119 N. Y. 204, 23 N. E. 542.

**Ohio.** *State v. Henry County*, 41 O. S. 423.

**Washington.** *State v. Seattle*, 60 Wash. 241, 110 Pac. 1008.

<sup>3</sup> *Gibson v. Sherman County*, 97 Neb. 79, 149 N. W. 107; *Wrought Iron Bridge Co. v. Attica*, 119 N. Y. 204, 23 N. E. 542.

of judicial power,<sup>4</sup> especially if the legislature attempts to fix the amount of the claim and to pass on its validity.<sup>5</sup> A law making legal a past payment of license fees for the sale of intoxicating liquors made to the wrong officers,<sup>6</sup> or one requiring a county to pay money received by it on invalid bonds,<sup>7</sup> or one making valid a contract for paving a city street, invalid when made because the statutory notice had not been given,<sup>8</sup> is not affected by this clause.

However, where nothing of value has been received by the party seeking to avoid the contract, it seems that a curative act is unconstitutional. Under an unconstitutional statute warrants were given for the scalps of certain wild animals. It was held that a subsequent curative act, attempting to validate such warrants was itself unconstitutional.<sup>9</sup>

A statute which authorizes certain classes of transactions in the future will not be construed as having a retroactive effect.<sup>10</sup>

**§ 3657. Void transactions.** If the parties have made an actual agreement upon a valuable consideration, a subsequent statute may make such contract valid even if when made it was void and not merely voidable.<sup>1</sup> A statute making valid a prior contract of a foreign corporation which when made is invalid by reason of omission to comply with the statute regulating its admission to do business,<sup>2</sup> or because of the omission of the corporation to pay to

<sup>4</sup> *Harris v. County Commissioners*, 130 Md. 488, L. R. A. 1917E, 824, 100 Atl. 733.

<sup>5</sup> *Harris v. County Commissioners*, 130 Md. 488, L. R. A. 1917E, 824, 100 Atl. 733; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

<sup>6</sup> *State v. Patterson*, 53 N. J. L. 120, 20 Atl. 828.

<sup>7</sup> *New York Life Ins. Co. v. Cuyahoga Co.*, 106 Fed. 123, 45 C. C. A. 233; *State v. Dickerman*, 16 Mont. 278, 40 Pac. 698.

<sup>8</sup> *Windsor v. Des Moines*, 101 Ia. 343, 70 N. W. 214.

<sup>9</sup> *Felix v. Board*, 62 Kan. 832, 84 Am. St. Rep. 424, 62 Pac. 667.

<sup>10</sup> *Willcox v. Edwards*, 162 Cal. 455, 123 Pac. 276; *Schaun v. Brandt*, 116 Md. 560, 82 Atl. 551; *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420.

<sup>1</sup> *Satterlee v. Matthewson*, 27 U. S. (2 Pet.) 380, 7 L. ed. 458; *Welch v.*

*Wadsworth*, 30 Conn. 149, 79 Am. Dec. 236; *Burget v. Merritt*, 155 Ind. 143, 57 N. E. 714.

<sup>2</sup> *United States*. To the same effect, see *Gross v. United States Mortgage Co.*, 108 U. S. 477, 27 L. ed. 795; *West Side Belt Ry. v. Pittsburgh Construction Co.*, 219 U. S. 92, 55 L. ed. 107 [affirming, 227 Pa. St. 90, 75 Atl. 1029].

*Illinois*. *United States Mortgage Co. v. Gross*, 93 Ill. 483.

*Indiana*. *Clark v. Darr*, 156 Ind. 692, 60 N. E. 688.

*Montana*. *Mutual Benefit Life Ins. Co. v. Winne*, 20 Mont. 20, 49 Pac. 446.

*Tennessee*. *Swope v. Jordan*, 107 Tenn. 166, 64 S. W. 52; *Butler v. Loan Association*, 97 Tenn. 679, 37 S. W. 385.

*Wisconsin*. *Bennington County Savings Bank v. Lowry*, 160 Wis. 659, 152 N. W. 463.

the state the proportion of its dividends required by statute,<sup>3</sup> or one making valid a conveyance by expectant heirs in certain cases,<sup>4</sup> or by a married woman after a divorce has been granted to her without proper service on her husband, although he had actual notice of the pendency of the action,<sup>5</sup> or one curing the defective acknowledgment of a corporate charter,<sup>6</sup> or curing a defect in a conveyance, which consisted in its acknowledgment before a notary who was a stockholder in a corporation which was a party thereto,<sup>7</sup> or one making valid a contract invalid when made because unstamped,<sup>8</sup> or contracts invalid when made because made on Sunday,<sup>9</sup> or unenforceable for want of a writing,<sup>10</sup> is in each case valid.

Whether the repeal of a statute which made certain transactions invalid as usurious, renders such transactions valid, is a question upon which there has been a conflict of authority. The greater number of courts have held that a contract which is invalid for usury becomes enforceable if the statutes are repealed, or are amended so as to make such contract valid.<sup>11</sup> This result is explained, in part, on the theory that the usury statutes are penal in their nature, and that a penalty can not be enforced after the repeal of the statute, and, in part, on the theory that the contract is binding as between the parties, although the state, out of con-

<sup>3</sup> *Bleakney v. Farmers' & Mechanics' Bank*, 17 S. & R. (Pa.) 64, 17 Am. Dec. 635.

<sup>4</sup> *Burget v. Merritt*, 155 Ind. 143, 57 N. E. 714.

<sup>5</sup> *Wistar v. Foster*, 46 Minn. 484, 24 Am. St. Rep. 241, 49 N. W. 247.

<sup>6</sup> *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 45 Am. St. Rep. 700, 26 L. R. A. 509, 28 S. W. 668.

<sup>7</sup> *Steger v. Traveling Men's Building & Loan Association*, 208 Ill. 236, 100 Am. St. Rep. 225, 70 N. E. 236.

<sup>8</sup> *State v. Norwood*, 12 Md. 195 (the mere repeal of the stamp act is held to make such contracts valid).

<sup>9</sup> *Berry v. Clary*, 77 Me. 482, 1 Atl. 360.

<sup>10</sup> *Hurley v. Hurley*, 110 Va. 31, 65 S. E. 472.

<sup>11</sup> *United States. Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682; *Petterson v. Berry*, 125 Fed. 902, 60 C. C. A. 610.

*Alabama. Montgomery Mutual Building & Loan Association v. Robinson*, 69 Ala. 413.

*Arkansas. Woodruff v. Scruggs*, 27 Ark. 26, 11 Am. Rep. 777.

*Florida. Coe v. Muller*, 74 Fla. 399, 77 So. 88.

*Georgia. Bibb County Loan Association v. Richards*, 21 Ga. 592.

*Iowa. Edworthy v. Iowa Savings & Loan Association*, 114 Ia. 220, 86 N. W. 315; *Iowa Savings & Loan Association v. Heidt*, 107 Ia. 297, 70 Am. St. Rep. 197, 43 L. R. A. 689, 77 N. W. 1050.

*New York. Curtis v. Leavitt*, 15 N. Y. 9.

*Tennessee. Hardaway v. Lilly* (Tenn. Ch. App.), 48 S. W. 712.

*Virginia. Danville v. Pace*, 66 Va. (25 Gratt.) 1, 18 Am. Rep. 663; *Smoot v. People's Perpetual Loan & Building Association*, 95 Va. 686, 41 L. R. A. 589, 29 S. E. 746.

siderations of public policy, refuses to give effect thereto, and that if the state changes its theory of public policy, it may give effect to such contract without impairing its obligation. It is true that usury contracts are not illegal or even void in the ordinary sense of the term.<sup>12</sup> In other jurisdictions, usurious contracts are regarded as governed by the rules which ordinarily apply to illegal contracts, and such contract can not be made valid by subsequent legislation.<sup>13</sup> This result is justified upon the theory that they are not contracts at all, in legal effect, and that such invalidity is not merely a penalty, which can be abolished after it has been incurred, at the will of the legislature.<sup>14</sup> The difference in result which is thus noted is due, in part, to differences in the wording of the statute, and, in part, to a divergence in judicial theory as to the effect of statutes which are practically identical.

**§ 3658. Repeal of curative act.** A subsequent curative act may itself become a part of the contract upon renewal so that it can not be repealed thereafter to the impairment of the obligation of such contract.<sup>1</sup> If a contract entered into by a foreign corporation which has not complied with the statute which regulates its admission to do business, has been made valid by subsequent legislation, it can not be made invalid by repeal of such legislation.<sup>2</sup> A loan was made by a loan association when the law then in force made such loan usurious on account of the premiums charged. Subsequently, the statute was modified so as to permit such loans. The loan was then renewed, a new note being given. Subsequently this modification of the statute was itself repealed. It was held that the loan made valid by its renewal under the second statute could not be made invalid by the third.<sup>3</sup>

**§ 3659. Executory and executed contracts.** Properly speaking, a contract is an executory promise.<sup>1</sup> While this clause is generally invoked to protect executory contracts,<sup>2</sup> it has

<sup>12</sup> See §§ 1007 et seq.

<sup>13</sup> *Long v. Gresham*, 148 Ga. 170, 96 S. E. 211; *Austin v. Burgess*, 36 Wis. 186.

<sup>14</sup> *Austin v. Burgess*, 36 Wis. 186.

<sup>1</sup> *Bennington County Savings Bank v. Lowry*, 160 Wis. 659, 152 N. W. 463.

<sup>2</sup> *Bennington County Savings Bank v. Lowry*, 160 Wis. 659, 152 N. W. 463.

<sup>3</sup> *Edworthy v. Iowa Savings & Loan*

*Association*, 114 Ia. 220, 86 N. W. 315.

After full performance on both sides it is no longer a contract, although it has been one.

<sup>1</sup> See §§ 41 et seq.

<sup>2</sup> *Stephens v. Southern Pacific Ry.*, 109 Cal. 86, 50 Am. St. Rep. 17, 29 L. R. A. 751, 41 Pac. 783; *McMurray v. Sidwell*, 155 Ind. 560, 80 Am. St. Rep. 255, 58 N. E. 722.

been held to apply as well to executed contracts.<sup>3</sup> This was probably due to the fact that the constitution of the United States, prior to the Fourteenth Amendment, did not contain any provision which forbade a state to take property without due process of law; and to the fact that the prohibition against *ex post facto* legislation was held to apply only to criminal legislation.<sup>4</sup> The supreme court was, therefore, compelled "to toil up hill, in order to bring within the restriction on the states to pass laws impairing the obligation of contracts, the most obvious cases to which the constitution was intended to extend its protection."<sup>5</sup> Nevertheless, it made the journey, successfully if not artistically, by holding that the term "contract" included executed transactions.<sup>6</sup>

If lands have been granted by the state,<sup>7</sup> including a grant of a right to the possession and use as distinct from the title,<sup>8</sup> or if lands have been dedicated to a public use, such as a park so as to confer easements upon the abutting property owners,<sup>9</sup> or if lands have been bought at a tax sale,<sup>10</sup> or acquired other-

<sup>3</sup> *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 3 L. ed. 162; *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691; *Houston & Texas Central Ry. v. Texas*, 177 U. S. 66, 44 L. ed. 673; *Omaha Water Co. v. Omaha*, 147 Fed. 1, 12 L. R. A. (N.S.) 736; *Saratoga State Waters Corporation v. Pratt*, 227 N. Y. 429, 125 N. E. 834; *Houston & Texas Central Ry. v. Texas & Pacific Ry.*, 70 Tex. 649, 8 S. W. 498.

"Neither party could undo what had been fully executed and completed, and the law therefore implies a contract that neither party will attempt to do so, or in other words the law implies a contract that the payments made shall not be thereafter repudiated or denied." *Houston & Texas Central Ry. v. Texas*, 177 U. S. 66, 98, 44 L. ed. 673; *Franklin County Grammar School v. Bailey*, 62 Vt. 467, 10 L. R. A. 405, 20 Atl. 820.

<sup>4</sup> *Calder v. Bull*, 3 U. S. (3 Dall.) 386, 1 L. ed. 648.

<sup>5</sup> Note by Mr. Justice Johnson in 27 U. S. (2 Pet.) 681 (686) to *Satterlee v.*

*Matthewson*, 27 U. S. (2 Pet.) 380, 7 L. ed. 458.

<sup>6</sup> *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 3 L. ed. 162.

<sup>7</sup> *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 3 L. ed. 162; *Minnesota v. Duluth & Iron Range Ry.*, 97 Fed. 353; *Saratoga State Waters Corporation v. Pratt*, 227 N. Y. 429, 125 N. E. 834.

<sup>8</sup> *Saratoga State Waters Corporation v. Pratt*, 227 N. Y. 429, 125 N. E. 834.

<sup>9</sup> *Chicago v. Ward*, 160 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849, 48 N. E. 927.

<sup>10</sup> *United States. Tracy v. Reed*, 38 Fed. 60, 2 L. R. A. 773.

*Arkansas. St. Louis I. M. & S. Ry. Co. v. Alexander*, 49 Ark. 190, 4 S. W. 753.

*Florida. Hull v. State*, 29 Fla. 79, 30 Am. St. Rep. 95, 16 L. R. A. 308, 11 So. 97; *State v. Bradshaw*, 39 Fla. 137, 22 So. 296.

*Kansas. Morgan v. Miami County*, 27 Kan. 89.

*Minnesota. Merrill v. Dearing*, 32 Minn. 479, 21 N. W. 721.

wise,<sup>11</sup> such conveyances are held to be executed contracts, and therefore statutes which take away such rights are held to be invalid as impairing the obligation of contracts. This principle was applied by the supreme court of the United States at an early date,<sup>12</sup> before there was a provision in the constitution of the United States restraining a state from depriving persons of private property without due process of law. Accordingly, at that time, private property could be protected against state action only by an extension of the clause protecting the obligation of contracts. The precedent thus set has been followed in the later cases, and has resulted in protecting conveyances which were not, properly speaking, the result of contract. Executed conveyances are thus protected even if without consideration.<sup>13</sup> A husband's right to reduce his wife's choses in action to possession can not be taken away by a subsequent statute.<sup>14</sup>

While executed conveyances are thus protected, the legislature may change the laws of descent so as to make property pass by descent to a child previously illegitimate but thereby made legitimate,<sup>15</sup> or may make additional provisions for escheat,<sup>16</sup> or restrict the power to devise realty.<sup>17</sup> It may make prospective regulations as to filing for record and the like, if a reasonable time is given in which to comply therewith.<sup>18</sup>

The exercise of the right of eminent domain is not an unconstitutional impairment of the obligation of contracts.<sup>19</sup> A contingent claim to a reversion expectant on the dissolution of a corporation is not such a vested right that it can not be taken away by a statute authorizing the sale of such realty under a judicial sale.<sup>20</sup>

South Dakota. *State v. Flypaa*, 3 S. D. 586, 54 N. W. 599.

North Dakota. *Roberts v. First National Bank*, 8 N. D. 504, 79 N. W. 1049.

Wisconsin. *Robinson v. Howe*, 13 Wis. 341.

<sup>11</sup> *Evans v. Cropp*, 141 Ky. 514, 133 S. W. 221; *Burt v. Busch*, 82 Mich. 506, 46 N. W. 790.

<sup>12</sup> *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 3 L. ed. 162.

<sup>13</sup> *Franklin County Grammar School v. Bailey*, 62 Vt. 467, 10 L. R. A. 405, 20 Atl. 820.

<sup>14</sup> *Leete v. State Bank*, 141 Mo. 574, 42 S. W. 1074.

<sup>15</sup> *Hughes v. Murdock*, 45 La. Ann. 935, 13 So. 182.

<sup>16</sup> *Hamilton v. Brown*, 161 U. S. 256, 40 L. ed. 691.

<sup>17</sup> *Patton v. Patton*, 39 O. S. 590.

<sup>18</sup> See § 3683.

<sup>19</sup> *Baltimore & Fredricktown Turnpike Road Co. v. Baltimore, Cantonsville & Ellicott's Mills Passenger Ry.*, 81 Md. 247, 31 Atl. 854; *Cox v. Revelle*, 125 Md. 579, L. R. A. 1915E, 443, 94 Atl. 203.

<sup>20</sup> *Bass v. Roanoke Navigation & Waterpower Co.*, 111 N. Car. 439, 19 L. R. A. 247, 16 S. E. 402.

**§ 3660. Corporate charters.** A grant of authority to be a corporation and to exercise certain corporate powers, appears to be a license or concession on the part of the state which may be exercised as long as the state grants it, but which may be resumed by the state whenever it sees fit. This was apparently the original view in this country; but in a case decided by the supreme court of the United States,<sup>1</sup> the doctrine that the term "contract" in this constitutional provision included conveyances and the conveyances were protected by this clause, was still further extended. By analogy a charter of a corporation was treated as a grant, and it was held that such charter might contain a contract between the state and the corporation which would be protected by this provision. The decision was widely at variance with the view of law which seems to have been generally entertained by the bench and the bar; and, as a result, the states promptly enacted statutes or adopted constitutional amendments by which they reserved the right to control and modify charters and franchises.<sup>2</sup> The rule itself has been challenged both on principle and on precedent,<sup>3</sup> but it has been followed by the courts so frequently,<sup>4</sup> that it must be

<sup>1</sup> *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 4 L. ed. 620.

See discussion in *Greenwood v. Union Freight Ry.*, 105 U. S. 13, 26 L. ed. 961.

<sup>2</sup> See §§ 3688 et seq.

<sup>3</sup> For discussion and criticism of this case, see *A New View of the Dartmouth College Case*, by Charles Doe, 6 *Harvard Law Review* 161, 213; *The Dartmouth College Case*, by Ephriam A. Otis, 27 *American Law Review* 525; *Status and Tendencies of the Dartmouth College Case*, by Alfred Russell, 30 *American Law Review* 321; and *Should the Dartmouth College Decision be Recalled*, by James C. Jenkins, 51 *American Law Review* 711.

<sup>4</sup> *United States. Chicago, Burlington & Quincy Ry. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377; *Houston & Texas Central Ry. v. Texas*, 170 U. S. 243, 42 L. ed. 1023; *Carondelet Canal & Navigation Co. v. Louisiana*, 233 U. S. 362, 58 L. ed. 1001 [reversing, 129 La. 279, 56 So. 137];

*Bank of Oxford v. Love*, 250 U. S. 603, 63 L. ed. 1165 (obiter); *Central Trust Co. v. Citizens St. Ry.*, 82 Fed. 1.

**Arkansas.** *Arkansas State Co. v. State*, 94 Ark. 27, 140 Am. St. Rep. 103, 27 L. R. A. (N.S.) 255, 125 S. W. 1001.

**Kentucky.** *Foster v. Frankfort, Lexington & Versailles Turnpike Road Co.* (Ky.), 65 S. W. 840; *Slade v. Lexington*, 141 Ky. 214, 32 L. R. A. (N.S.) 201, 132 S. W. 404.

**Massachusetts.** In re opinion of Justices, — Mass. —, 131 N. E. 31.

**Michigan.** *Highland Park v. Detroit & Birmingham Plank Road Co.*, 95 Mich. 489, 55 N. W. 382.

**Mississippi.** *Southern Realty Co. v. Tchula Co-operative Stores*, 114 Miss. 309, 75 So. 121.

**Ohio.** *Ross County Bank v. Lewis*, 5 O. S. 447.

**Oregon.** *Lorntsen v. Union Fishermen's Co.*, 71 Or. 540, 143 Pac. 621.

**Pennsylvania.** *Manheim Borough v. Manheim Water Co.*, 229 Pa. St. 177, 78 Atl. 93.

regarded as established law, as far as frequent repetition of an erroneous construction can alter the effect of a constitution or a statute.

This rule does not mean that every provision of the charter of a corporation must be a contract, but merely that as far as it is contractual in the contemplation of the law, it is protected by this constitutional provision.<sup>5</sup> A right to sell lands formerly used for toll-house purposes to any purchaser,<sup>6</sup> or a right to maintain toll-gates on a plankroad and to take toll,<sup>7</sup> or a right that no competing turnpike should be established,<sup>8</sup> or a land grant offered for each mile of road constructed,<sup>9</sup> are contract rights that can not be taken away by subsequent legislation.

Not every provision in the charter is contractual in its nature, however. Only provisions which either vest property in the corporation or may influence persons to take stock in the corporation constitute contracts.<sup>10</sup> Power to consolidate with competing corporations may be taken away,<sup>11</sup> and so may power to receive sub-

**Tennessee.** Turnpike Co. v. Davidson County, 106 Tenn. 258 [sub nomine, Nashville, Shelbyville & Murfreesboro Turnpike Co. v. Davidson County, 61 S. W. 68]; State v. Lebanon & Nashville Turnpike Co. (Tenn. Ch. App.), 61 S. W. 1096.

**Utah.** Garey v. St. Joe Mining Co., 32 Utah 497, 12 L. R. A. (N.S.) 554, 91 Pac. 369.

**Wisconsin.** Attorney-General v. Chicago, Milwaukee & St. Paul Ry., 35 Wis. 425; State v. Railway Cos., 128 Wis. 449, 108 N. W. 594.

This clause applies to charters of religious and charitable corporations. In re opinion of Justices, — Mass. —, 131 N. E. 31.

<sup>5</sup>It is "not the charter which is protected but only any contract the charter may contain." Stone v. Mississippi, 101 U. S. 814, 817, 25 L. ed. 1079.

See to the same effect, Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 L. ed. 1102; State v. Great

Northern Ry., 100 Minn. 445, 10 L. R. A. (N.S.) 250, 111 N. W. 289.

<sup>6</sup>Foster v. Frankfort, Lexington & Versailles Turnpike Road Co. (Ky.), 65 S. W. 840 (hence a statute providing that they can be sold only to the owner of abutting land is invalid).

<sup>7</sup>Highland Park v. Detroit & Birmingham Plank Road Co., 95 Mich. 489, 55 N. W. 382.

<sup>8</sup>Nashville & Murfreesboro Turnpike Co. v. Davidson Co., 106 Tenn. 258, 61 S. W. 68.

<sup>9</sup>Houston & Texas Central Ry. v. Texas, 170 U. S. 243, 42 L. ed. 1023 (after an important part of the road has been completed).

<sup>10</sup>Pearsall v. Great Northern Ry., 161 U. S. 646, 40 L. ed. 838; Bank of Oxford v. Love, 111 Miss. 699, 8 A. L. R. 894, 72 So. 133 [affirmed, Bank of Oxford v. Love, 250 U. S. 603, 63 L. ed. 1165].

<sup>11</sup>Pearsall v. Great Northern Ry., 161 U. S. 646, 40 L. ed. 838 [reversing, 73 Fed. 933]; Louisville & Nashville Ry. v. Kentucky, 161 U. S. 677, 40 L. ed. 849.

## 6335. IMPAIRMENT OF OBLIGATION OF CONTRACT § 3661

scriptions from municipal corporations,<sup>12</sup> or a statute fixing the proportion of bonds to stock.<sup>13</sup> A banking corporation may be made subject to the supervision of bank examiners.<sup>14</sup>

These rules, however, have little application in contract law, since charters of corporations, conveyances, and the like, are usually classed with contracts solely for invoking the protection of this clause. Further discussion here is therefore unnecessary, especially in view of the general reservation, by the state, of the power to modify corporate charters.<sup>15</sup>

Franchises may be modified by a valid exercise of the police power.<sup>16</sup>

**§ 3661. Rights of stockholders as against corporation.** As a result of the rule in the *Dartmouth College* case,<sup>1</sup> that the charter of a corporation may constitute a contract, the rights of stockholders in the corporation of which they are members, are held to be contract rights, the obligation of which can not be impaired by subsequent legislation.<sup>2</sup> The right of stockholders to vote in proportion to the number of shares held can not be altered;<sup>3</sup> but under a constitution reserving the power to alter, amend or repeal future acts of incorporation, cumulative voting may be provided for by statute.<sup>4</sup> An amendment can not authorize a pre-existing mutual insurance company to transform itself into a joint-stock

<sup>12</sup> *Norton v. Taxing District*, 129 U. S. 479, 32 L. ed. 774; *Wilkes County v. Call*, 123 N. Car. 308, 44 L. R. A. 252, 31 S. E. 481 [citing, *Galveston, Harrisburg & San Antonio Ry. v. Texas*, 170 U. S. 226, 42 L. ed. 1017; *Citizens' Savings & Loan Association v. Perry County*, 156 U. S. 692, 39 L. ed. 585; *Norton v. Brownville*, 129 U. S. 479, 32 L. ed. 774; and citing as overruled, *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. ed. 628; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544].

<sup>13</sup> *C. H. Venner Co. v. United States Steel Corporation*, 116 Fed. 1012.

<sup>14</sup> *Bank of Oxford v. Love*, 111 Miss. 699, 8 A. L. R. 894, 72 So. 133 [affirmed, *Bank of Oxford v. Love*, 250 U. S. 603, 63 L. ed. 1165].

<sup>15</sup> See §§ 3688 et seq.

<sup>16</sup> See §§ 3690 et seq.

<sup>1</sup> See § 3660.

<sup>2</sup> *Clearwater v. Meredith*, 68 U. S. (1 Wall.) 25, 24 L. ed. 624; *Peterson v. Gibson*, 191 Ill. 365, 85 Am. St. Rep. 263, 54 L. R. A. 836, 61 N. E. 127 [citing, *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065; *Association v. Kentner*, 188 Ill. 431, 58 N. E. 966]; *Intiso v. Metropolitan Saving & Loan Association*, 68 N. J. L. 588, 53 Atl. 206; *Schwarzwaelder v. German Mutual Fire Insurance Co.*, 59 N. J. Eq. 589, 44 Atl. 769; *Huber v. Martin*, 127 Wis. 412, 3 L. R. A. (N.S.) 653, 105 N. W. 1031.

<sup>3</sup> *Tucker v. Russell*, 82 Fed. 263.

<sup>4</sup> *Looker v. Maynard*, 179 U. S. 46, 45 L. ed. 79; *Gregg v. Granby Mining & Smelting Co.*, 164 Mo. 616, 65 S. W. 312.

company against the will of one pre-existing member.<sup>5</sup> A member of a beneficial association who has, when he becomes a member, a right to change the beneficiary of his insurance certificate, can not thereafter be deprived of such right.<sup>6</sup> On the other hand, it is said that there are no vested rights in a mutual benefit certificate before the death of the insured; and that the rules of the society may be changed so as to deprive him of additional insurance in case of non-payment of premiums.<sup>7</sup>

It is generally said that the legislature may authorize consolidation of corporations even though some of the stockholders dissent,<sup>8</sup> and that the shares of dissenting stockholders may be appropriated by eminent domain,<sup>9</sup> although they can not be compelled to become members of the new corporation, at least if the state has not reserved the power to modify the corporate charter.<sup>10</sup> On the other hand, a provision for reorganizing a benefit society without the consent of all its members has been held to be unconstitutional.<sup>11</sup> The rights of a withdrawing shareholder of a building association can not be impaired by subsequent legislation.<sup>12</sup>

On the other hand, a change in the method of enforcing existing rights is valid.<sup>13</sup> A provision in effect allowing dividends to be paid in property instead of in money is valid.<sup>14</sup> A statute which requires a stockholder to see that a transfer of stock is entered in the books of a corporation at the office of the secretary of state,

<sup>5</sup> *Schwarzwaelder v. German Mutual Fire Ins. Co.*, 59 N. J. Eq. 589, 44 Atl. 769.

<sup>6</sup> *Peterson v. Gibson*, 191 Ill. 365, 85 Am. St. Rep. 263, 54 L. R. A. 836, 61 N. E. 127 [citing, *Baldwin v. Begley*, 185 Ill. 180, 56 N. E. 1065; *Covenant Mutual Life Association v. Kentner*, 188 Ill. 431, 58 N. E. 966].

<sup>7</sup> *Westerman v. Supreme Lodge*, 196 Mo. 670, 5 L. R. A. (N.S.) 1114, 94 S. W. 470.

<sup>8</sup> *Clearwater v. Meredith*, 68 U. S. (1 Wall.) 25, 17 L. ed. 604; *Lauman v. Lebanon Valley Ry. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685; *Winfrey v. Riverside Cotton Mills Co.*, 113 Va. 717, 75 S. E. 309.

<sup>9</sup> *Offield v. New York, New Haven & Hartford Ry.*, 203 U. S. 372, 51 L. ed.

231; *Spencer v. Seaboard Air Line Ry. Co.*, 137 N. Car. 107, 1 L. R. A. (N.S.) 604, 49 S. E. 96.

<sup>10</sup> *Clearwater v. Meredith*, 68 U. S. (1 Wall.) 25, 17 L. ed. 604; *Lauman v. Lebanon Valley Ry. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685.

<sup>11</sup> *Huber v. Martin*, 127 Wis. 412, 3 L. R. A. (N.S.) 653, 105 N. W. 1031.

The essential feature of this reorganization scheme, however, was to turn the surplus over to the promoters of the new organization.

<sup>12</sup> *Intiso v. Metropolitan Savings & Loan Association*, 68 N. J. L. 588, 53 Atl. 206.

<sup>13</sup> *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N.S.) 779, 93 Pac. 168.

<sup>14</sup> *Merchant v. Western Land Association*, 56 Minn. 327, 57 N. W. 931.

in order to determine his liability for the debts of the corporation does not impair the obligation of his contract.<sup>16</sup>

**§ 3662. Liabilities of stockholders to creditors.** The liability of a stockholder to the creditors of a corporation is generally held to be so far contractual in its nature that it can not be modified by legislation subsequent to the debts involved,<sup>1</sup> either increasing such liability,<sup>2</sup> as where an assessment on stock, fully paid up, is authorized,<sup>3</sup> or diminishing it,<sup>4</sup> as where a subsequent statute repeals a prior statute which imposed a personal liability on the stockholders in an amount in addition to that paid in on their stock equal to the par value thereof.<sup>5</sup> If an obligation is incurred by a corporation at a time when each creditor may maintain his action to enforce the liability of stockholders, the legislature can not modify such right by providing that an action is to be brought in favor of all creditors, by a receiver.<sup>6</sup>

A statute making valid certain defectively attempted incorporations, does not affect a prior right of action against the incorporators personally for the debts of such organization.<sup>7</sup>

<sup>16</sup> *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N.S.) 779, 93 Pac. 168.

<sup>1</sup> *United States. Hawthorne v. Calef*, 60 U. S. (2 Wall.) 10, 17 L. ed. 776; *Pinney v. Nelson*, 183 U. S. 144, 46 L. ed. 125; *Evans v. Nellis*, 101 Fed. 920; *Webster v. Bowers*, 104 Fed. 627.

*Alabama. Central Agricultural & Mechanical Association v. Alabama Gold Life Ins. Co.*, 70 Ala. 120.

*Kansas. Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331; *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915B, 797, 119 Pac. 74.

*Minnesota. Yoncalla State Bank v. Gemmill*, 134 Minn. 334, L. R. A. 1917A, 1223, 159 N. W. 798.

*Missouri. Providence Savings Institution v. Jackson Place Skating & Bathing Rink*, 52 Mo. 552.

<sup>2</sup> *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557, 18 N. W. 356; *Enterprise Ditch Co. v. Moffit*, 58 Neb. 642, 76 Am. St. Rep. 122, 45 L. R. A. 647, 79 N. W. 560; *Ireland v. Palestine Braffetsville, New Paris & New Westville Turnpike Co.*, 19 O. S. 369.

<sup>3</sup> *Yoncalla State Bank v. Gemmill*, 134 Minn. 334, L. R. A. 1917A, 1223, 159 N. W. 798; *Enterprise Ditch Co. v. Moffit*, 58 Neb. 642, 76 Am. St. Rep. 122, 45 L. R. A. 647, 79 N. W. 560; *Garey v. St. Joe Mining Co.*, 32 Utah 497, 12 L. R. A. (N.S.) 554, 91 Pac. 369.

*Contra*, under a reservation of power to alter the charter. *Somerville v. St. Louis Min. & Mill. Co.*, 46 Mont. 268, L. R. A. 1915B, 811, 127 Pac. 464.

<sup>4</sup> *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163; *Converse v. Hamilton*, 224 U. S. 243, 56 L. ed. 749; *Walterscheid v. Boudish*, 77 Kan. 665, 96 Pac. 56; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 45 Am. St. Rep. 700, 26 L. R. A. 509, 28 S. W. 668.

<sup>5</sup> *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915B, 797, 119 Pac. 74; *Barton National Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

<sup>6</sup> *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915B, 797, 119 Pac. 74.

<sup>7</sup> *Christian v. Bowman*, 49 Minn. 99, 51 N. W. 663.

**§ 3663. Grant of franchise as contract.** A grant of public franchises may be under competent political authority and in such form that when duly accepted it constitutes a contract within the protection of this clause of the constitution.<sup>1</sup> A grant of a right of way, to a railroad by a municipal corporation,<sup>2</sup> or by

<sup>1</sup> **United States.** *Chicago v. Sheldon*, 76 U. S. (9 Wall.) 50, 19 L. ed. 594; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *City Ry. Co. v. Citizens' Street Ry.*, 166 U. S. 557, 41 L. ed. 1114; *Cleveland v. Cleveland Electric Ry.*, 201 U. S. 529, 50 L. ed. 854; *Russell v. Sebastian*, 233 U. S. 195, L. R. A. 1918E, 882, 58 L. ed. 912; *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, L. R. A. 1918E, 874, 59 L. ed. 184; *Detroit United Ry. v. Michigan*, 242 U. S. 238, 61 L. ed. 268; *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S. 574, L. R. A. 1918E, 865, 62 L. ed. 481.

**Alabama.** *Mobile Electric Co. v. Mobile*, 201 Ala. 607, 79 So. 39.

**California.** *Beverly Hills v. Los Angeles*, 175 Cal. 311, 165 Pac. 924.

**Indiana.** *Terre Haute, & Indiana Ry. v. State*, 159 Ind. 438, 65 N. E. 401.

**Iowa.** *Burlington v. Burlington Street Ry. Co.*, 49 Ia. 144, 31 Am. Rep. 145.

**Louisiana.** *Kennon v. Hilburn*, 144 La. 131, 80 So. 224; *New Orleans v. Great Southern Telephone & Telegraph Co.*, 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533.

**Massachusetts.** *Commonwealth v. Boston*, 97 Mass. 555.

**Minnesota.** *St. Paul v. Chicago, Milwaukee & St. Paul Ry.*, 63 Minn. 330, 34 L. R. A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458.

**New Jersey.** *Cape May & Schellenger's Landing Ry. v. Cape May*, 35 N. J. Eq. 419.

**New York.** *People v. International Bridge Co.*, 223 N. Y. 137, 119 N. E. 351;

*People v. Mealy*, 224 N. Y. 187, 120 N. E. 155.

**Ohio.** *Cincinnati Street Ry. Co. v. Smith*, 29 O. S. 291; *Cincinnati & Springfield Ry. Co. v. Carthage*, 36 O. S. 631; *Interurban Railway & Terminal Co. v. Public Utilities Commission*, 98 O. S. 287, 3 A. L. R. 696, 120 N. E. 831; *Cincinnati v. Public Utilities Commission*, 98 Ohio 320, 121 N. E. 688.

**South Dakota.** *Watertown v. Watertown Light & Power Co.*, 42 S. D. 220, 173 N. W. 739.

**Virginia.** *Virginia-Western Power Co. v. Commonwealth*, 125 Va. 469, 9 A. L. R. 1148, 99 S. E. 723.

**Washington.** *Pacific Telephone & Telegraph Co. v. Everett*, 97 Wash. 259, 166 Pac. 650; *State v. Home Telephone & Telegraph Co.*, 102 Wash. 196, 172 Pac. 899.

**Wisconsin.** *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *Superior v. Douglas County Telephone Co.*, 141 Wis. 363, 122 N. W. 1023; *State v. Bancroft*, 148 Wis. 124, 38 L. R. A. (N.S.) 526, 134 N. W. 330; *Superior v. Duluth Street Ry. Co.*, 166 Wis. 487, 165 N. W. 1081.

<sup>2</sup> **United States.** *Iron Mountain Ry. v. Memphis*, 96 Fed. 113, 37 C. C. A. 410.

**Alabama.** *Port of Mobile v. Louisville & Nashville Ry. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106.

**California.** *Arcata v. Arcata & Mad River Ry. Co.*, 92 Cal. 639, 28 Pac. 676; *Workman v. Southern Pacific Ry. Co.*, 129 Cal. 536, 62 Pac. 185, 316.

**Illinois.** *Snell v. Chicago*, 133 Ill. 413, 8 L. R. A. 858, 24 N. E. 532.

**Louisiana.** *East Louisiana Ry. Co. v. New Orleans*, 46 La. Ann. 526, 15 So. 157.

the state,<sup>3</sup> or a grant to an interurban railway by a county of the right to use a highway,<sup>4</sup> or a grant by a municipal corporation to a street railway company of a right of way in the streets,<sup>5</sup> or a grant to a railroad of the right of erecting a freight house upon a levee,<sup>6</sup> or a grant of a right to construct telegraph<sup>7</sup>

**Ohio.** Cincinnati & Springfield Ry. Co. v. Carthage, 38 O. S. 631.

**Texas.** Houston & Texas Central Ry. v. Texas & Pacific Ry. Co., 70 Tex. 649, 8 S. W. 498; Rio Grande Ry. Co. v. Brownsville, 45 Tex. 88.

<sup>3</sup> New York, Lake Erie & Western Ry. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846; Commonwealth v. Mobile & Ohio Ry. (Ky.), 64 L. R. A. 916, 64 S. W. 451.

<sup>4</sup> Northern Ohio Traction & Light Co. v. State, 245 U. S. 574, L. R. A. 1918E, 865, 62 L. ed. 481 (construed as a perpetual franchise, in the absence of express limitation).

<sup>5</sup> United States. Chicago v. Sheldon, 76 U. S. (9 Wall.) 50, 19 L. ed. 594; City Ry. Co. v. Citizen's Street Ry., 166 U. S. 557, 41 L. ed. 1114, 64 Fed. 647, and affirming, 56 Fed. 746; Cleveland v. Cleveland City Ry., 194 U. S. 517, 48 L. ed. 1102; Cleveland v. Cleveland Electric Ry., 201 U. S. 529, 50 L. ed. 854; Detroit United Ry. v. Michigan, 242 U. S. 238, 61 L. ed. 268; Coast Line Ry. Co. v. Savannah, 30 Fed. 646; Citizens' Street Ry. Co. v. Memphis, 53 Fed. 715; Citizens' Street Ry. Co. v. City Ry., 56 Fed. 746; Baltimore Trust & Guarantee Co. v. Baltimore, 64 Fed. 153; Detroit Citizens' Street Ry. v. Detroit, 64 Fed. 628, 26 L. R. A. 667, 12 C. C. A. 365; Africa v. Knoxville, 70 Fed. 729; Louisville Trust Co. v. Cincinnati, 76 Fed. 296, 22 C. C. A. 334.

**Alabama.** Birmingham & Pratt Mines Street Ry. v. Birmingham Street Ry., 79 Ala. 465, 58 Am. Rep. 615.

**Illinois.** Parmelee v. Chicago, 60 Ill.

267; People v. Chicago West Division Ry. Co., 118 Ill. 113, 7 N. E. 116.

**Indiana.** Western Paving & Supply Co. v. Citizens' Street Ry. Co., 128 Ind. 525, 25 Am. St. Rep. 462, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88; Williams v. Citizens' Ry. Co., 130 Ind. 71, 30 Am. St. Rep. 201, 15 L. R. A. 64, 29 N. E. 408; City Ry. Co. v. Citizens' Street Ry. Co., — Ind. —, 52 N. E. 157.

**Iowa.** Sioux City Street Ry. Co. v. Sioux City, 78 Ia. 367, 43 N. W. 224.

**Massachusetts.** Browne v. Turner, 176 Mass. 9, 56 N. E. 969.

**Missouri.** Hovelman v. Kansas City Horse Railroad Co., 79 Mo. 632; Kansas City v. Corrigan, 86 Mo. 67.

**New York.** People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 L. R. A. 255, 18 N. E. 692 [reversing, 45 Hun 519; Mayor, etc., of New York v. Second Avenue Ry. Co., 32 N. Y. 261].

**Wisconsin.** State v. Madison Street Ry., 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487; State v. Hilbert, 72 Wis. 184, 39 N. W. 326; Wright v. Milwaukee Electric Ry. & Light Co., 95 Wis. 29, 60 Am. St. Rep. 74, 36 L. R. A. 47, 69 N. W. 791; Superior v. Duluth Street Ry. Co., 166 Wis. 487, 165 N. W. 1081.

<sup>6</sup> St. Paul v. Chicago, Milwaukee & St. Paul Ry., 63 Minn. 330, 34 L. R. A. 184, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458.

<sup>7</sup> New Orleans v. Western Union Telegraph Co., 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; Michigan Telegraph Co. v. St. Joseph, 121 Mich. 502, 80 Am. St. Rep. 520, 47 L. R. A. 87, 80 N. W. 383; Hudson Telephone Co. v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123.

or telephone lines in public streets,<sup>9</sup> or electric lights and power,<sup>9</sup> or to construct and maintain electric conductors,<sup>10</sup> or to lay water pipes<sup>11</sup> or gas pipes<sup>12</sup> in the public streets, or permission to an

<sup>9</sup> **United States.** *Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S. 649, 56 L. ed. 934; *Michigan Telephone Co. v. Charlotte*, 93 Fed. 11.

**Alabama.** *New Decatur v. American Telephone & Telegraph Co.*, 176 Ala. 492, 58 So. 613.

**Illinois.** *London Mills v. White*, 208 Ill. 289, 70 N. E. 313.

**Maryland.** *Chesapeake & Potomac Telephone Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033.

**Minnesota.** *Northwestern Telephone Exchange Co. v. Minneapolis*, 81 Minn. 140, 53 L. R. A. 175, 83 N. W. 527, 86 N. W. 69.

**North Dakota.** *Northwestern Telephone Exchange Co. v. Anderson*, 12 N. D. 585, 102 Am. St. Rep. 580, 65 L. R. A. 771, 98 N. W. 706.

**Pennsylvania.** *Commonwealth v. Warwick*, 185 Pa. St. 623, 40 Atl. 93.

**Washington.** *Pacific Telephone & Telegraph Co. v. Everett*, 97 Wash. 259, 166 Pac. 650; *State v. Home Telephone & Telegraph Co.*, 102 Wash. 196, 172 Pac. 899.

**Wisconsin.** *Superior v. Douglas County Telephone Co.*, 141 Wis. 363, 122 N. W. 1023.

<sup>9</sup> **United States.** *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, L. R. A. 1918E, 874; *Levis v. Newton*, 75 Fed. 884; *South-west Missouri Light Co. v. Joplin*, 101 Fed. 23.

**Alabama.** *Mobile Electric Co. v. Mobile*, 201 Ala. 607, 79 So. 39.

**Florida.** *Capital City Light & Fuel Co. v. Tallahassee*, 42 Fla. 462, 28 So. 810.

**Louisiana.** *Kennon v. Hilburn*, 144 La. 131, 80 So. 224.

**Vermont.** *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65

Vt. 377, 36 Am. St. Rep. 868, 20 L. R. A. 821, 26 Atl. 635.

**Washington.** *Commercial Electric Light & Power Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592.

**West Virginia.** *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 50 L. R. A. 142, 35 S. E. 994.

<sup>10</sup> *People v. Squire*, 145 U. S. 175, 36 L. ed. 666 [affirming] *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820; *State v. St. Louis*, 145 Mo. 551, 42 L. R. A. 113, 46 S. W. 981.

<sup>11</sup> **United States.** *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *St. Tammany Waterworks Co. v. New Orleans Waterworks Co.*, 120 U. S. 64, 30 L. ed. 563; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886; *Russell v. Sebastian*, 233 U. S. 105, L. R. A. 1918E, 882, 58 L. ed. 912; *Little Falls Electric & Water Co. v. Little Falls*, 102 Fed. 663.

**Alabama.** *Stein v. Mobile*, 49 Ala. 362, 20 Am. Rep. 283.

**California.** *Beverly Hills v. Los Angeles*, 175 Cal. 311, 165 Pac. 924.

**Connecticut.** *Citizens' Water Co. v. Bridgeport Hydraulic Co.*, 55 Conn. 1, 10 Atl. 170.

**Illinois.** *Quincy v. Bull*, 106 Ill. 337.

**New York.** *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 46 L. R. A. 687, 55 N. E. 562; *Warsaw Waterworks Co. v. Warsaw*, 161 N. Y. 176, 55 N. E. 486.

**Oregon.** *Hillsboro v. Public Service Commission*, 97 Or. 320, 187 Pac. 617.

**Wisconsin.** *Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818.

<sup>12</sup> **United States.** *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. ed. 516.

individual to build a vault under an alley,<sup>13</sup> or to construct a dam across a stream,<sup>14</sup> may each, on acceptance thereof by the grantee, and his action in reliance thereon, constitute a contract, the obligation of which is protected by this clause in the constitution.

**§ 3664. Validity and construction of franchises.** Public franchises are, nevertheless, given far less protection by this constitutional provision than might be inferred from the general language which is used in many of the preceding cases. The opposition of the courts to the recognition of contractual rights arising out of franchises has manifested itself in a number of different ways. Franchises are construed strictly in favor of the public and against the party to whom they are granted; and in consequence of this construction they are held, in most states, not to be contracts, wherever the language which is used can be made to bear such construction.<sup>1</sup> If franchises have been granted by a public corporation, the courts are, as a rule, unwilling to recognize the power of a municipal corporation to grant a franchise which can not be modified by the state,<sup>2</sup> in the absence of specific authority

Franchise granted by the state legislature. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. ed. 510; *Missouri v. Murphy*, 170 U. S. 78, 42 L. ed. 955 [affirming, 130 Mo. 10, 31 L. R. A. 798, 31 S. W. 594].

Franchise granted by the city council. *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788.

**Illinois.** *Chicago Municipal Gas Light & Fuel Co. v. Lake*, 130 Ill. 42, 22 N. E. 616.

**Indiana.** *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107, 49 Am. St. Rep. 183, 27 L. R. A. 514, 39 N. E. 433.

**Ohio.** *Toledo v. Northwestern Ohio Natural Gas Co.*, 5 Ohio C. C. 557.

**Rhode Island.** *Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 Am. Dec. 621.

<sup>13</sup> *Gregsten v. Chicago*, 145 Ill. 451, 36 Am. St. Rep. 496, 34 N. E. 426.

<sup>14</sup> *State v. Bancroft*, 148 Wis. 124, 38 L. R. A. (N.S.) 526, 134 N. W. 330.

<sup>1</sup> **United States.** *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176; *Milwaukee Electric*

*Ry. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254.

**Idaho.** *Sandpoint Water & Light Co. v. Sandpoint*, 31 Ida. 498, L. R. A. 1918F, 1106, 173 Pac. 972.

**Indiana.** *Winfield v. Public Service Commission*, 187 Ind. 53, 118 N. E. 531.

**Oregon.** *Woodburn v. Public Service Commission*, 82 Or. 114, L. R. A. 1917C, 98, 161 Pac. 391.

**West Virginia.** *Benwood v. Public Service Commission*, 75 W. Va. 127, L. R. A. 1915C, 261, 83 S. E. 295.

**Wisconsin.** *Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925.

<sup>2</sup> **United States.** *Dubuque Electric Co. v. Dubuque*, 260 Fed. 353, 10 A. L. R. 495.

**Florida.** *State v. Burr*, — Fla. —, 84 So. 61.

**Idaho.** *Sandpoint Water & Light Co. v. Sandpoint*, 31 Ida. 498, L. R. A. 1918F, 1106, 173 Pac. 972.

**Indiana.** *Winfield v. Public Service Commission*, 187 Ind. 53, 118 N. E. 531.

from the state to make such contract. Furthermore, all grants of special privileges to public utilities as well as all contracts between public utilities and individuals, are presumed to be made subject to the police power of the state;<sup>3</sup> and in some cases the

**Iowa.** *Iowa Ry. & Light Co. v. Jones Auto Co.*, 182 Ia. 982, 164 N. W. 780.

**Louisiana.** *Black v. New Orleans Ry. & Light Co.*, 145 La. 180, 82 So. 81.

**Michigan.** *Traverse City v. Michigan Railroad Commission*, 202 Mich. 575, 168 N. W. 481.

**Montana.** *State v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799.

**New Jersey.** *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Commissioners*, 92 N. J. L. 168, 12 A. L. R. 737, 104 Atl. 218.

**Oklahoma.** *Pawhuska v. Pawhuska Oil & Gas Co.*, 64 Okla. 214, 166 Pac. 1058.

**Oregon.** *Woodburn v. Public Service Commission*, 82 Or. 114, L. R. A. 1917C, 93, 161 Pac. 391; *Portland v. Public Service Commission*, 89 Or. 325, 173 Pac. 1178.

**Pennsylvania.** *Leiper v. Baltimore & Philadelphia Ry. Co.*, 262 Pa. St. 328, 105 Atl. 551.

**Tennessee.** *Memphis v. Enloe*, — Tenn. 52, 214 S. W. 71.

**Utah.** *Salt Lake City v. Utah Light & Traction Co.*, 52 Utah 210, 3 A. L. R. 715, 173 Pac. 556.

**Washington.** *State v. Superior Court*, 67 Wash. 37, L. R. A. 1915C, 287, 120 Pac. 861.

**West Virginia.** *Benwood v. Public Service Commission*, 75 W. Va. 127, L. R. A. 1915C, 261, 83 S. E. 295.

**Wisconsin.** *Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; *Milwaukee Electric Railway & Light Co. v. Railroad Commission*, 153 Wis. 592, L. R. A. 1915F, 744, 142 N. W. 491.

<sup>3</sup>**Alabama.** *Mobile v. Mobile Electric Co.*, 203 Ala. 574, 84 So. 816.

**Georgia.** *Railroad Commission v. Louisville & Nashville Ry. Co.*, 140 Ga.

817, L. R. A. 1915E, 902, 80 S. E. 327; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 142 Ga. 841, L. R. A. 1916E, 358, 83 S. E. 946.

**Illinois.** *Hite v. Cincinnati, Indianapolis & Western Ry. Co.*, 284 Ill. 297, 119 N. E. 904.

**Indiana.** *Winfield v. Public Service Commission*, 187 Ind. 53, 118 N. E. 531; *Washington v. Public Service Commission*, — Ind. —, 129 N. E. 401.

**Louisiana.** *Black v. New Orleans Ry. & Light Co.*, 145 La. 180, 82 So. 81.

**Michigan.** *Grand Rapids & Indiana Ry. Co. v. Cobbs*, 203 Mich. 133, 168 N. W. 961.

**Missouri.** *Fulton v. Public Service Commission*, 275 Mo. 67, 204 S. W. 336; *Kansas City v. Public Service Commission*, 276 Mo. 539, 210 S. W. 381.

**New Jersey.** *Atlantic Coast Electric Ry. Co. v. Board of Public Utility Commissioners*, 92 N. J. L. 168, 12 A. L. R. 737, 104 Atl. 218.

**New York.** *People v. Public Service Commission*, 225 N. Y. 216, 121 N. E. 777.

**Oklahoma.** *Sapulpa v. Oklahoma Natural Gas Co.*, 79 Okla. 196, 192 Pac. 224.

**Oregon.** *Portland v. Public Service Commission*, 89 Or. 325, 173 Pac. 1178.

**Pennsylvania.** *Leiper v. Baltimore & Philadelphia Ry. Co.*, 262 Pa. St. 328, 105 Atl. 551; *Suburban Water Co. v. Borough of Oakmont*, — Pa. St. —, 110 Atl. 778.

**Vermont.** *Rutland Ry., Light & Power Co. v. Burditt Bros.*, — Vt. —, 111 Atl. 582.

**Washington.** *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash. 330, L. R. A. 1917C, 574, 159 Pac. 133.

courts have gone beyond presumptions and have said that the police power is necessarily reserved in such grants,<sup>4</sup> and that it can not be contracted away.<sup>5</sup> In view of the nature of sovereignty, it would seem that this view was the sound one. If public utilities are so public in their purpose that they may be given the power of eminent domain, it would appear that their purpose was so public that neither a municipal corporation nor the legislature could preclude the state from exercising such police power.

A provision that the council may determine whether a franchise is broken is final; and it is said that the court would impair the obligation of the contract if it refused to give effect thereto.<sup>6</sup>

**§ 3665. Exclusive franchises.** If a statute grants an exclusive franchise and such statute is valid, a subsequent act of a municipality interfering with such franchise impairs the obligation of the original contract.<sup>1</sup> The construction of waterworks by a city impairs an exclusive grant of such franchise.<sup>2</sup>

Since an invalid contract is not protected by this clause, an unauthorized grant of an exclusive franchise is not protected thereby.<sup>3</sup> The mere grant of a franchise is not presumed to be the

**West Virginia.** *Mill Creek Coal & Coke Co. v. Public Service Commission*, 84 W. Va. 662, 7 A. L. R. 1081, 100 S. E. 557.

**Wisconsin.** *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Menasha Woodenware Co.*, 159 Wis. 130, L. R. A. 1915F, 732, 150 N. W. 411.

<sup>4</sup> *Winfield v. Public Service Commission*, 187 Ind. 53, 118 N. E. 531.

<sup>5</sup> *Camden v. Arkansas Light & Power Co.*, 145 Ark. 205, 224 S. W. 444.

<sup>6</sup> *Newsom v. Rainier*, 94 Or. 199, 185 Pac. 206.

<sup>1</sup> *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. ed. 516; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. ed. 510; *In re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983; *Philadelphia & Gray's Ferry Passenger Ry.'s Appeal*, 102 Pa. St. 123; *Potter County Water Co. v. Austin*, 206 Pa. St. 297, 55 Atl.

991; *Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 Am. Dec. 621.

<sup>2</sup> *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341; *Westerly Waterworks v. Westerly*, 80 Fed. 611; *Bellevue Water Co. v. Bellevue*, 3 Ida. 739, 35 Pac. 693; *White v. Meadville*, 177 Pa. St. 643, 34 L. R. A. 567, 35 Atl. 695; *Memphis v. Memphis Water Co.*, 52 Tenn. (5 Heisk.) 495.

<sup>3</sup> *United States. Hamilton Gas Light Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963.

**Connecticut.** *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19.

**New York.** *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167, 5 L. R. A. 546, 22 N. E. 381; *In re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983.

**Pennsylvania.** *Lehigh Water Co.'s Appeal*, 102 Pa. St. 515.

**Washington.** *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 47 L. R. A. 214, 58 Pac. 773.

grant of an exclusive franchise.<sup>4</sup> A grant of a franchise to operate a waterworks is not a contract preventing the municipality from constructing a competing plant.<sup>5</sup> A general statute prohibiting a ferry from being established within half a mile of one already established is not a contract that no competing ferry at a less distance will ever be permitted.<sup>6</sup>

Even if a franchise is non-exclusive, conduct of a municipality interfering with such franchise other than by fair competition impairs the obligation of the original contract. A non-exclusive grant of a franchise to construct waterworks can not be impaired by subsequently establishing a municipal waterworks to be supported in part by compulsory taxation upon realty near hydrants.<sup>7</sup>

**§ 3666. Paving streets, constructing bridges, etc.** Similar considerations apply to cases in which an attempt has been made to impose upon a public utility a greater burden with reference to paving a part of a street than was imposed in the original grant. If the original grant amounted to a contract, it is frequently held that it is not subject to subsequent modification by the city or the state,<sup>1</sup> even under an attempt to exercise the police power. A pub-

**West Virginia.** *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650; *Clarksburg Electric Light Co. v. Clarksburg*, 47 W. Va. 739, 50 L. R. A. 142, 35 S. E. 994.

<sup>4</sup>*Fanning v. Gregoire*, 57 U. S. (16 How.) 524, 14 L. ed. 1043; *Belmont Bridge v. Wheeling Bridge*, 138 U. S. 287, 34 L. ed. 967; *Williams v. Wing*, 177 U. S. 601, 44 L. ed. 905.

"A contract binding the state is only created by clear language and is not to be extended by implication beyond the terms of the statute." *Williams v. Wingo*, 177 U. S. 601, 603, 44 L. ed. 906.

<sup>5</sup>*Helena Waterworks Co. v. Helena*, 195 U. S. 383, 49 L. ed. 245; *North Springs Water Co. v. Tacoma*, 21 Wash. 517, 47 L. R. A. 214, 58 Pac. 773.

<sup>6</sup>*Williams v. Wingo*, 177 U. S. 601, 44 L. ed. 905.

<sup>7</sup>*Warsaw Waterworks Co. v. Warsaw*, 161 N. Y. 176, 55 N. E. 486; *Skaneateles Waterworks Co. v. Skaneateles*, 161 N. Y. 154, 46 L. R. A. 687,

161 N. E. 562 [citing, *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Asylum v. New Orleans*, 105 U. S. 362, 26 L. ed. 1128; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. ed. 516; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 524; *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 29 L. ed. 510; *Bank v. Knoop*, 57 U. S. (16 How.) 369, 14 L. ed. 977; *Dodge v. Woolsey*, 59 U. S. (18 How.) 331, 15 L. ed. 401; *New Jersey v. Wilson*, 7 Cranch. 164; *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 L. R. A. 255, 18 N. E. 692].

<sup>1</sup>*Augusta v. Augusta-Aiken Ry. & Electric Corporation*, 150 Ga. 529, 104 S. E. 503; *Madison v. Alton, Granite & St. Louis Traction Co.*, 235 Ill. 346, 85 N. E. 597; *State v. Olympia Light & Power Co.*, 91 Wash. 519, 158 Pac. 85; *Superior v. Duluth Street Ry. Co.*, 166 Wis. 487, 165 N. W. 1081.

lic corporation, however, which has granted a franchise to a street railway, by the terms of which such street railway is to pave a part of the street, can not attack the constitutionality of a subsequent taxation statute which relieves the street railway from such liability.<sup>2</sup>

If, on the other hand, such grant is held not to amount to a contract, or if it is subject to the police power of the state, such additional burden may be imposed, if not unreasonable.<sup>3</sup> The same result has been reached by construing the original grant as contemplating the change in future conditions.<sup>4</sup>

On the same principle, a definite and valid contract with reference to the construction of a bridge by a public utility can not be impaired by subsequent acts of the legislature or of the public corporation;<sup>5</sup> but if the original grant does not amount to a contract or if it is subject to the exercise of the police power, the public utility may be required to construct or maintain such a bridge as the safety of the public reasonably requires.<sup>6</sup>

A street railway may be compelled to remove its tracks after the expiration of its franchise.<sup>7</sup>

**§ 3667. Rate regulations.** At the same time, as has already been pointed out,<sup>1</sup> a number of jurisdictions have treated franchises as valid contracts, and some of them still continue to take this view. Where franchises are regarded as valid obligations, not subject to the police power of the state, provisions therein which fix rates can not be altered by the subsequent action of the state, since such action impairs the obligation of the contract.<sup>2</sup>

<sup>2</sup> *Worcester v. Worcester Consolidated Street Ry. Co.*, 196 U. S. 539, 49 L. ed. 591.

<sup>3</sup> *Milwaukee Electric Railway & Light Co. v. Wisconsin*, 252 U. S. 100, 10 A. L. R. 892, 64 L. ed. 476 [affirming, 166 Wis. 163, 164 N. W. 844]; *Detroit v. Detroit United Ry.*, 172 Mich. 496, 138 N. W. 215; *Binninger v. New York*, 177 N. Y. 199, 69 N. E. 390; *State v. Milwaukee Electric Ry. & Light Co.*, 165 Wis. 230, 161 N. W. 745.

<sup>4</sup> *Duluth v. Duluth Street Ry.*, 137 Minn. 286, 10 A. L. R. 904, 163 N. W. 669.

<sup>5</sup> *Northern Pacific Ry. v. Duluth*, 208 U. S. 583, 52 L. ed. 630.

<sup>6</sup> *In re Knox County Electric Co.*, 119 Me. 179, 109 Atl. 898; *Brookline v. Boston & Albany Ry. Co.*, — Mass. —, 128 N. E. 97; *St. Paul v. Great Northern Ry. Co.*, 145 Minn. 355, 177 N. W. 492.

<sup>7</sup> *Detroit United Ry. v. Detroit*, — U. S. —, 41 Sup. Ct. 285.

<sup>1</sup> See § 3663.

<sup>2</sup> *United States. Cleveland v. Cleveland City Ry.*, 194 U. S. 517, 48 L. ed. 1102; *Cleveland v. Cleveland Electric Ry.*, 201 U. S. 529, 50 L. ed. 854.

*Alabama. Mobile Electric Co. v. Mobile*, 201 Ala. 607, 79 So. 39.

*Michigan. Pingree v. Michigan Central Ry.*, 118 Mich. 314, 53 L. R. A. 274, 76 N. W. 635 [citing, *New Orleans*

This includes cases in which a reduction in interurban fares is sought to be effected by an extension of the limits of the municipal corporation.<sup>3</sup>

Where, for any of the reasons already given, the grant of a franchise is not regarded as a valid obligation, or where it is held to be subject to the police power, the state, acting through its proper agencies, may modify such rates.<sup>4</sup> The state may regulate

**Gaslight Co. v. Louisiana Light & Heat Producing Co.**, 115 U. S. 650, 29 L. ed. 516; **Georgia Railroad & Banking Co. v. Smith**, 128 U. S. 174, 32 L. ed. 377; **Reagan v. Farmers' Loan & Trust Co.**, 154 U. S. 362, 38 L. ed. 1014; **Chicago, Burlington & Quincy Ry. Co. v. Iowa**, 94 U. S. 155, 24 L. ed. 94; **Ruggles v. Illinois**, 108 U. S. 526, 27 L. ed. 812].

**Mississippi. Stone v. Yazoo & Mississippi Valley Ry. Co.**, 62 Miss. 607, 52 Am. Rep. 193.

**New York. Quinby v. Public Service Commission**, 223 N. Y. 244, 3 A. L. R. 685, 119 N. E. 433; **People v. Mealy**, 224 N. Y. 187, 120 N. E. 155.

**Ohio. Interurban Railway & Terminal Co. v. Public Utilities Commission**, 98 O. S. 287, 3 A. L. R. 606, 120 N. E. 831; **Cincinnati v. Public Utilities Commission**, 98 O. S. 320, 3 A. L. R. 705, 121 N. E. 688.

**South Dakota. Watertown v. Watertown Light & Power Co.**, 42 S. D. 220, 173 N. W. 739.

**Virginia. Virginia-Western Power Co. v. Commonwealth**, 125 Va. 469, 9 A. L. R. 1148, 99 S. E. 723.

**Washington. Pacific Telephone & Telegraph Co. v. Everett**, 97 Wash. 259, 166 Pac. 650; **State v. Home Telephone & Telegraph Co.**, 102 Wash. 196, 172 Pac. 899.

<sup>3</sup>**Detroit United Ry. v. Michigan**, 242 U. S. 238, 61 L. ed. 268.

<sup>4</sup>**Alabama. Mobile v. Mobile Electric Co.**, 203 Ala. 574, 84 So. 816.

**Arkansas. Camden v. Arkansas Light & Power Co.**, 145 Ark. 205, 224 S. W. 444.

**Georgia. Union Dry Goods Co. v. Georgia Public Service Corporation**, 142 Ga. 841, L. R. A. 1916E, 358, 83 S. E. 946.

**Idaho. Sandpoint Water & Light Co. v. Sandpoint**, 31 Ida. 498, L. R. A. 1918F, 1106, 173 Pac. 972.

**Iowa. Iowa Ry. & Light Co. v. Jones Auto Co.**, 182 Ia. 982, 164 N. W. 780; **Selkirk v. Sioux City Gas & Electric Co.**, — Ia. —, 176 N. W. 301.

**Michigan. Traverse City v. Michigan Railroad Commission**, 202 Mich. 575, 168 N. W. 481.

**Missouri. Kansas City v. Public Service Commission**, 276 Mo. 539, 210 S. W. 381.

**New York. People v. Public Service Commission**, 225 N. Y. 216, 121 N. E. 777.

**Oklahoma. Pawhuska v. Pawhuska Oil & Gas Co.**, 64 Okla. 214, 166 Pac. 1058; **Sapulpa v. Oklahoma Natural Gas Co.**, 79 Okla. 196, 192 Pac. 224.

**Oregon. Woodburn v. Public Service Commission**, 82 Or. 114, L. R. A. 1917C, 98, 161 Pac. 391.

**Tennessee. Memphis v. Enloe**, — Tenn. —, 214 S. W. 71.

**Utah. Salt Lake City v. Utah Light & Traction Co.**, — Utah —, 3 A. L. R. 715, 173 Pac. 556.

**West Virginia. Benwood v. Public Service Commission**, 75 W. Va. 127, L. R. A. 1915C, 261, 83 S. E. 295.

**Wisconsin. Milwaukee Electric Railway & Light Co. v. Railroad Commission**, 153 Wis. 592, L. R. A. 1915F, 744, 142 N. W. 491.

the rates charged by a railway,<sup>5</sup> a street railway,<sup>6</sup> a telephone company,<sup>7</sup> a heating company,<sup>8</sup> light and power companies,<sup>9</sup> and companies which supply electricity,<sup>10</sup> or gas,<sup>11</sup> or both.<sup>12</sup>

While the theory that a provision which fixes rates is not a contract, has in the past been invoked in order to enable the state to regulate or to lower rates, it works both ways; and it may justify the state in raising the rates above those fixed originally.<sup>13</sup>

**§ 3668. Contracts limiting the exercise of the power of taxation.** In striking contrast to the unwillingness of the courts to permit legislatures to barter away the police power of the state or to restrain its exercise in any way,<sup>1</sup> is their willingness to allow the state to make valid and binding contracts limiting its taxing

<sup>5</sup> *Leiper v. Baltimore & Philadelphia Ry. Co.*, 262 Pa. St. 328, 105 Atl. 551.

<sup>6</sup> *United States. Dubuque Electric Co. v. Dubuque*, 260 Fed. 353, 10 A. L. R. 495.

*Missouri. Kansas City v. Public Service Commission*, 276 Mo. 539, 210 S. W. 381.

*Oregon. Portland v. Public Service Commission*, 89 Or. 325, 173 Pac. 1178.

*Tennessee. Memphis v. Enloe*, — Tenn. —, 214 S. W. 71.

*Utah. Salt Lake City v. Utah Light & Traction Co.*, — Utah —, 3 A. L. R. 715, 173 Pac. 556.

*Wisconsin. Milwaukee Electric Railway & Light Co. v. Railroad Commission*, 153 Wis. 592, L. R. A. 1915F, 744, 142 N. W. 491.

<sup>7</sup> *Traverse City v. Michigan Railroad Commission*, 202 Mich. 575, 168 N. W. 481; *Woodburn v. Public Service Commission*, 82 Or. 114, L. R. A. 1917C, 98, 161 Pac. 391; *State v. Superior Court*, 67 Wash. 37, L. R. A. 1915C, 287, 120 Pac. 861.

<sup>8</sup> *Iowa Ry. & Light Co. v. Jones Auto Co.*, 182 Ia. 982, 164 N. W. 780.

<sup>9</sup> *Camden v. Arkansas Light & Power Co.*, 145 Ark. 205, 224 S. W. 444; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 142 Ga. 841, L. R. A. 1916E, 358, 83 S. E. 946.

<sup>10</sup> *Mobile v. Mobile Electric Co.*, 203 Ala. 574, 84 So. 816.

<sup>11</sup> *Selkirk v. Sioux City Gas & Electric Co.*, — Ia. —, 176 N. W. 301; *State v. Billings Gas Co.*, 55 Mont. 102, 173 Pac. 799; *Pawhuska v. Pawhuska Oil & Gas Co.*, 64 Okla. 214, 166 Pac. 1058; *Sapulpa v. Oklahoma Natural Gas Co.*, — Okla. —, 192 Pac. 224.

<sup>12</sup> *People v. Public Service Commission*, 225 N. Y. 216, 121 N. E. 777.

<sup>13</sup> *Idaho. Sandpoint Water & Light Co. v. Sandpoint*, 31 Ida. 498, L. R. A. 1918F, 1106, 173 Pac. 972.

*Indiana. Washington v. Public Service Commission*, — Ind. —, 129 N. E. 401.

*Louisiana. Black v. New Orleans Ry. & Light Co.*, 145 La. 180, 82 So. 81.

*Maine. In re Island Falls Water Co.*, 118 Me. 397, 108 Atl. 459.

*Missouri. Fulton v. Public Service Commission*, 275 Mo. 67, 204 S. W. 386.

*Oregon. Hillsboro v. Public Service Commission*, 97 Or. 320, 187 Pac. 617.

*Utah. Salt Lake City v. Utah Light & Traction Co.*, — Utah —, 3 A. L. R. 715, 173 Pac. 556.

*Virginia. Richmond v. Chesapeake & Potomac Telephone Co.*, 127 Va. 612, 105 S. E. 127.

<sup>1</sup> See §§ 3690 et seq.

power or providing for exemption from taxation. Where such contracts are found to exist, and their existence is clearly established, they are regarded as binding upon the state, and the obligation can not be impaired by subsequent legislation.<sup>2</sup> This result has been justified on the theory that the state has power to select

<sup>2</sup> **United States.** *Woodruff v. Trapnall*, 51 U. S. (10 How.) 190, 13 L. ed. 383; *State Bank v. Knoop*, 57 U. S. (16 How.) 369, 14 L. ed. 977 [reversing, *Knoup v. Piqua, Branch of State Bank*, 1 O. S. 603]; *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U. S. (16 How.) 416, 14 L. ed. 997 [affirming, *Debolt v. Ohio Life Ins. & Trust Co.*, 1 O. S. 563]; *Furman v. Nichol*, 75 U. S. (8 Wall.) 44, 19 L. ed. 370; *Home of the Friendless v. Rause*, 75 U. S. (8 Wall.) 430, 19 L. ed. 495; *Erie Ry. v. Pennsylvania*, 88 U. S. (21 Wall.) 492, 22 L. ed. 595; *Keith v. Clark*, 97 U. S. 454, 24 L. ed. 1071; *Hoge v. Railroad*, 99 U. S. 348, 25 L. ed. 303; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420, 54 L. ed. 544; *Choate v. Trapp*, 224 U. S. 665, 56 L. ed. 941; *Wright v. Central of Georgia Ry.*, 236 U. S. 674, 59 L. ed. 781.

**Alabama.** *State v. Alabama Bible Society*, 134 Ala. 632, 32 So. 1011.

**Connecticut.** *Seymour v. Hartford*, 21 Conn. 481.

**Colorado.** *Colorado Farm & Live Stock Co. v. Beerbohm*, 43 Colo. 464, 96 Pac. 443; *Gale v. Beerbohm*, 43 Colo. 521, 96 Pac. 449.

**Kentucky.** *Commonwealth v. Ohio Valley Ry.*, 95 Ky. 60, 23 S. W. 868.

**Illinois.** *State v. Illinois Central Ry.*, 246 Ill. 188, 92 N. E. 814.

**Louisiana.** *Rousset v. New Orleans*, 115 La. 551, 39 So. 596.

**Maryland.** *State v. Baltimore & Ohio Ry.*, 127 Md. 434, 96 Atl. 636.

**Minnesota.** *State v. Sioux City & St. Paul Ry.*, 82 Minn. 158, 84 N. W. 794.

**Missouri.** *North St. Louis Gymnastic Society v. Hagerman*, 232 Mo. 693, 135 S. W. 42; *Newark v. Mt. Pleasant Cemetery Co.*, 58 N. J. L. 168, 33 Atl. 396 [affirming, *Mt. Pleasant Cemetery Co. v. Newark*, 52 N. J. L. 539, 20 Atl. 832].

**Ohio.** *Armstrong v. Athens County*, 10 Ohio 235.

**Oklahoma.** *In re Assessment of First National Bank*, 58 Okla. 508, L. R. A. 1917B, 294, 160 Pac. 469.

**Oregon.** *Hogg v. Mackay*, 23 Or. 339, 37 Am. St. Rep. 682, 19 L. R. A. 77, 31 Pac. 779.

**Pennsylvania.** *Commonwealth v. Philadelphia & Erie Ry.*, 164 Pa. St. 252, 30 Atl. 145.

**Rhode Island.** *Brown University v. Granger*, 19 R. I. 704, 36 L. R. A. 847, 36 Atl. 720.

**Tennessee.** *State v. Bank of Commerce*, 95 Tenn. 221, 31 S. W. 993.

**Vermont.** *Bixby v. Roscoe*, 85 Vt. 105, 81 Atl. 255.

**Virginia.** *Whiting v. West Point*, 88 Va. 905, 29 Am. St. Rep. 750, 15 L. R. A. 860, 14 S. E. 698.

**Wisconsin.** *State v. Chicago & Northwestern Ry.*, 128 Wis. 449, 108 N. W. 594.

On this subject, see *The Nature of Tax Exemptions*, by Frank J. Goodnow, 13 Columbia Law Review 104; *Perpetual Exemption from Taxation*, by Elisha R. Potter, 1 American Law Register (N.S.) 718; *Exemption from Taxation by Legislative Contract*, by James F. Colby, 13 American Law Review 26; and *Legislative Tax-Exemption Contract*, by Ernest W. Huffcut, 24 American Law Review 399.

its objects of taxation.<sup>3</sup> The reasoning stops at the point at which some justification would seem to be most necessary. The fact that the state has power to select its objects of taxation would seem to be the best possible reason for saying that it should continue to possess such power and to exercise it, untrammelled by ill-advised bargains which former legislatures have seen fit to make. The objections to the validity of such contracts have been put as strongly in these opinions as they can be stated; but in spite of this the supreme court of the United States has upheld their validity, and the power of this court rather than the correctness of its reasonings has made the state courts bow to its authority. The supreme court of the United States has, however, upheld the validity of such contracts in spite of the protests of some of the state courts,<sup>4</sup> and of the minority of the supreme court of the United States.<sup>5</sup> A contract by statute to exempt the property of

<sup>3</sup> "The assumption that a State, in exempting certain property from taxation, relinquishes a part of its sovereign power, is unfounded. The taxing power may select its objects of taxation; and this is generally regulated by the amount necessary to answer the purposes of the State. Now the exemption of property from taxation is a question of policy and not of power." *Piqua Branch Bank v. Knoop*, 57 U. S. (16 How.) 369, 14 L. ed. 977.

<sup>4</sup> *Commonwealth v. Farmers' Bank*, 97 Ky. 590, 31 S. W. 1013.

<sup>5</sup> Perhaps the best illustration of the conflict between the state courts and the United States Supreme Court is found in a line of Ohio cases which grew out of the change in the method of taxing banks. By the act of 1845 a tax of six per cent was levied on demands paid by banks in lieu of all taxes to which the banks or stockholders would otherwise be subject. In 1851 the legislature enacted a statute which taxed the property of banks as other property was taxed. As the act of 1851 increased the tax upon banks they resisted such tax. The courts of Ohio held that the act of 1845 did not amount to a contract, and that the

state could not barter away its taxing power. *Mechanics' & Traders' Bank v. Debolt*, 1 O. S. 591; *Toledo Bank v. Bond*, 1 O. S. 622; *Knoop v. Bank*, 1 O. S. 603; *Skelly v. Jefferson Branch Bank*, 9 O. S. 606. These decisions were reversed by the Supreme Court of the United States. *Piqua Branch Bank v. Knoop*, 57 U. S. (16 How.) 369; *Dodge v. Woolsey*, 59 U. S. (18 How.) 331; *Mechanics' & Traders' Bank v. Debolt*, 59 U. S. (18 How.) 380; *Jefferson Branch Bank v. Skelly*, 66 U. S. 436.

The validity of a contract for exemption from taxation was assumed at the outset without much discussion. *Gordon v. Appeal Tax Court*, 44 U. S. (3 How.) 133, 11 L. ed. 529.

When the question was next presented, Catron, Daniel, Campbell dissented in strong opinions; two of them of considerable length. *State Bank v. Knoop*, 57 U. S. (16 How.) 369, 14 L. ed. 977.

In a subsequent case, Mr. Justice Miller wrote a dissenting opinion in which Chief Justice Chase and Justice Field concurred, in which he said: "It can not be maintained, that this power to bargain away, for an unlimited time,

a railroad company,<sup>6</sup> or other corporation,<sup>7</sup> or stock in a corporation,<sup>8</sup> or certain occupations,<sup>9</sup> can not be impaired by subsequent legislation. Full effect is given to a contract by which a public corporation leases land and agrees to pay the taxes thereon.<sup>10</sup> If state bonds are issued under a contract by which they are exempt from taxation, the state can not impair the obligation of such con-

the right of taxation, if it exist at all, is limited, in reference to the subjects of taxation. In all the discussion of this question, in this court and elsewhere, no such limitation has been claimed. If the legislature can exempt in perpetuity, one piece of land, it can exempt all land. If it can exempt all land, it can exempt all other property. It can, as well, exempt persons as corporations. And no hindrance can be seen, in the principle adopted by the court, to rich corporations, as railroads and express companies, or rich men, making contracts with the legislatures, as they best may, and with such appliances as it is known they do use, for perpetual exemption from all the burdens of supporting the government. The result of such a principle, under the growing tendency to special and partial legislation, would be, to exempt the rich from taxation, and cast all the burden of the support of government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity.

With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court, and that the one we have here considered is of this character. We are strengthened, in this view of the subject, by the fact that a series of dissents, from this doctrine, by some of our predecessors, shows that it has

never received the full assent of this court; and referring to those dissents for more elaborate defence of our views, we content ourselves with thus renewing the protest against a doctrine which we think must finally be abandoned." *Washington University v. Rouse*, 75 U. S. (8 Wall.) 439, 19 L. ed. 498.

Finally, Mr. Justice Miller yielded; though expressing his personal belief that "one legislature \* \* \* has no power to bargain away the right of any succeeding legislature to levy taxes." *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352. -

<sup>6</sup> *Barnes v. Kornegay*, 62 Fed. 671; *Commonwealth v. Ohio Valley Ry.*, 95 Ky. 60, 23 S. W. 868; *Commonwealth v. Philadelphia & Erie Ry.*, 164 Pa. St. 252, 30 Atl. 145.

<sup>7</sup> *Ohio Life Ins. & Trust Co. v. De-bolt*, 57 U. S. (16 How.) 416, 14 L. ed. 997; *St. Vincent's College v. Schaefer*, 104 Mo. 261, 16 S. W. 395.

<sup>8</sup> *Mobile & Ohio Ry. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645 [modified on rehearing so as to uphold the tax on stock issued as increased stock after the tax law took effect, 163 U. S. 416, 41 L. ed. 211].

<sup>9</sup> *New Orleans v. Great Southern Telephone & Telegraph Co.*, 40 La. Ann. 41, 8 Am. St. Rep. 502, 3 So. 533; *New York v. Second Avenue Ry.*, 32 N. Y. 261.

<sup>10</sup> *Hampton Beach Improvement Co. v. Hampton*, 77 N. H. 373, L. R. A. 1915C, 698, 92 Atl. 549.

tract by subsequent taxation.<sup>11</sup> If a foreign corporation obtains permission to do business under an agreement by which it is to receive all of the rights of domestic corporations,<sup>12</sup> it can not be treated in a manner different from domestic corporations,<sup>13</sup> nor can it be taxed at a higher rate,<sup>14</sup> without impairing the obligation of such contract.

Conversely, agreements by which property owners assume a greater burden of taxation than could be otherwise imposed upon them,<sup>15</sup> as where they apply formally for permission to pay in installments,<sup>16</sup> are binding, and can not be impaired by subsequent legislation,<sup>17</sup> as by remitting over-due assessments.<sup>18</sup>

**§ 3669. Presumption against contract for exemption from taxation.** The objections to contracts which grant exemptions from taxation have produced a marked effect, even in jurisdictions in which such contracts are treated as valid. There is a strong presumption against the existence of such a contract, and the intention to enter into such a contract must appear clearly from the statute, ordinance, or other legislative enactment.<sup>1</sup>

In the absence of an agreement between the state and the property owner for exemption from taxation, supported by a sufficient consideration, actual exemption from taxation,<sup>2</sup> or from assessments

<sup>11</sup> *In re Assessment of First National Bank*, 58 Okla. 508, L. R. A. 1917B, 294, 160 Pac. 469.

<sup>12</sup> *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103, 51 L. ed. 393; *American Can Co. v. Emmerson*, 288 Ill. 289, 123 N. E. 581.

<sup>13</sup> *American Can Co. v. Emmerson*, 288 Ill. 289, 123 N. E. 581.

<sup>14</sup> *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103, 51 L. ed. 393.

<sup>15</sup> *Drainage District No. 7, Washington County v. Bernards*, 89 Or. 531, 174 Pac. 1167.

<sup>16</sup> *Drainage District No. 7, Washington County v. Bernards*, 89 Or. 531, 174 Pac. 1167.

<sup>17</sup> *Drainage District No. 7, Washington County v. Bernards*, 89 Or. 531, 174 Pac. 1167.

<sup>18</sup> *Drainage District No. 7, Washing-*

*ton County v. Bernards*, 89 Or. 531, 174 Pac. 1167.

<sup>1</sup> *Great Northern Ry. v. Minnesota*, 216 U. S. 206, 54 L. ed. 446; *Wright v. Georgia Ry. & Banking Co.*, 216 U. S. 420, 54 L. ed. 544; *J. W. Perry Co. v. Norfolk*, 220 U. S. 472, 55 L. ed. 548; *Brown University v. Granger*, 19 R. I. 704, 36 L. R. A. 847, 36 Atl. 720; *Parker v. Quinn*, 23 Utah 332, 64 Pac. 961.

<sup>2</sup> *Tucker v. Ferguson*, 89 U. S. (22 Wall.) 527, 22 L. ed. 805; *Grand Lodge v. New Orleans*, 166 U. S. 143, 41 L. ed. 951 [affirming, *Grand Lodge v. New Orleans*, 44 La. Ann. 659, 11 So. 148]; *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 43 L. ed. 823; *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840; *Wells v. Savannah*, 181 U. S. 531, 45 L. ed. 986

for benefits,<sup>3</sup> does not constitute a valid obligation to continue such exemption.<sup>4</sup>

Statutes exempting railroads from taxation if built and operated in certain territory,<sup>5</sup> or a charter exempting a railroad from taxation for twenty years,<sup>6</sup> or exempting realty from general road taxes if assessed for local street improvements in an amount equal to or greater than the general tax,<sup>7</sup> or a provision in a municipal charter that any given tract of realty should be assessed only once for constructing a street,<sup>8</sup> none of them constitute contracts. The imposition of a specific tax,<sup>9</sup> such as a license,<sup>10</sup> or a privilege tax,<sup>11</sup> is not an implied contract that such tax will not be increased. The imposition of an annual tax upon a foreign corporation for the privilege of doing business in the state, is not a contract ex-

[affirming, 107 Ga. 1, 32 S. E. 669]; *Gulf & Ship Island Ry. v. Hewes*, 183 U. S. 66, 46 L. ed. 86; *Wisconsin & Michigan Ry. v. Powers*, 191 U. S. 379, 48 L. ed. 229; *Covington v. First National Bank*, 198 U. S. 100, 49 L. ed. 963; *Citizens' National Bank v. Kentucky*, 217 U. S. 443, 54 L. ed. 832; *Newport v. Masonic Temple Association*, 103 Ky. 592, 45 S. W. 881, 46 S. W. 697; *Northern Counties Land Co. v. Excelsior Land, Mining & Development Co.*, — Minn. —, 178 N. W. 497; *Manistee & North Eastern Ry. v. Commissioner of Railroads*, 118 Mich. 349, 76 N. W. 633.

<sup>3</sup> *United States. Kehr v. Stewart*, 197 U. S. 60, 49 L. ed. 663.

*Iowa. Miller v. Hageman*, 114 Ia. 195, 86 N. W. 281.

*Kentucky. Bradley v. McAtee*, 70 Ky. (7 Bush) 667, 3 Am. Rep. 309.

*New Jersey. State v. Mayor*, 35 N. J. L. 168, 37 N. J. L. 415, 18 Am. Rep. 720.

*Oregon. Ladd v. Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654.

<sup>4</sup> "The facts proved must show either a contract expressed in terms, or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the

contract. If there be any doubt on these matters the contract has not been proved and the exemption does not exist." *Wells v. Savannah*, 181 U. S. 531, 539, 45 L. ed. 986 [citing, *Tucker v. Ferguson*, 89 U. S. (22 Wall.) 527, 22 L. ed. 805]; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645.

<sup>5</sup> *Wisconsin & Michigan Ry. v. Powers*, 191 U. S. 379, 48 L. ed. 229; *Manistee & North Eastern Ry. v. Commissioner of Railroads*, 118 Mich. 349, 76 N. W. 633.

<sup>6</sup> *Gulf & Ship Island Ry. v. Hewes*, 183 U. S. 66, 46 L. ed. 86.

<sup>7</sup> *Miller v. Hagemann*, 114 Ia. 195, 86 N. W. 281.

<sup>8</sup> *Bradley v. McAtee*, 70 Ky. (7 Bush) 667, 3 Am. Rep. 309; *State v. Mayer*, 35 N. J. L. 168, 37 N. J. L. 415, 18 Am. Rep. 729; *Ladd v. Portland*, 32 Or. 271, 67 Am. St. Rep. 526, 51 Pac. 654.

<sup>9</sup> *Adams v. Yazoo & Mississippi Valley Railroad Co.*, 77 Miss. 194, 60 L. R. A. 33, 24 So. 200, 317, 28 So. 956.

<sup>10</sup> *Bishoff v. State*, 43 Fla. 67, 30 So. 808; *Baker v. Lexington (Ky.)*, 53 S. W. 16; *State v. Gazlay*, 5 Ohio 15.

But a statute requiring a new license has been held invalid. *Wright v. Atlanta*, 54 Ga. 645.

<sup>11</sup> *Western Union Telegraph Co. v. Harris (Tenn. Ch. App.)*, 52 S. W. 748.

empting its property within that state from taxation;<sup>12</sup> and, in the absence of contract, such tax may be increased.<sup>13</sup> A tax upon a seller of goods who is the agent of a foreign corporation, does not impair the obligation of the contract between the principal and the agent.<sup>14</sup> A license or occupation tax may be imposed upon one who is already in business.<sup>15</sup>

**§ 3670. Authority to grant exemption from taxation.** Even where the validity of such contracts is recognized, a public corporation such as a city, can not enter into such a contract without statutory authority.<sup>1</sup>

Under a constitutional provision to the effect that laws which exempt from taxation property other than that specified in the constitution, are void, no valid contract for exemption can be entered into.<sup>2</sup> A power of the legislature to collect taxes and assessments can not be affected by contracts between individuals.<sup>3</sup> The fact that assessments for benefits are given priority over pre-existing mortgages does not impair the obligation of such contracts.<sup>4</sup>

**§ 3671. Construction of contract for exemption from taxation.** Where a contract to exempt from taxation is shown to exist, it is construed strictly in favor of the state.<sup>1</sup> An exemption of the property of a railway will not extend to leasehold interests.<sup>2</sup> An exemption from taxation does not extend to exemption from assessments for local benefits.<sup>3</sup>

<sup>12</sup> *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. ed. 825 [affirming, 50 Ga. 530]; *Commonwealth v. New York, Lake Erie & Western Ry.*, 129 Pa. St. 463, 15 Am. St. Rep. 724, 18 Atl. 412.

<sup>13</sup> *Tarr v. Western Loan & Savings Co.*, 15 Ida. 741, 21 L. R. A. (N.S.) 707, 99 Pac. 1049.

<sup>14</sup> *Kehrer v. Stewart*, 197 U. S. 60, 49 L. ed. 663.

<sup>15</sup> *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Kehrer v. Stewart*, 197 U. S. 60, 49 L. ed. 663; *McMillan v. Knoxville*, 139 Tenn. 319, 202 S. W. 65; *Cuthbert v. Commonwealth*, 85 Va. 899, 9 S. E. 16.

<sup>1</sup> *Turner Investment Co. v. Seattle*, 70 Wash. 201, 41 L. R. A. (N.S.) 781, 126 Pac. 426.

<sup>2</sup> *Tarver v. Dalton*, 134 Ga. 462, 29 L. R. A. (N.S.) 183, 67 S. E. 929.

<sup>3</sup> *Baldwin v. Moroney*, 173 Ind. 574, 30 L. R. A. (N.S.) 761, 91 N. E. 3.

<sup>4</sup> *Baldwin v. Moroney*, 173 Ind. 574, 30 L. R. A. (N.S.) 761, 91 N. E. 3.

<sup>1</sup> *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 43 L. ed. 823; *Wright v. Central of Georgia Ry.*, 146 Ga. 406, 91 S. E. 471; *Dubuque v. Illinois Central Railway Co.*, 39 Ia. 56; *Pratt Institute v. New York*, 183 N. Y. 151, 75 N. E. 1119.

<sup>2</sup> *Wright v. Central of Georgia Ry. Co.*, 146 Ga. 406, 91 S. E. 471.

<sup>3</sup> *Dubuque v. Illinois Central Railway Co.*, 39 Ia. 56.

A succession tax is held not to be a direct tax upon property bequeathed or passing by intestate succession, but to be a charge upon the right to take such property. Accordingly, such tax may be laid upon property specifically exempted by statute from taxation.<sup>4</sup>

**§ 3672. Assessments for benefits.** Special assessments for benefits are not based on contracts.<sup>1</sup> Accordingly, a statute which provides for assessment for the original improvement and for maintenance by general taxation may be amended so as to include maintenance in the assessment.<sup>2</sup> Where otherwise proper, a reassessment of benefits is not invalid as impairing the obligation of a contract.<sup>3</sup> A city ordinance requiring a street railway company to pave between the rails is not such a contract to impose no further assessment that the state legislature can not further require the railway company to pave one foot outside its rails.<sup>4</sup>

**§ 3673. Appropriations, etc.** A statute appropriating fines and forfeitures to the use of public corporations,<sup>1</sup> or to the use of informers,<sup>2</sup> is not a contract, and may be repealed by subsequent statute. A statute offering a bounty may be repealed even as to persons who have expended money for the purpose of earning such bounty.<sup>3</sup>

<sup>4</sup> *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196 [citing, *Carpenter v. Pennsylvania*, 58 U. S. (17 How.) 456, 15 L. ed. 127]; *Chanler v. Kelsey*, 205 U. S. 466, 51 L. ed. 882 [affirming, 176 N. Y. 486, 64 L. R. A. 279, 68 N. E. 871]; *State v. St. Louis County Probate Court*, 128 Minn. 371, L. R. A. 1916A, 901, 150 N. W. 1094; *Cornett's Executors v. Commonwealth*, 127 Va. 640, 105 S. E. 230.

A state may impose an inheritance tax upon the right of succession to United States bonds; and such tax does not impair the obligation of the contract, nor does it interfere with the power of the United States to borrow money. *Cornett's Executors v. Commonwealth*, 127 Va. 640, 105 S. E. 230.

<sup>1</sup> *Earle Road Improvement District v. Johnson*, 145 Ark. 438, 224 S. W. 965; *Collins v. A. Jaicks Co.*, 279 Mo. 404,

214 S. W. 391; *Brown v. Silverton*, 97 Or. 441, 190 Pac. 971.

<sup>2</sup> *Collins v. A. Jaicks Co.*, 279 Mo. 404, 214 S. W. 391.

<sup>3</sup> *Earle Road Improvement District v. Johnson*, 145 Ark. 438, 224 S. W. 965.

<sup>4</sup> *Sioux City Street Ry. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898 [affirming, *Sioux City Street Ry. v. Sioux City*, 78 Ia. 367, 43 N. W. 224].

<sup>1</sup> *Shell v. Beeland*, 123 Ala. 569, 26 So. 342; *Harold v. Herrington*, 95 Ala. 395, 11 So. 131; *Watson Seminary v. Pike County*, 149 Mo. 57, 45 L. R. A. 675, 50 S. W. 880.

<sup>2</sup> *Cushman v. Hale*, 68 Vt. 444, 35 Atl. 382.

<sup>3</sup> *Salt Company v. East Saginaw*, 80 U. S. (13 Wall.) 373, 20 L. ed. 611 [affirming, 19 Mich. 259, 2 Am. Rep. 82].

## V

## IMPAIRMENT OF OBLIGATION

**§ 3674. Impairment of obligation—General principles.** A contract, at modern law, is an agreement to which the law attaches an obligation.<sup>1</sup> Within the meaning of this constitutional provision, the obligation of a contract is the duty of performance which the law demands, and in case of breach of which it will give relief of some sort.<sup>2</sup> In this sense, the obligation of a contract is impaired when the substantive rights of the parties thereunder are changed.<sup>3</sup> The extent to which their substantive rights are impaired is probably immaterial,<sup>4</sup> since they are entitled to their rights under the original contract without any change.<sup>5</sup> A change in law which may affect the transaction, but which leaves unchanged the rights of the parties, does not impair the obligation of the contract.<sup>6</sup> A contract with bondholders to maintain a fund for redeeming bonds is not impaired by making appropriations therefrom not exceeding the amount of unissued bonds.<sup>7</sup>

**§ 3675. Impairment of obligation distinguished from breach or discharge.** A statute by which a state attempts to repudiate a contract into which it has entered, or an ordinance by which a

<sup>1</sup> See §§ 37 and 49.

<sup>2</sup> *United States. Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 6 L. ed. 606; *McCracken v. Hayward*, 43 U. S. (2 How.) 608, 11 L. ed. 397; *Louisiana v. Police Jury*, 111 U. S. 716, 28 L. ed. 574; *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 45 L. ed. 834.

*California. Bates v. Gregory*, 89 Cal. 387, 26 Pac. 891.

*Connecticut. Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183.

*Kentucky. Adams v. Greene*, 182 Ky. 504, 206 S. W. 759.

*Minnesota. State v. Krahmer*, 105 Minn. 422, 21 L. R. A. (N.S.) 157, 117 N. W. 780.

*Vermont. Fitzgerald v. Grand Trunk Ry.*, 63 Vt. 169, 13 L. R. A. 70, 22 Atl. 76.

*Washington. Howard v. Ross*, 38 Wash. 627, 80 Pac. 819.

*Wisconsin. Wachter v. Famachon*, 62 Wis. 117, 22 N. W. 160.

<sup>3</sup> *Jefferson County Board of Education v. Littrell*, 173 Ky. 78, 190 S. W. 465; *Adams v. Greene*, 182 Ky. 504, 206 S. W. 759; *In re Opinion of Justices*, 190 Mass. 605, 77 N. E. 1038; *State v. Krahmer*, 105 Minn. 422, 21 L. R. A. (N.S.) 157, 117 N. W. 780; *Brearley School v. Ward*, 201 N. Y. 358, 40 L. R. A. (N.S.) 1215, 94 N. E. 1001.

<sup>4</sup> *Hillebert v. Porter*, 28 Minn. 496, 11 N. W. 84.

<sup>5</sup> *Adams v. Greene*, 182 Ky. 504, 206 S. W. 759.

<sup>6</sup> *State v. Howard*, — Okla. —, 171 Pac. 41.

<sup>7</sup> *State v. Howard*, — Okla. —, 171 Pac. 41.

public corporation attempts to repudiate a contract into which it has entered, may amount to a breach of such contract, but it is not a law which impairs its obligation. The refusal of a state to perform a building contract,<sup>2</sup> or a contract for dredging a harbor,<sup>3</sup> or the refusal of a city to pay a debt,<sup>4</sup> or to perform a contract under which a system of sewers has been constructed,<sup>5</sup> is, in each case, a breach of such contract; but it is not a law impairing its obligation. A joint resolution of the legislature requiring the treasurer to write off past due bonds is not a law impairing the obligation of a contract.<sup>6</sup> A statute which declares a forfeiture of a franchise for breach of condition and provides for bringing action to enforce such condition,<sup>7</sup> or a finding by a council that a franchise has been forfeited, if by the terms of the franchise the finding of the council is conclusive,<sup>8</sup> does not impair the obligation of the contract.

Important practical consequences follow from this distinction. For jurisdictional purposes the remedy in such cases is an action on the contract; and a court can not take jurisdiction on the ground that a constitutional question is presented.<sup>9</sup> State officers who act in accordance with the direction of the legislature in refusing performance, incur no personal liability;<sup>10</sup> and public officers can not be enjoined from acting in accordance with such directions

<sup>1</sup> United States. *Brown v. Colorado*, 106 U. S. 95, 27 L. ed. 132; *St. Paul Gas Light Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788; *Dawson v. Columbia Avenue Trust Co.*, 197 U. S. 178, 49 L. ed. 713; *Shawnee Sewerage & Drainage Co. v. Stearns*, 220 U. S. 462, 55 L. ed. 544; *McCormick v. Oklahoma City*, 236 U. S. 657, 59 L. ed. 771; *Hays v. Port of Seattle*, 251 U. S. 233, 64 L. ed. 243.

Arkansas. *Caldwell v. Donaghey*, 108 Ark. 60, 45 L. R. A. (N.S.) 721, 156 S. W. 839.

Illinois. *Chalstran v. Board of Education*, 244 Ill. 470, 91 N. E. 712.

New York. *Lord v. Thomas*, 64 N. Y. 107; *Danolds v. State*, 89 N. Y. 36.

South Carolina. *Smith v. Jennings*, 67 S. Car. 324, 45 S. E. 821.

Wisconsin. *McDougall v. Racine*

County, 156 Wis. 663, 146 N. W. 794.

<sup>2</sup> *Caldwell v. Donaghey*, 108 Ark. 60, 45 L. R. A. (N.S.) 721, 156 S. W. 839.

<sup>3</sup> *Hays v. Port of Seattle*, 251 U. S. 233, 64 L. ed. 243.

<sup>4</sup> *Dawson v. Columbia Avenue Trust Co.*, 197 U. S. 178, 49 L. ed. 713.

<sup>5</sup> *Shawnee Sewerage & Drainage Co. v. Stearns*, 220 U. S. 462, 55 L. ed. 544.

<sup>6</sup> *Smith v. Jennings*, 67 S. Car. 324, 45 S. E. 821.

<sup>7</sup> *State v. Columbia Ry., Gas & Electric Co.*, 112 S. Car. 528, 100 S. E. 355.

<sup>8</sup> *Newsom v. Rainier*, 94 Or. 199, 185 Pac. 296.

<sup>9</sup> *Dawson v. Columbia Avenue Trust Co.*, 197 U. S. 178, 49 L. ed. 713; *Shawnee Sewerage & Drainage Co. v. Stearns*, 220 U. S. 462, 55 L. ed. 544.

<sup>10</sup> *Caldwell v. Donaghey*, 108 Ark. 60, 45 L. R. A. (N.S.) 721, 156 S. W. 839.

of the state or the public corporations,<sup>11</sup> since the granting of an injunction under such circumstances would amount to a decree for specific performance; and the remedy in such cases is ordinarily an action at law for damages.

Statutes by which a state or a public corporation repudiates a contract with reference to taxation, including contracts for exemption from taxation and contracts pledging the proceeds of said taxes for certain purposes, have been spoken of as laws which impair the obligation of such contracts.<sup>12</sup> The same result would, in most cases, be reached by treating this as a case of breach, since specific relief in equity is ordinarily the only available remedy.

**§ 3676. Impairment of obligation—Subsequent and prior contracts.** A law passed after a contract is made and purporting to affect it, may be invalid as impairing the obligation of such contract.<sup>1</sup> A law in force when a contract is made is part thereof.<sup>2</sup> Whatever objections may be made to the validity of such law, it

<sup>11</sup> *Chalstran v. Board of Education*, 244 Ill. 470, 91 N. E. 712; *Lord v. Thomas*, 64 N. Y. 107; *Danolds v. State*, 89 N. Y. 36; *McDougall v. Racine County*, 156 Wis. 663, 146 N. W. 794.

<sup>12</sup> *Board of Revenue v. Farson*, 197 Ala. 375, L. R. A. 1918B, 881, 72 So. 613; *First National Bank v. Terry*, 203 Ala. 401, 83 So. 170; *Edwards v. Helena*, 58 Mont. 202, 191 Pac. 387; *In re Assessment of First National Bank*, 58 Okla. 508, L. R. A. 1917B, 204, 160 Pac. 469.

See §§ 3668 et seq.

<sup>1</sup> *United States. Gunn v. Barry*, 82 U. S. 610, 21 L. ed. 212; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132.

*Alabama. Ernst v. Hollis*, 89 Ala. 638, 8 So. 122.

*California. Stephens v. Southern Pacific Ry. Co.*, 109 Cal. 86, 50 Am. St. Rep. 17, 29 L. R. A. 751, 41 Pac. 783.

*Florida. State v. Bradshaw*, 39 Fla. 137, 22 So. 296.

*Indiana. McMurray v. Sidwell*, 155 Ind. 560, 80 Am. St. Rep. 255, 58 N. E. 722.

*Massachusetts. Cary Library v. Bliss*, 151 Mass. 364, 7 L. R. A. 765, 25 N. E. 92.

*Mississippi. Hamilton v. State (Miss.)*, 8 So. 761, s. c., 67 Miss. 217, 7 So. 282.

*Nebraska. State v. McPeak*, 31 Neb. 139, 47 N. W. 691; *American Building & Loan Association v. Rainbolt*, 48 Neb. 434, 67 N. W. 493; *State v. Kearney*, 49 Neb. 325, 68 N. W. 533.

*New York. Hughes v. Cuming*, 165 N. Y. 91, 58 N. E. 794.

*Texas. Flewellen v. Proetzel*, 80 Tex. 191, 15 S. W. 1043.

<sup>2</sup> *Denny v. Bennett*, 128 U. S. 489, 32 L. ed. 491; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382; *Reed v. Painter*, 129 Mo. 674, 31 S. W. 919; *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 53 L. R. A. 305, 50 S. W. 519.

does not impair the obligation of such contracts.<sup>3</sup> To be invalid as impairing the obligation of contracts a statute "must be one enacted after the making of the contract, the obligation of which is claimed to be impaired."<sup>4</sup> The obligation of future contracts is not impaired by a statute which forbids the use of a photograph of another for advertising purposes, without his written consent,<sup>5</sup> or which imposes an additional license fee on merchants who offer profit-sharing coupons,<sup>6</sup> or one which forbids trading stamps to be redeemed in merchandise,<sup>7</sup> or by a statute which forbids the sale of railway tickets through brokers,<sup>8</sup> or which gives lien on a motor vehicle even after possession has been surrendered,<sup>9</sup> or which gives a lien on crops to laborers and makes it superior to prior mort-

<sup>3</sup> **United States.** *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773; *Galveston, Harrisburg & San Antonio Ry. v. Texas*, 170 U. S. 226, 42 L. ed. 1017; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382; *Pinney v. Nelson*, 183 U. S. 144, 46 L. ed. 125; *Blackstone v. Miller*, 188 U. S. 180, 47 L. ed. 439; *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046; *Rast v. Van Deman*, 240 U. S. 342, L. R. A. 1917A, 421, 60 L. ed. 679.  
**Georgia.** *National Bank v. Augusta Cotton & Compress Co.*, 104 Ga. 403, 30 S. E. 888.

**Illinois.** *Burdick v. People*, 149 Ill. 600, 611, 41 Am. St. Rep. 329, 24 L. R. A. 152, 36 N. E. 948, 952; *Dunne v. Rock Island County*, 283 Ill. 628, 119 N. E. 591; *Robison v. Harrington*, 61 Ill. App. 543.

**Indiana.** *Barrett v. Millikan*, 156 Ind. 510, 83 Am. St. Rep. 220, 60 N. E. 310; *Small v. Hammes*, 156 Ind. 556, 60 N. E. 342.

**Louisiana.** *Frazee v. Dupre*, 51 La. Ann. 411, 25 So. 260.

**Michigan.** *Wellman v. Chicago & Grand Trunk Ry.*, 83 Mich. 592, 47 N. W. 489.

**Minnesota.** *Perkins v. Stewart*, 75 Minn. 21, 77 N. W. 434.

**Missouri.** *Ellerbe v. United Masonic Benefit Association*, 114 Mo. 501, 21 S.

W. 843; *St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878.

**New Jersey.** *Crucible Steel Co. v. Polack Tyre & Rubber Co.*, 92 N. J. L. 221, 104 Atl. 324.

**New York.** *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223, 34 L. R. A. (N.S.) 1143, 85 N. E. 1097.

**Ohio.** *Williams v. Donough*, 65 O. S. 499, 56 L. R. A. 766, 63 N. E. 84.

**Oregon.** *State v. Thompson*, 47 Or. 492, 4 L. R. A. (N.S.) 480, 84 Pac. 476.

**Pennsylvania.** *McMaster v. Normal*, 162 Pa. St. 260, 29 Atl. 734; *Kraus v. Philadelphia*, 265 Pa. St. 425, 109 Atl. 226.

**Wisconsin.** *Sperry & Hutchinson Co. v. Weigle*, 166 Wis. 613, 166 N. W. 54.

<sup>4</sup> *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391, 30 L. ed. 1059 [quoted in *Pinney v. Nelson*, 183 U. S. 144, 147, 46 L. ed. 125].

<sup>5</sup> *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223, 34 L. R. A. (N.S.) 1143, 85 N. E. 1097.

<sup>6</sup> *Rast v. Van Deman*, 240 U. S. 342, L. R. A. 1917A, 421, 60 L. ed. 679.

<sup>7</sup> *Sperry & Hutchinson Co. v. Weigle*, 166 Wis. 613, 166 N. W. 54.

<sup>8</sup> *State v. Thompson*, 47 Or. 492, 4 L. R. A. (N.S.) 480, 84 Pac. 476.

<sup>9</sup> *Crucible Steel Co. v. Polack Tyre & Rubber Co.*, 92 N. J. L. 221, 104 Atl. 324.

gages,<sup>10</sup> or which provides for the escheat of unclaimed bank deposits,<sup>11</sup> or by a statute which regulates the manner in which a municipal corporation may borrow money.<sup>12</sup> A statute imposing a personal liability upon the stockholders of foreign corporations doing business within the state does not impair the obligation of the contract entered into between the stockholders of a foreign corporation subsequently incorporated for the purpose of doing business in that state.<sup>13</sup> A law providing that an assignment for the benefit of creditors may be made whenever property is seized on execution or attachment and that such assignment shall discharge the lien of such levy or attachment, is valid as applying to debts subsequently incurred.<sup>14</sup> The fact that a contract contains a provision that it is subject to changes in by-laws does not prevent the protection of this clause.<sup>15</sup>

**§ 3677. Relative priority of statute and contract.** In this sense the contract comes into existence at the moment that it becomes enforceable between the parties, even though further acts are to be done in performance thereof.<sup>1</sup> If a contract has been made for borrowing money on security of a judgment to be confessed in the future, a statute which gives an additional interest in realty to the widow of the debtor is inoperative as against such contract.<sup>2</sup> Property which is transferred by a trust deed which is executed before a tax law is enacted, but which does not pass title until after such law takes effect, is subject to such tax.<sup>3</sup> When a certificate of stock is issued to a member of a loan association incorporated in a foreign state, and his application for a loan is approved, a contract exists which can not be impaired by subsequent legislation restricting the right of such corporation to do business

<sup>10</sup> *Sitton v. Dubois*, 14 Wash. 624, 45 Pac. 303 (as to mortgages given after statute was enacted).

<sup>11</sup> *Commonwealth v. Dollar Savings Bank*, 250 Pa. St. 138, 1 A. L. R. 1048, 102 Atl. 569 (such statute is constitutional although enacted after the deposit is made).

See § 3699.

<sup>12</sup> *Kraus v. Philadelphia*, 265 Pa. St. 425, 100 Atl. 226.

<sup>13</sup> *Pinney v. Nelson*, 183 U. S. 144, 46 L. ed. 125.

<sup>14</sup> *In re Pauley's Estate*, 149 Pa. St. 196, 24 Atl. 114.

<sup>15</sup> *Modern Woodmen of America v. White*, — Colo. —, 199 Pac. 965.

<sup>1</sup> *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 45 L. ed. 834; *Central Trust Co. v. Louisville, St. Louis & Texas Ry.*, 70 Fed. 282; *Davidson v. Richardson*, 50 Or. 323, 17 L. R. A. (N.S.) 319, 91 Pac. 1080.

<sup>2</sup> *Davidson v. Richardson*, 50 Or. 323, 17 L. R. A. (N.S.) 319, 91 Pac. 1080.

<sup>3</sup> *Carter v. Bugbee*, 92 N. J. L. 390, 106 Atl. 412.

in such state, even though the loan was not made until after the statute was passed.<sup>4</sup> If a debt was contracted before a statute was passed and a note given therefor after the statute was passed, the date of contracting the debt determines the validity of the statute.<sup>5</sup> It will not be presumed, however, that a given contract was entered into before the statute in question was passed; but that fact must be affirmatively shown.<sup>6</sup>

On the other hand, a transaction which has not yet created contract rights may be affected by a statute passed during such transaction.<sup>7</sup> A statute withdrawing public land from sale does not impair the rights of prospective purchasers who have not complied with the law so far as to secure their rights.<sup>8</sup> If they have complied with the law so far as to acquire rights in the public lands a subsequent change of statute can not divest such rights.<sup>9</sup>

The date of the law, in determining the application of this principle, is the date at which the law is passed and not that at which it is to go into effect, if it is to go into effect at a period subsequent to its passage.<sup>10</sup> A statute made contracts of a foreign cor-

<sup>4</sup> *Bedford v. Eastern Building & Loan Association*, 181 U. S. 227, 45 L. ed. 834.

<sup>5</sup> *Wilson v. Brochon*, 95 Fed. 82.

<sup>6</sup> *Blair v. Ostrander*, 109 Ia. 204, 77 Am. St. Rep. 532, 47 L. R. A. 469, 80 N. W. 330; *Williams v. Donough*, 65 O. S. 499, 56 L. R. A. 766, 63 N. E. 84.

<sup>7</sup> *Campbell v. Wade*, 132 U. S. 34, 33 L. ed. 240; *Frellsen v. Crandell*, 217 U. S. 71, 54 L. ed. 670; *Rast v. Van Deman*, 240 U. S. 342, L. R. A. 1917A, 421, 60 L. ed. 679; *Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601; *Carter v. Bugbee*, 92 N. J. L. 390, 106 Atl. 412.

<sup>8</sup> *Campbell v. Wade*, 132 U. S. 34, 33 L. ed. 240.

<sup>9</sup> *Stark v. Starrs*, 73 U. S. (6 Wall.) 402, 18 L. ed. 925; *Frisbie v. Whitney*, 76 U. S. (9 Wall.) 187, 19 L. ed. 668; *The Yosemite Valley Case* (*Hutchings v. Low*), 82 U. S. (15 Wall.) 77, 21 L. ed. 82; *Barney v. Dolph*, 97 U. S. 652, 24 L. ed. 1063; *Wirth v. Branson*, 98 U. S. 118, 25 L. ed. 86 [distinguishing, *Allen v. Forrest*, 8 Wash. 700, 24 L. R.

A. 606, 36 Pac. 971]; *Campbell v. Wade*, 132 U. S. 34, 33 L. ed. 240; *American Association v. Innis*, 109 Ky. 595, 60 S. W. 388; *State v. Bridges*, 22 Wash. 64, 79 Am. St. Rep. 914, 60 Pac. 60 [citing, *Lytle v. Arkansas*, 50 U. S. (9 How.) 314].

<sup>10</sup> *United States. Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 47 L. ed. 328; *Wrightman v. Boone County*, 88 Fed. 435 (same case, 82 Fed. 412).

*Kentucky. Hedger v. Rennaker*, 58 Ky. (3 Met.) 255.

*Massachusetts. Smith v. Morrison*, 39 Mass. (22 Pick.) 430.

*Michigan. Price v. Hopkins*, 13 Mich. 318.

*Minnesota. Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714; *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653.

*Nebraska. O'Brien v. Gaslin*, 20 Neb. 347, 30 N. W. 274 [following, *Harbach v. Miller*, 4 Neb. 31].

*New York. Gilbert v. Ackerman*, 159 N. Y. 118, 45 L. R. A. 118, 53 N. E. 753.

*North Dakota. Merchants' National*

poration which did not file its charter with the secretary of state void on the corporation's behalf, but valid against it. This statute was to go into effect at a future time. It was held that a contract entered into by such corporation in the interim was affected by such statute.<sup>11</sup> A deed of trust executed after the passage of a statute providing that certain mechanics' liens created after mortgages may have priority over them, but before it goes into effect, is governed by the provisions of such statute.<sup>12</sup> The greater number of the cases cited are on the point that in determining what is a reasonable time for bringing suit in case the Statute of Limitations is shortened, the time given is to be counted from the date of the passage of the act.<sup>13</sup> Where a Statute of Limitations was to take effect six months after its passage, it was not invalid as impairing the obligation of contracts because causes of action were barred thereby as soon as it took effect, if a reasonable time was given after the passage of the act.<sup>14</sup>

A statute in force when the contract was made was subsequently repealed and then re-enacted. Its re-enactment was held not to

**Bank v. Braithwaite**, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244; **Osborne v. Lindstrom**, 9 N. D. 1, 81 Am. St. Rep. 516, 46 L. R. A. 715, 81 N. W. 72.

**Pennsylvania. Korn v. Browne**, 64 Pa. St. 55.

**Virginia. Virginia Development Co. v. Crozer Iron Co.**, 90 Va. 126, 44 Am. St. Rep. 893, 17 S. E. 806.

**Wisconsin. Eaton v. Supervisors**, 40 Wis. 668.

Contra, that it is the taking effect of the statute and not the date of its passage. **Ludwig v. Stewart**, 32 Mich. 27.

<sup>11</sup> **Diamond Glue Co. v. Glue Co.**, 187 U. S. 611, 47 L. ed. 328.

<sup>12</sup> **Virginia Development Co. v. Crozer Iron Co.**, 90 Va. 126, 44 Am. St. Rep. 893, 17 S. E. 806.

<sup>13</sup> **United States. Wrightman v. Boone County**, 88 Fed. 435 (same case, 82 Fed. 412).

**Kentucky. Hedger v. Rennaker**, 45 Ky. (3 Met.) 255.

**Massachusetts. Smith v. Morrison**, 39 Mass. (22 Pick.) 430.

**Nebraska. O'Brien v. Gaslin**, 20 Neb. 347 [following, 30 N. W. 274; **Harbach v. Miller**, 4 Neb. 31].

**North Dakota. Osborne v. Lindstrom**, 9 N. D. 1, 81 Am. St. Rep. 516, 46 L. R. A. 715, 81 N. W. 72.

"The plain purpose of this provision was to give the holders of judgments rendered ten years or more before the passage of the act a reasonable time in which to revive their judgments before the act took effect." **Wrightman v. Boone County**, 88 Fed. 435, 436; **Gilbert v. Ackerman**, 159 N. Y. 118, 45 L. R. A. 118, 53 N. E. 753.

Contra, **Ludwig v. Stewart**, 32 Mich. 27.

<sup>14</sup> **Hill v. Townley**, 45 Minn. 167, 47 N. W. 653.

Contra, **Gilbert v. Ackerman**, 159 N. Y. 118, 45 L. R. A. 118, 53 N. E. 753.

impair the obligation of the contract, no modification of it having been made while such repeal is in force.<sup>15</sup>

If a corporation whose charter is not subject to alteration by the state accepts the benefits of subsequent legislation, it becomes subject to all the provisions thereof.<sup>16</sup> The contractual charter rights of a lessee of a street railway line date from the charter of the lessee and not from that of the lessor.<sup>17</sup> A statute which increases the liability of a stockholder in a bank after the organization of such bank, is said not to impair the obligation of the contract with reference to deposits which are made after such statute is enacted.<sup>18</sup>

### § 3678. Illustrations of impairment of obligation of contracts.

As is natural, the earlier cases illustrate more frequently than the later ones, undisguised attempts to impair the obligation of contracts, while the later cases are more likely to illustrate attempts of the legislature to impair the obligation of contracts by statutes not avowedly passed for that purpose. Whether the intention is open or concealed, the statute is invalid if its effect is to impair the obligation of contracts. Contracts valid when made can not be made invalid by a subsequent statute declaring that they are unenforceable.<sup>1</sup> The liability of sureties can not be modified by legis-

<sup>15</sup> *Knights' Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U. S. 197, 47 L. ed. 139. (The statute provided that suicide should be no defense to a policy of life insurance. The policy contained a provision that the insurance company should not be liable in case of suicide, which provision was void by reason of such statute).

<sup>16</sup> *Yates v. People*, 207 Ill. 316, 69 N. E. 775.

<sup>17</sup> *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 59 L. R. A. 631, 65 N. E. 451. (The lessor's charge gave it the right to charge a fixed rate of fare not subject to involuntary reduction. The lessee was subject to the right of the city to fix the rate of fare. After the lease the city was allowed to change the rate of fare, below that allowed to the lessor).

<sup>18</sup> *Pate v. Bank of Newton*, 116 Miss.

666, 77 So. 601 (under reservation of power to amend).

<sup>1</sup> *United States. White v. Hart*, 80 U. S. (13 Wall.) 646, 20 L. ed. 685; *Louisiana v. Taylor*, 105 U. S. 454, 26 L. ed. 1133; *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 1 L. R. A. (N.S.) 1171.

*California. Bates v. Gregory* (Cal.), 22 Pac. 683; *Bates v. Gregory*, 89 Cal. 387, 26 Pac. 891.

*Colorado. British America Assurance Co. v. Colorado & Southern Ry. Co.*, 52 Colo. 589, 41 L. R. A. (N.S.) 1202, 125 Pac. 508.

*Delaware. Pusey v. Love*, 6 Penn. (Del.) 80, 11 L. R. A. (N.S.) 953, 66 Atl. 1013.

*Florida. Prairie Pebble Phosphate Co. v. Silverman*, — Fla. —, 86 So. 508.

*Oregon. Miller v. Henry*, 62 Or. 4,

lation which is enacted after they have incurred such liability.<sup>2</sup> If a sub-contractor has given bond under a contract which imposes certain liabilities upon such sureties, persons who have advanced credit to the contractor can not be deprived of the benefit of such bond by subsequent legislation.<sup>3</sup> Bonds, valid when issued,<sup>4</sup> or contracts between a railroad company and its employes, whereby the latter waive their rights to damages for personal injuries, if valid when made,<sup>5</sup> or contracts for removing logs belonging to one party which have floated upon the lands of the other party in high water, without paying damages,<sup>6</sup> or a contract by a city for a heating plant,<sup>7</sup> can not be made invalid by subsequent statute. If one has obtained a permit from proper municipal authority to erect a frame building within fire limits, and incurs liabilities on contracts for the erection thereof, the city can not thereafter rescind such permit.<sup>8</sup> An act providing that in case of a division of a religious society a majority of each congregation shall determine to which branch the congregation shall belong, which determination is to be conclusive as to the rights in the property held in trust for such congregation, is invalid.<sup>9</sup> An act requiring pre-existing warrants to be registered in a certain time, making them invalid if not so registered, is unconstitutional.<sup>10</sup> If an insurance company has entered into contracts which provide for subrogating it to the claims of the insured, a statute which forbids subrogation in certain cases can not operate so as to impair the obligation of such contracts of insurance.<sup>11</sup> A loan made by a

41 L. R. A. (N.S.) 97, 124 Pac. 197; Drainage District No. 7, Washington County v. Bernards, 89 Or. 531, 174 Pac. 1167.

Washington. Title Guaranty & Surety Co. v. Coffman, 97 Wash. 211, 166 Pac. 620.

<sup>2</sup> Gilpatric v. National Surety Co., — Conn. —, 110 Atl. 545; Title Guaranty & Surety Co. v. Coffman, 97 Wash. 211, 166 Pac. 620.

<sup>3</sup> Title Guaranty & Surety Co. v. Coffman, 97 Wash. 211, 166 Pac. 620.

<sup>4</sup> Red Rock v. Henry, 106 U. S. 596, 27 L. ed. 251; Bates v. Gregory (Cal.), 22 Pac. 683; Bates v. Gregory, 89 Cal. 387, 26 Pac. 891.

<sup>5</sup> Shaver v. Pennsylvania Co., 71 Fed. 931.

<sup>6</sup> Bradley v. Tittabawasee Boom Co., 82 Mich. 9, 46 N. W. 24.

<sup>7</sup> (City of) Ludlow v. Peck-Williamson Heating & Ventilating Co., 116 Ky. 608, 76 S. W. 377.

<sup>8</sup> Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443.

<sup>9</sup> Finley v. Brent, 87 Va. 103, 11 L. R. A. 214, 12 S. E. 228.

<sup>10</sup> Robinson v. Magee, 9 Cal. 81, 70 Am. Dec. 638.

<sup>11</sup> British America Assurance Co. v. Colorado & Southern Ry. Co., 52 Colo. 589, 41 L. R. A. (N.S.) 1202, 125 Pac. 508.

foreign corporation before a statute requiring the charter to be filed in that state is not affected by such subsequent act.<sup>12</sup>

**§ 3679. Release of public rights.** A statute by which the state attempts to modify a contract between it and a private individual, to the advantage of such individual, is said not to impair its obligation.<sup>1</sup> A contract under which a state has issued its bonds, to be received as payment for certain public lands, is not impaired by subsequent legislation for the payment of such bonds in money.<sup>2</sup>

If a public official has, without any fault of his own, lost public money for which he is personally liable, a release of such liability is held valid in some states,<sup>3</sup> on the theory that it is not a gift or a purely gratuitous release, but is a "release of a claim which though legally due, the legislature found that it would be unjust and oppressive to collect," and is supported by the consideration of "the moral obligation to release it."<sup>4</sup> The chief point of interest in this holding is that it revives the by-gone theory of a moral obligation. Other courts hold that such release impairs the obligation of the contract between the public official and the public corporation.<sup>5</sup> In this connection and in support of the last proposition, the analogous case *In re Greene*<sup>6</sup> might be referred to. In that case, a county treasurer who was also a bank cashier overdrew his account at the bank to pay his obligations to the county. Subsequently the bank sued the county to recover this money.

<sup>12</sup> *Pioneer Savings & Loan Co. v. Cannon*, 96 Tenn. 599, 54 Am. St. Rep. 858, 33 L. R. A. 112, 36 S. W. 386; and see on the same point *Root v. Sweeney*, 12 S. D. 43, 80 N. W. 149.

<sup>1</sup> *Tipton v. Smythe*, 78 Ark. 392, 115 Am. St. Rep. 44, 7 L. R. A. (N.S.) 714, 94 S. W. 678.

<sup>2</sup> "There can be no higher method of discharging a past-due obligation than by payment in money; and, when this method of payment was provided by the statute, the bondholder sustained no impairment of his contract by being deprived of the right to use it in payment for lands." *Tipton v. Smythe*, 78 Ark. 392, 115 Am. St. Rep. 44, 7 L. R. A. (N.S.) 714, 94 S. W. 678.

<sup>3</sup> *Arkansas. Pearson v. State*, 56

Ark. 148, 35 Am. St. Rep. 91, 19 S. W. 499.

*Indiana. Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192.

*Iowa. McSurely v. McGrew*, 140 Ia. 163, 132 Am. St. Rep. 248, 118 N. W. 415.

*Oregon. Miller v. Henry*, 62 Or. 4, 41 L. R. A. (N.S.) 97, 124 Pac. 197.

*Ohio. Board of Education v. McLandsborough*, 36 O. S. 227, 38 Am. Rep. 582.

<sup>4</sup> *Pearson v. State*, 56 Ark. 148, 35 Am. St. Rep. 91, 19 S. W. 499.

<sup>5</sup> *McClelland v. State*, 138 Ind. 321, 37 N. E. 1089; *Johnson v. Randolph County*, 140 Ind. 152, 39 N. E. 311; *Bristol v. Johnson*, 34 Mich. 123.

<sup>6</sup> 166 N. Y. 485, 60 N. E. 183.

Judgment was rendered in favor of the county. The bank then applied to the legislature and a special act was passed requiring the county to pay such debt. This act was held invalid.

**§ 3680. Additional defense as impairment of obligation—State insolvency laws.** A new defense, not permitted by law when the contract was entered into, can not be created by subsequent statute.<sup>1</sup> A state can not enact an insolvency statute under which a discharge may be given which will be operative as against pre-existing debts.<sup>2</sup> A state insolvent act may be modified as to pre-existing debts so as to withdraw the protection of the discharge granted after the act was passed from certain classes of debts, as where by statute the discharge of the principal debtor did not release another liable for the same debt, as guarantor, surety or otherwise.<sup>3</sup> An insolvency statute which merely provides for another method for compelling the debtor to pay, or of distributing his property among his creditors, does not impair the obligation of prior contracts.<sup>4</sup>

**§ 3681. Partial impairment.** A statute which leaves part of the contract in force, but modifies certain of its terms or changes its legal effect is invalid.<sup>1</sup> The legislature can not restrict the

<sup>1</sup> *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 4 L. ed. 529; *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 6 L. ed. 606; *Conway v. Seamons*, 55 Vt. 8, 45 Am. Rep. 579.

<sup>2</sup> *United States v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 4 L. ed. 529; *Farmers' & Mechanics' Bank v. Smith*, 19 U. S. (6 Wheat.) 131, 5 L. ed. 224; *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 6 L. ed. 606; *Tennessee Bank v. Horn*, 58 U. S. (17 How.) 157, 15 L. ed. 70.

*Connecticut v. Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183.

*Massachusetts v. Blanchard v. Russell*, 13 Mass. 1, 7 Am. Dec. 106 (obiter).

*Minnesota v. Union Bank v. Rugg*, 78 Minn. 256, 80 N. W. 1121.

*New York v. Roosevelt v. Cebra*, 17 Johns. (N. Y.) 108.

*North Dakota v. Elton v. O'Connor*, 6 N. D. 1, 33 L. R. A. 524, 68 N. W. 84.

*Vermont v. Conway v. Seamons*, 55 Vt. 8, 45 Am. Rep. 579.

<sup>3</sup> *Willis v. Mabon*, 48 Minn. 140, 31 Am. St. Rep. 626, 16 L. R. A. 281, 50 N. W. 1110.

<sup>4</sup> *In re Davis*, 103 Neb. 703, 173 N. W. 695.

<sup>1</sup> *United States v. Bronson v. Kinzie*, 42 U. S. (1 How.) 311, 13 L. ed. 143; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304.

*Indiana v. Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624, 11 L. R. A. 370, 26 N. E. 778.

*Kentucky v. Louisville School Board v. Bank of Kentucky*, 86 Ky. 150, 5 S. W. 739.

*Louisiana v. State v. Long*, 136 La. 1, L. R. A. 1915E, 235, 66 So. 377.

*Massachusetts v. Cook v. Googins*, 126 Mass. 410.

*Minnesota v. O'Brien v. Krenz*, 36 Minn. 136, 30 N. W. 458.

assignability or negotiability of prior contracts,<sup>2</sup> or require the same notice to be given to blank indorsers out of the chain of title as to regular indorsers, to fix liability,<sup>3</sup> or dispense with certain acts, necessary when a contract was made to fix the liability of an indorser,<sup>4</sup> or make invalid a power of attorney contained in a note which has already been given,<sup>5</sup> or change the time of performance,<sup>6</sup> as by abolishing days of grace,<sup>7</sup> or change the place of performance.<sup>8</sup> A statute limiting the amount of recovery on a debt secured by mortgage to the proceeds of the mortgaged property is invalid.<sup>9</sup> A statute forbidding sale under an inferior lien where realty has once been sold under a superior lien and the holder of the legal title has the right to redeem in fifteen months impairs the obligation of the contract of a prior lien.<sup>10</sup> A change in the security for prior bonds from a lien on realty to the personal liability of a city, impairs the obligation of the contract.<sup>11</sup> It is said, however, that if a provision is made for adequate security, a guardian may be allowed to give a personal bond instead of a mortgage.<sup>12</sup> A statute which provides that no action can be brought on pre-existing notes unless the plaintiff files an affidavit that he has paid taxes thereon is invalid.<sup>13</sup>

**Nebraska.** *State v. McPeak*, 31 Neb. 139, 47 N. W. 601.

<sup>2</sup> *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304.

<sup>3</sup> *Cook v. Googins*, 126 Mass. 410.

<sup>4</sup> *Farmers' Bank v. Gunnell*, 67 Va. (26 Gratt.) 131.

<sup>5</sup> *Milwaukee Second Ward Savings Bank v. Schranck*, 97 Wis. 250, 39 L. R. A. 569, 73 N. W. 31.

<sup>6</sup> *May v. Cass County*, 12 N. D. 137, 96 N. W. 292; *Bywaters v. Paris & Great Northern Ry.*, 73 Tex. 624, 11 S. W. 856.

A change as to the time of paying taxes may change the practical operation of a contract to pay all taxes which become due before a certain time. This does not impair the obligation of the contract, however, since the parties had assumed the risk as to all taxes which might fall due by the

date specified. *Ward v. Union Trust Co. of New York*, 224 N. Y. 73, 3 A. L. R. 1154, 120 N. E. 81.

<sup>7</sup> *Wood v. Rosendale*, 18 Ohio C. C. 247.

<sup>8</sup> *Williams v. Bruffy*, 96 U. S. 176, 24 L. ed. 716; *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624, 11 L. R. A. 370, 26 N. E. 778.

<sup>9</sup> *Dennis v. Moses*, 18 Wash. 537, 40 L. R. A. 302, 52 Pac. 333.

<sup>10</sup> *Shrigley v. Black*, 66 Kan. 213, 71 Pac. 301.

<sup>11</sup> *Indianapolis v. Robison*, 186 Ind. 660, 117 N. E. 861; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70.

<sup>12</sup> *In re Lee's Tutorship*, 147 La. 231, 84 So. 598.

<sup>13</sup> *Walker v. Whitehead*, 83 U. S. (16 Wall.) 314, 21 L. ed. 357.

**§ 3682. Change in rate of interest.** A statute changing the rate of interest for pre-existing contracts impairs their obligation,<sup>1</sup> whether such rate is expressly fixed by contract,<sup>2</sup> or the contract specifically provides for interest but does not fix the rate, thereby impliedly adopting the legal rate,<sup>3</sup> or even, by some authorities if the contract is simply for the payment of money, without any provision for interest.<sup>4</sup> The interest on state<sup>5</sup> or county warrants<sup>6</sup> can not be changed by statute. If a state debt bears no interest when it is incurred the state can not be compelled by subsequent statute to pay interest thereon.<sup>7</sup>

On the other hand, where a statute provided that warrants should bear interest from the date of presentation, the interest becomes a part of the obligation only after presentation; and a statute reducing the rate of interest is valid as to warrants issued before such statute was passed but not presented till after.<sup>8</sup> In New York a statute reducing the rate of interest from seven per cent. to six, was held to apply to interest accruing after the passage of the act, but not to that accruing before, where the contract on which the money was due did not specifically provide for interest as a claim on book account,<sup>9</sup> or a claim for an unpaid divi-

<sup>1</sup> *United States. Koshkonong v. Burton*, 104 U. S. 668, 26 L. ed. 886.

*Colorado. First National Bank v. Arthur*, 10 Colo. App. 283, 50 Pac. 738; *Butler v. Rockwell*, 17 Colo. 290, 17 L. R. A. 611, 29 Pac. 458.

*Connecticut. Seymour v. Continental Life Ins. Co.*, 44 Conn. 300, 26 Am. Rep. 469.

*Montana. State v. Barrett*, 25 Mont. 112, 63 Pac. 1030.

*Ohio. Kilgore v. Emmitt*, 33 O. S. 410.

*Oregon. Seton v. Hoyt*, 34 Or. 266, 75 Am. St. Rep. 641, 43 L. R. A. 634, 55 Pac. 967.

*Pennsylvania. Scranton v. Hyde Park Gas Co.*, 102 Pa. St. 382.

*Washington. Union Savings Bank & Trust Co. v. Gelbach*, 8 Wash. 497, 24 L. R. A. 359, 36 Pac. 467; *State v. Bowen*, 11 Wash. 432, 39 Pac. 648; *Williams v. Shoudy*, 12 Wash. 362, 41 Pac. 169.

*West Virginia. Murdock v. Frank-*

*lin Ins. Co.*, 33 W. Va. 407, 7 L. R. A. 572, 10 S. E. 777.

*Wisconsin. Howland v. Marr*, 20 Wis. 275.

<sup>2</sup> *Sims v. Squires*, 80 Ind. 42; *Kassing v. Ordway*, 100 Ia. 611, 69 N. W. 1013; *Richardson v. Campbell*, 27 Neb. 644, 11 L. R. A. 189, 43 N. W. 405; *Guild v. First National Bank*, 4 S. D. 566, 57 N. W. 499.

<sup>3</sup> *Wyckoff v. Wyckoff*, 44 N. J. Eq. 56, 13 Atl. 662.

<sup>4</sup> *Lee v. Davis*, 8 Ky. (1 A. K. Mar.) 397, 10 Am. Dec. 746.

<sup>5</sup> *State v. Barrett*, 25 Mont. 112, 63 Pac. 1030.

<sup>6</sup> *Seton v. Hoyt*, 34 Or. 266, 75 Am. St. Rep. 641, 43 L. R. A. 634, 55 Pac. 967.

<sup>7</sup> *Molineux v. State*, 109 Cal. 378, 50 Am. St. Rep. 49, 42 Pac. 34.

<sup>8</sup> *State v. Young*, 22 Wash. 547, 61 Pac. 725.

<sup>9</sup> *Reese v. Rutherford*, 90 N. Y. 644.

dend.<sup>10</sup> One who has bought a tax certificate does not acquire a contractual right in the rate of interest; and the state may change this rate after such purchase.<sup>11</sup> The legislature may change the rate of interest which is allowed as damages, after the contract has been entered into.<sup>12</sup> The rate of interest to be paid on a mortgage debt, as a condition of redemption, may be changed after the mortgage is given and before the sale of the property.<sup>13</sup>

**§ 3683. Change in law of notice.** A statute which provides for notice which was not necessary when the transaction was entered into, but which leaves a fair opportunity for giving such notice, affects the remedy only; and it may apply to prior contracts.<sup>1</sup> A statute which provides that a corporation must file notice of a transfer of stock in the office of the secretary of state, in order to relieve stockholders from liability, and which imposes upon the stockholders the duty of seeing that such notice is filed, does not impair the obligation of the contract as to those who were stockholders when such statute was enacted.<sup>2</sup> A statute passed after a foreclosure sale, which requires a purchaser of such sale to give notice to those who have a right to redeem before he takes his deed, does not impair the obligation of such contract, if it leaves a reasonable time in which to give such notice.<sup>3</sup> Such a statute would not, however, apply to a case in which the purchaser was entitled to his tax deed when the subsequent statute was passed, or where the enactment of such statute would lengthen the period after which he was entitled to his deed.<sup>4</sup> A statute passed after a tax sale, requiring the vendee to give notice to the owner or occupant of the land at least sixty days before the end of the three-year period fixed by law for redemption has been held

<sup>10</sup> *Sanders v. Lake Shore & Michigan Southern Ry.*, 94 N. Y. 641.

<sup>11</sup> *Security Savings Society v. Spokane*, 111 Wash. 35, 189 Pac. 260.

<sup>12</sup> *Jersey City v. O'Callaghan*, 41 N. J. L. 349.

<sup>13</sup> *Connecticut Mutual Life Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648.

<sup>1</sup> *Curtis v. Whitney*, 80 U. S. (13 Wall.) 68, 20 L. ed. 513; *Heitsch v. Minneapolis Threshing Machine Co.*, 29 N. D. 94, L. R. A. 1915D, 349, 29 N. W. 94; *Clark Implement Co. v. Wad-*

*den*, 34 S. D. 550, L. R. A. 1915C, 414, 149 N. W. 424; *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N.S.) 779, 93 Pac. 168.

<sup>2</sup> *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N.S.) 779, 93 Pac. 168.

<sup>3</sup> *Gage v. Stewart*, 127 Ill. 207, 11 Am. St. Rep. 116, 19 N. E. 702; *Clark Implement Co. v. Wadden*, 34 S. D. 550, L. R. A. 1915C, 414, 149 N. W. 424.

<sup>4</sup> *State v. Fylpaa*, 3 S. D. 586, 54 N. W. 599.

valid.<sup>5</sup> A period of ninety-one days for compliance with the statute was held a reasonable period of time.<sup>6</sup> A statute which requires certain notices to be recorded, is applicable to prior contracts although they were entered into when the filing of such notices was sufficient.<sup>7</sup> On the other hand, it is said that a tax sale must be governed by the statutes in force when the tax lien arose, and that the notice must comply therewith.<sup>8</sup> This is based on the theory that a tax is "a contract forced upon the parties by the compulsion of law enacted by the taxing power of the state."<sup>9</sup>

A statute dispensing with notice does not impair the obligation of contracts.<sup>10</sup> If judicial proceedings have not been instituted or if a reasonable time is given for compliance with subsequent legislation, a statute which modifies the requisites of notice or process in judicial proceedings,<sup>11</sup> is valid even as applicable to prior contracts. This includes a statute which requires notice,<sup>12</sup> or reduces the time for giving notice,<sup>13</sup> or which changes the method of serving notice.<sup>14</sup> A statute which requires notice to be given to a city within a specified time after actions are begun to enforce assessments, is said to be inapplicable to prior assessments,<sup>15</sup> even though an action is not begun thereon until after such statutory change has been made.<sup>16</sup> This is based on the theory that such statute, although remedial, may give a new defense to the original action.<sup>17</sup>

**§ 3684. Change in right to acquire a lien.** The right to acquire a lien is most frequently illustrated at modern law by mechanic's liens, though it is of course not limited to liens of this

<sup>5</sup> *Coulter v. Stafford*, 56 Fed. 564, 6 C. C. A. 18; *Herrick v. Niesz*, 16 Wash. 74, 47 Pac. 414.

<sup>6</sup> *Coulter v. Stafford*, 56 Fed. 564, 6 C. C. A. 18.

<sup>7</sup> *Heitsch v. Minneapolis Threshing Machine Co.*, 29 N. D. 94, L. R. A. 1915D, 349, 29 N. W. 94.

<sup>8</sup> *Chapman v. Jocelyn*, 182 Cal. 294, 187 Pac. 962 (sale to satisfy assessment bond).

<sup>9</sup> *Chapman v. Jocelyn*, 182 Cal. 294, 187 Pac. 962.

<sup>10</sup> *McKennon v. State*, 42 Tex. Cr. Rep. 371, 96 Am. St. Rep. 802, 60 S. W. 41.

<sup>11</sup> *Pennsylvania Life Insurance Co. v.*

*Marcus*, 89 N. J. L. 633, 99 Atl. 405; *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512; *Orvik v. Casselman*, 15 N. D. 34, 105 N. W. 1105.

<sup>12</sup> *Pennsylvania Life Insurance Co. v. Marcus*, 89 N. J. L. 633, 99 Atl. 405.

<sup>13</sup> *Orvik v. Casselman*, 15 N. D. 34, 105 N. W. 1105.

<sup>14</sup> *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512.

<sup>15</sup> *Ruecking Construction Co. v. Withnell*, 269 Mo. 546, 191 S. W. 685.

<sup>16</sup> *Ruecking Construction Co. v. Withnell*, 269 Mo. 546, 191 S. W. 685.

<sup>17</sup> *Ruecking Construction Co. v. Withnell*, 269 Mo. 546, 191 S. W. 685.

class. Whether the right to acquire a mechanic's lien is a part of the contract under which the work is done or the material is furnished, or whether it is a remedy merely, is a question upon which there is a conflict in authority. Some authorities hold that a right to the lien vests at least when the material is furnished,<sup>1</sup> or according to some expressions of opinion, even when the contract is made,<sup>2</sup> and that no statute passed thereafter can take away the right to such lien.<sup>3</sup> Other authorities hold that the right to a lien is merely a remedy cumulative to the common-law right of action upon the contract,<sup>4</sup> and that accordingly the right to acquire such a lien may be taken away or limited by a statute passed after the contract is made and the services rendered or materials furnished thereunder but before the lien has become fixed.<sup>5</sup> In any event, the courts will construe a statute, if possible, so as to preserve a right to a lien, given by a former statute, which is repealed by the later one.<sup>6</sup> Even where the right to acquire a lien can not be taken away, the method of enforcing it may be changed by a subsequent statute if some adequate means of enforcing it is left.<sup>7</sup> Thus where the pre-existing law permitted a mechanic's lien to be taken on a building upon which work has been done or material furnished, and provided that such building might be sold separate from the

<sup>1</sup> *Goodbub v. Estate of Hornung*, 127 Ind. 181, 26 N. E. 770; *Groesbeck v. Barger*, 1 Kan. App. 61, 41 Pac. 204.

<sup>2</sup> *Spangler v. Green*, 21 Colo. 505, 52 Am. St. Rep. 259, 42 Pac. 674; *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385.

<sup>3</sup> *Colorado. Spangler v. Green*, 21 Colo. 505, 52 Am. St. Rep. 259, 42 Pac. 674.

*Indiana. Goodbub v. Estate of Hornung*, 127 Ind. 181, 26 N. E. 770.

*Kansas. Weaver v. Sells*, 10 Kan. 610.

*Michigan. Kirkwood v. Hoxie*, 95 Mich. 62, 35 Am. St. Rep. 549, 54 N. W. 720.

*Minnesota. Tell v. Woodruff*, 45 Minn. 10, 47 N. W. 262.

*North Carolina. Warren v. Woodward*, 70 N. Car. 382.

*Oregon. The Gazelle v. Lake*, 1 Or. 120.

*Tennessee. Phillips v. Mason*, 54 Tenn. (7 Heisk.) 6.

*Wisconsin. Streubel v. Milwaukee & Mississippi Railroad Co.*, 12 Wis. 71.

<sup>4</sup> *Templeton v. Horne*, 82 Ill. 491; *Smith v. Bell*, 70 Ill. App. 490; *Wilson v. Simon*, 91 Md. 1, 80 Am. St. Rep. 427, 45 Atl. 1022.

<sup>5</sup> *Wilson v. Simon*, 91 Md. 1, 80 Am. St. Rep. 427, 45 Atl. 1022; *Best v. Baumgardner*, 122 Pa. St. 17, 1 L. R. A. 356, 15 Atl. 691.

<sup>6</sup> "The evident intention of Section 24 of the Act of 1862 was to save and preserve to the claimants all rights and liens acquired under pre-existing laws which were then repealed, and which, but for such saving clause, would have been liable to be lost by such repeal." *McCrea v. Craig*, 23 Cal. 522, 525.

<sup>7</sup> *Phelps-Bigelow Windmill Co. v. North American Trust Co.*, 62 Kan. 529, 64 Pac. 63; *Groesbeck v. Barger*, 1 Kan. App. 61, 41 Pac. 204.

land if the land was encumbered by a prior mortgage, a statute passed providing that the land and building may be sold together if the court finds that it is for the best interests of all parties so to do, the proceeds being so distributed as to secure the same relative priority as before may be applied, though the rights of the parties were fixed before the later statute was passed.<sup>8</sup> On the other hand, the time within which a lien may be acquired may be changed by legislative enactment after the right to secure the lien exists, but before the lien is acquired, if a reasonable time is given after the passage of such statute to secure such lien.<sup>9</sup> A subsequent statute may give a mechanic's lien where none existed before, since it is in this case clearly a remedy cumulative to the common-law right of action on the contract.<sup>10</sup> However, a statute which gives additional rights to a subcontractor and which relieves him from filing a notice of his lien, has been held to impair the obligation of the original contract made before such statute was passed.<sup>11</sup> This is especially true if the statute gives the subcontractors liens without regard to the price agreed upon between the owner of the building and the original contractor.<sup>12</sup> So a statute giving to a corporation a lien upon its stock for debts or liabilities due to it from a stockholder is valid as to liabilities for subscriptions already incurred.<sup>13</sup> A statute, passed after A has died and his debts have become a lien on his realty, allowing executors to borrow money to pay decedents' debts and to give mortgages on decedent's realty is valid as to A's estate, as it merely changes the form of the lien.<sup>14</sup>

**§ 3685. Change in priority of vested liens.** A lien which has attached to property,<sup>1</sup> such as a mechanic's lien,<sup>2</sup> or a judgment

<sup>8</sup> *Red River Valley National Bank v. Craig*, 181 U. S. 548, 45 L. ed. 994 [affirming, *Craig v. Herzman*, 9 N. D. 140, 81 N. W. 288].

<sup>9</sup> *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 24 Pac. 648.

<sup>10</sup> *Templeton v. Horne*, 82 Ill. 491; *Bolton v. Johns*, 5 Pa. St. 145, 47 Am. Dec. 404.

*Contra*, *Smith v. Bell*, 70 Ill. App. 490.

<sup>11</sup> *Spangler v. Green*, 21 Colo. 505, 52 Am. St. Rep. 259, 42 Pac. 674.

<sup>12</sup> *Hall v. Banks*, 79 Wis. 229, 48 N. W. 385.

<sup>13</sup> *Tutwiler v. Tuskaloosa Coal, Iron & Land Co.*, 89 Ala. 391, 7 So. 398.

<sup>14</sup> *Murphy v. Farmers' & Merchants' Bank*, 131 Cal. 115, 63 Pac. 368.

<sup>1</sup> *Florence Gas, Electric Light & Power Co. v. Hanby*, 101 Ala. 15, 13 So. 343; *Jensen v. Wilton E. Wilcox Lumber Co.*, 295 Ill. 294, 129 N. E. 133; *Manchester v. Popkin*, — Mass. —, 130 N. E. 62.

<sup>2</sup> *Florence Gas, Electric Light & Power Co. v. Hanby*, 101 Ala. 15, 13 So. 343; *McFadden v. Blocker*, 2 Ind. Terr. 260, 58 L. R. A. 878, 48 S. W. 1043.

lien,<sup>3</sup> or a lien on logs obtained by a laborer,<sup>4</sup> or the lien of a mortgage,<sup>5</sup> or the lien of a corporation on the shares of its stockholders for debts due it from them,<sup>6</sup> can not be divested by a subsequent statute, nor can its priority be affected. A statute which provides for priorities in case a bank becomes insolvent can not apply to a case in which the bank was insolvent before the statute was enacted.<sup>7</sup> A curative statute can not change the pre-existing order of priority of liens,<sup>8</sup> nor can a judgment which is a lien by force of the statute be divested by a subsequent statute requiring a transcript to be filed in each county to make the judgment a lien.<sup>9</sup> A conveyance made before the statute is passed can not be made subordinate to a lien acquired after the statute is passed.<sup>10</sup> Mortgages given before the passage of statutes attempting to make them inferior in priority to a subsequently acquired lien for grain

<sup>3</sup> *United States. Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793.

*Illinois. Dobbins v. First National Bank*, 112 Ill. 553; *Rock Island National Bank v. Thompson*, 173 Ill. 593, 64 Am. St. Rep. 137, 50 N. E. 1089.

*New York. Gilman v. Tucker*, 128 N. Y. 190, 26 Am. St. Rep. 464, 13 L. R. A. 304, 28 N. E. 1040.

*Virginia. Merchants' Bank v. Ballou*, 98 Va. 112, 81 Am. St. Rep. 715, 44 L. R. A. 306, 32 S. E. 481.

<sup>4</sup> *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463.

<sup>5</sup> *United States. Toledo, Delphos & Burlington Ry. v. Hamilton*, 134 U. S. 296, 33 L. ed. 905; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93; *Central Trust Co. v. Charlotte, Columbia & Augusta Ry.*, 65 Fed. 257.

*Illinois. Jensen v. Wilton E. Wilcox Lumber Co.*, 295 Ill. 294, 129 N. E. 133.

*Kansas. Shrigley v. Black*, 66 Kan. 213, 71 Pac. 301.

*Louisiana. Blouin v. Ledet*, 109 La. 709, 33 So. 741; *Vicksburg, Shreveport & Pacific Ry. v. Sledge*, 41 La. Ann. 896, 6 So. 725.

*Maine. Chipman v. Peabody*, 88 Me. 282, 34 Atl. 77.

*North Dakota. Yeatman v. King*, 2

N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 721.

*Texas. Giles v. Stanton*, 86 Tex. 620, 26 S. W. 615.

This principle has been invoked to justify the action of the court in refusing to permit property to be sold free from the lien of a mortgage although no subsequent legislation was enacted to authorize such sale; and the question was one of the power of the court of equity rather than the impairment of the obligation of the contract. *Philadelphia Trust Co. v. Northumberland County Traction Co.*, 258 Pa. St. 152, 101 Atl. 970; *Columbia & Montour Electric Co. v. North Branch Transit Co.*, 258 Pa. St. 447, 102 Atl. 214.

<sup>6</sup> *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153, 80 N. W. 1110, 1135.

<sup>7</sup> *Harris v. Walker*, 190 Ala. 51, 74 So. 40.

<sup>8</sup> *Merchants' Bank v. Ballou*, 98 Va. 112, 81 Am. St. Rep. 715, 44 L. R. A. 306, 32 S. E. 481.

<sup>9</sup> *Rock Island National Bank v. Thompson*, 173 Ill. 593, 64 Am. St. Rep. 137, 50 N. E. 1089.

<sup>10</sup> *Crowther v. Fidelity Insurance, Trust & Safe Deposit Co.*, 85 Fed. 41, 29 C. C. A. 1.

furnished as seed,<sup>11</sup> or to a subsequent lien for furnishing food to animals,<sup>12</sup> or to a subsequent lien for storing an automobile,<sup>13</sup> or to a subsequent claim for wages,<sup>14</sup> or to a homestead, void under the law in force when the mortgage was given because not then recorded,<sup>15</sup> or to a subsequent judgment for personal injuries,<sup>16</sup> can not be so postponed. A statute which attempts to divest the lien of an assessment on the abutting realty for the entire contract price and to make the claim for intersections a personal liability of the city, unsecured by lien, is invalid.<sup>17</sup>

The power of taxation can not be affected by contracts made between individuals;<sup>18</sup> and, accordingly, a lien for taxes or assessments may be given priority over a mortgage, without impairing the obligation of such contract.<sup>19</sup> As long as a reasonable method of keeping a mortgage in effect is given, the legislature may provide for a method different from that in effect when the mortgage was given;<sup>20</sup> and it may accordingly provide for refiling a chattel mortgage, which was in existence when the statute was enacted,<sup>21</sup> or it may provide for recording notices of redemption instead of filing them.<sup>22</sup> Whatever objections may be made to statutes which provide for the loss of liens, they can not be attacked on the ground that they impair the obligation of contracts, if they were in effect before the lien was acquired.<sup>23</sup> If a statute which provides for postponing a chattel mortgage to the lien of one who takes

<sup>11</sup> *Yeatman v. King*, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 721.

<sup>12</sup> *National Bank v. Jones*, 18 Okla. 555, 12 L. R. A. (N.S.) 310, 91 Pac. 191.

<sup>13</sup> *Jensen v. Wilton E. Wilcox Lumber Co.*, 295 Ill. 294, 129 N. E. 133.

<sup>14</sup> *Giles v. Stanton*, 86 Tex. 620, 26 S. W. 615.

<sup>15</sup> *Blouin v. Ledet*, 109 La. 709, 33 So. 741.

<sup>16</sup> *Central Trust Co. v. Charlotte, Columbia & Augusta Ry.*, 65 Fed. 257.

<sup>17</sup> *Soule v. Seattle*, 6 Wash. 315, 33 Pac. 384, 1080. (However, a change in the method of assessment from assessment according to valuation to assessment according to frontage does not impair the obligation of a contract for such improvement.)

<sup>18</sup> See § 3670.

<sup>19</sup> *Baldwin v. Moroney*, 173 Ind. 574, 30 L. R. A. (N.S.) 761, 91 N. E. 3; *Lydecker v. Palisade Land Co.*, 33 N. J. Eq. 415.

<sup>20</sup> *Cobb v. International State Bank*, 67 Colo. 488, 186 Pac. 529; *Heitsch v. Minneapolis Threshing Machine Co.*, 29 N. D. 94, L. R. A. 1915D, 349, 150 N. W. 457.

<sup>21</sup> *Cobb v. International State Bank*, 67 Colo. 488, 186 Pac. 529.

Such statute can not apply to prior renewals. *Wilson v. Pickering*, 28 Mont. 435, 72 Pac. 821.

<sup>22</sup> *Heitsch v. Minneapolis Threshing Machine Co.*, 29 N. D. 94, L. R. A. 1915D, 349, 150 N. W. 457.

<sup>23</sup> *Howard v. Burke*, 176 Ia. 123, L. R. A. 1916E, 524, 157 N. W. 744.

nimals damage feasant, is in effect before the mortgage is given, the validity of such statute can not, of course, be attacked on the theory that it impairs the obligation of the contract.<sup>24</sup>

**§ 3686. Modification of tax laws in absence of contract.** If no contract exempting property from taxation or fixing the rate of taxation thereon exists, a subsequent statute increasing the burden of taxation or assessment is valid.<sup>1</sup> This clause does not therefore make invalid statutes which tax pre-existing contract rights,<sup>2</sup> or

<sup>24</sup>Howard v. Burke, 176 Ia. 123, L. A. 1916E, 524, 157 N. W. 744.

<sup>1</sup>United States. Sioux City Street ly. v. Sioux City, 138 U. S. 98, 34 L. d. 898 [affirming, 78 Ia. 367, 43 N. W. 24]; Wells v. Savannah, 181 U. S. 31, 45 L. ed. 986 [affirming, 107 Ga. , 32 S. E. 669]; Gulf & Ship Island ly. v. Hewes, 183 U. S. 66, 46 L. ed. 6; Moffitt v. Kelly, 218 U. S. 400, 30 L. R. A. (N.S.) 1179, 54 L. ed. 1086.

Georgia. Wright v. Central of Georgia Ry. Co., 146 Ga. 406, 91 S. E. 471.

Indiana. Baldwin v. Moroney, 173 Ind. 574, 30 L. R. A. (N.S.) 761, 91 N. E. 3.

Kansas. State v. Mollier, 96 Kan. 14, L. R. A. 1916C, 551, 152 Pac. 771.

Massachusetts. Hill v. Treasurer and Receiver General, 227 Mass. 331, 116 N. E. 509.

Minnesota. State v. Probate Court, 28 Minn. 371, L. R. A. 1916A, 901, 50 N. W. 1094; Northern Counties and Co. v. Excelsior Land, Mining & Development Co., — Minn. —, 178 N. V. 497.

North Dakota. Grand Forks County v. Cream of Wheat Co., — N. D. —, 70 N. W. 863 [affirmed without reference to impairment of obligation, Cream of Wheat Co. v. Grand Forks, 253 U. S. 325, 64 L. ed. 931].

Pennsylvania. Commonwealth v. New York, Lake Erie & Western Ry., 29 Pa. St. 463, 15 Am. St. Rep. 724, 8 Atl. 412.

Washington. Everett v. Adamson, 106 Wash. 355, 180 Pac. 144.

<sup>2</sup>United States. Noble State Bank v. Haskell, 219 U. S. 104, 32 L. R. A. (N.S.) 1062, 55 L. ed. 112.

Georgia. Wright v. Central of Georgia Ry. Co., 146 Ga. 406, 91 S. E. 471 (lease of railway, itself exempt from taxation).

Kentucky. Southern Building & Loan Association v. Norman, 98 Ky. 294, 56 Am. St. Rep. 367, 31 L. R. A. 41, 32 S. W. 952.

Massachusetts. Hill v. Treasurer and Receiver General, 227 Mass. 331, 116 N. E. 509.

New York. In re McKelway, 221 N. Y. 15, L. R. A. 1917E, 1143, 116 N. E. 348.

North Dakota. Grand Forks County v. Cream of Wheat Co., — N. D. —, 170 N. W. 863 [affirmed without reference to impairment of obligation, Cream of Wheat Co. v. Grand Forks, 253 U. S. 325, 64 L. ed. 931].

Pennsylvania. Commonwealth v. Lehigh Valley Ry., 129 Pa. St. 429, 454, 18 Atl. 406, 410; Commonwealth v. Delaware & Hudson Canal Co., 150 Pa. St. 245, 24 Atl. 599; Commonwealth v. New York, Lake Erie & Western Ry., 150 Pa. St. 234, 24 Atl. 609.

Virginia. Cornett's Executors v. Commonwealth, 127 Va. 610, 105 S. E. 230 (succession tax on United States bonds).

property rights,<sup>3</sup> in the absence of a valid contract for exemption from taxation.<sup>4</sup> A state may tax bonds which it has issued, if they were not made exempt from taxation by special agreement,<sup>5</sup> or it may, as far as this provision is concerned, require the mortgagor to pay the tax upon the mortgage and deduct it from the interest,<sup>6</sup> or require a bank to pay a tax upon a deposit and deduct it from the amount thereof.<sup>7</sup> While it has been said that the state can not retain interest upon its own bonds, or require debtors so to do, if the bonds are owned by non-residents,<sup>8</sup> this involves the question of due process of law, since the state is attempting to tax debts which are owing by its citizens to non-residents. The question of due process of law is not considered here, and the question of the obligation of the contract is not involved, especially if the tax statute was enacted before the bonds were issued.

A state may impose a tax upon an income paid to its citizens through trustees,<sup>9</sup> or a tax upon inheritance,<sup>10</sup> including a tax upon the interest of the joint tenant who dies first,<sup>11</sup> and the community property which passes to the surviving wife,<sup>12</sup> or upon a legacy which is given by will in satisfaction of an ante-nuptial contract,<sup>13</sup> or upon a legacy which is given in performance of a contract to devise property,<sup>14</sup> or upon a transfer under a power.<sup>15</sup> A new

<sup>3</sup> United States. *Moffitt v. Kelly*, 218 U. S. 400, 30 L. R. A. (N.S.) 1179, 54 L. ed. 1086.

Indiana. *Baldwin v. Moroney*, 173 Ind. 574, 30 L. R. A. (N.S.) 761, 91 N. E. 3.

Minnesota. *State v. Probate Court*, 128 Minn. 371, L. R. A. 1916A, 901, 150 N. W. 1094.

New Jersey. *Carter v. Bugbee*, 92 N. J. L. 390, 106 Atl. 412.

New York. *Ward v. Union Trust Company of New York*, 224 N. Y. 73, 3 A. L. R. 1154, 120 N. E. 81.

<sup>4</sup> See §§ 3668 et seq.

<sup>5</sup> *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Russellville Bank v. Russellville*, 133 Ky. 637, 134 Am. St. Rep. 479, 118 S. W. 921; *State National Bank v. Memphis*, 116 Tenn. 641, 7 L. R. A. (N.S.) 663, 94 S. W. 606.

<sup>6</sup> *Detroit v. Detroit Assessors*, 91 Mich. 78, 16 L. R. A. 59, 51 N. W. 787.

<sup>7</sup> *State v. Clement National Bank*, 84 Vt. 167, 78 Atl. 944.

<sup>8</sup> *State Tax on Foreign Held Bonds*, 82 U. S. (15 Wall.) 300, 21 L. ed. 179; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271.

<sup>9</sup> *State v. Widule*, 164 Wis. 56, 159 N. W. 630.

<sup>10</sup> *State v. Probate Court*, 128 Minn. 371, L. R. A. 1916A, 901, 150 N. W. 1094.

<sup>11</sup> *In re McKelway*, 221 N. Y. 15, L. R. A. 1917E, 1143, 116 N. E. 348.

<sup>12</sup> *Moffitt v. Kelly*, 218 U. S. 400, 30 L. R. A. (N.S.) 1179, 54 L. ed. 1086.

<sup>13</sup> *Hill v. Treasurer and Receiver General*, 227 Mass. 331, 116 N. E. 509.

<sup>14</sup> *State v. Mollier*, 96 Kan. 514, L. R. A. 1916C, 551, 152 Pac. 771. (The statute imposing the tax was enacted after the contract to devise and before the devise.)

<sup>15</sup> *Chanler v. Kelsey*, 205 U. S. 466,

method of determining the value of stock in a domestic corporation does not impair the obligation of a contract.<sup>16</sup> One who has bought a tax certificate on land may be compelled to pay subsequent taxes,<sup>17</sup> or assessments.<sup>18</sup>

**§ 3687. Impairment of obligation of contract by limiting power of taxation.** The legislature can not, while leaving a municipality in existence, deprive it of the power to levy taxes sufficient to pay its pre-existing debts if such power was possessed when such debts were incurred.<sup>1</sup> If obligations have been incurred and the proceeds of certain specified taxes have been pledged thereto, the obligation of such contract can not be impaired by repealing the

51 L. ed. 882 [affirming, 176 N. Y. 486, 64 L. R. A. 279, 68 N. E. 871]. (The tax statute was enacted after the power and before the transfer thereunder. The United States court held, following the state court, that the transfer was the essential thing to be taxed.)

<sup>16</sup> *Grand Forks County v. Cream of Wheat Co.*, — N. D. —, 170 N. W. 863 [affirmed without reference to impairment of obligation, *Cream of Wheat Co. v. Grand Forks*, 253 U. S. 325, 64 L. ed. 931].

<sup>17</sup> *Northern Counties Land Co. v. Excelsior Land, Mining & Development Co.*, — Minn. —, 178 N. W. 497.

<sup>18</sup> *Everett v. Adamson*, 106 Wash. 355, 180 Pac. 144.

<sup>1</sup> *United States. Von Hoffman v. Quincy*, 71 U. S. (4 Wall.) 535, 18 L. ed. 403; (*City of Galena v. Amy*, 72 U. S. (5 Wall.) 705, 18 L. ed. 560; *Butz v. Muscatine*, 75 U. S. (8 Wall.) 575, 19 L. ed. 490; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395; *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. ed. 1090; *Ralls County Court v. United States*, 105 U. S. 733, 26 L. ed. 1220; *Louisiana v. Police Jury*, 111 U. S. 716, 28 L. ed. 574; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587; *Mobile v. Watson*, 116 U. S. 280, 29 L. ed. 620; *Seibert v. Lewis*, 122 U.

S. 284, 30 L. ed. 1161; *New Orleans Board of Liquidation v. Louisiana*, 179 U. S. 622, 45 L. ed. 347 [affirming, 51 La. Ann. 1849, 26 So. 679]; *Hubert v. New Orleans*, 215 U. S. 170, 54 L. ed. 144 [reversing, 119 La. 623, 44 So. 321]; *United States v. Knox County*, 51 Fed. 880; *In re Copenhaver*, 54 Fed. 660; *Hicks v. Cleveland*, 106 Fed. 459, 45 C. C. A. 420; *Padgett v. Post*, 106 Fed. 600, 45 C. C. A. 488.

*Illinois. People v. Chicago & Western Indiana Ry.*, 256 Ill. 388, 100 N. E. 35.

*Michigan. Hammond v. Place*, 116 Mich. 628, 72 Am. St. Rep. 543, 74 N. W. 1002.

*North Carolina. Broadfoot v. Fayetteville*, 124 N. Car. 478, 70 Am. St. Rep. 610, 32 S. E. 804.

*Ohio. Goodale v. Fennell*, 27 O. S. 426, 22 Am. Rep. 321.

*Tennessee. Memphis v. Bethel* (Tenn.), 17 S. W. 191.

*Washington. Townsend Gas & Electric Light Co. v. Hill*, 24 Wash. 469, 64 Pac. 778; *Eidenmiller v. Tacoma*, 14 Wash. 376, 44 Pac. 877.

*West Virginia. Welch Water, Light & Power Co. v. Welch*, 64 W. Va. 373, 62 S. E. 497.

*Wisconsin. State v. Madison*, 15 Wis. 30.

provision for such special tax or providing for a different method of paying such obligation.<sup>2</sup> If a special tax has been pledged for the payment of certain bonds, the legislature can not provide that such bonds are to be paid out of the proceeds of a lottery.<sup>3</sup> An ordinance which provides that the revenues from a water system shall be applied to the redemption of bonds which are issued therefor, and which has been accepted, can not be repealed.<sup>4</sup> A change of name or of boundaries can not justify the legislature in depriving a municipality of the power to lay taxes so as to pay its pre-existing debts,<sup>5</sup> nor does the attempt to destroy the municipality and to substitute therefor another, covering substantially the same territory.<sup>6</sup> If the new municipality is liable for the debts of its predecessor, a statute providing that it shall be liable only if the tax-paying voters shall vote to assume such liability is invalid.<sup>7</sup> In the absence of prior obligations the legislature may limit the power of a public corporation to levy taxes.<sup>8</sup>

The power of the legislature to create, alter or destroy public corporations is not defeated by the fact that such corporations may have incurred obligations.<sup>9</sup> A statute which reduces the area of a municipality but leaves the municipality able to pay all pre-existing debts, does not impair the obligation of contracts.<sup>10</sup> The legislature may provide for the application of the income from public utilities, in the absence of some prior contract for the application

<sup>2</sup> *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. ed. 1090; *Board of Revenue v. Farson*, 197 Ala. 375, L. R. A. 1918B, 881, 72 So. 613; *First National Bank v. Terry*, 203 Ala. 401, 83 So. 170; *Edwards v. Helena*, 58 Mont. 292, 191 Pac. 387.

<sup>3</sup> *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. ed. 1090.

<sup>4</sup> *Edwards v. Helena*, 58 Mont. 292, 191 Pac. 387.

<sup>5</sup> *Bates v. Gregory*, 89 Cal. 387, 26 Pac. 891.

<sup>6</sup> *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620; *Broadfoot v. Fayetteville*, 124 N. Car. 478, 70 Am. St. Rep. 610, 32 S. E. 804.

<sup>7</sup> *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. ed. 310.

<sup>8</sup> *State v. Flaherty*, — N. D. —, 178 N. W. 790.

<sup>9</sup> *Highway District No. 1 v. Fremont County*, 32 Ida. 473, 185 Pac. 66; *Attorney General v. Lowrey*, 131 Mich. 639, 92 N. W. 289; *Dreyfus v. Socorro*, — N. M. —, 189 Pac. 878; *Metcalf v. State*, 49 O. S. 586, 31 N. E. 1076.

See also, *In re School Code of 1919*, 30 Del. (7 Boyce) 406, 108 Atl. 39.

<sup>10</sup> *Kansas Town Co. v. McLean*, 7 Kan. App. 101, 53 Pac. 76; *Metcalf v. State*, 49 O. S. 586, 31 N. E. 1076.

So of a statute changing a school district so as to include some territory without the old district, and excluding some of the territory within the old district, and making the new district liable for the debts of its predecessor. *Attorney General v. Lowrey*, 131 Mich. 639, 92 N. W. 289.

See also, *In re School Code of 1919*, 30 Del. (7 Boyce) 406, 108 Atl. 39.

thereof,<sup>11</sup> or it may increase tax exemptions,<sup>12</sup> or it may permit a tax payer to set off, against his taxes, claims which are due to him,<sup>13</sup> or it may alter the apportionment of taxes between various taxing districts.<sup>14</sup> The legislature may destroy a municipal corporation and thus make it impossible to enforce its obligations.<sup>15</sup>

## VI

## RESERVED POWER

**§ 3688. Reservation of power over corporate charters and over contracts.** As a result of the Dartmouth College case,<sup>1</sup> many states proceeded to reserve the right to alter, amend, and repeal corporate charters and franchises. This reservation was sometimes effected by special reservations in charters, sometimes by legislation, and sometimes by constitutional provisions. It is generally held that these provisions prevent grants of charters and franchises from amounting to contracts, and that they are, accordingly, not within the protection of this constitutional provision.<sup>2</sup> Where

<sup>11</sup> *Dreyfus v. Socorro*, — N. M. —, 189 Pac. 878.

<sup>12</sup> *Arkansas Southern Ry. v. Louisiana & Arkansas Ry.*, 218 U. S. 431, 54 L. ed. 1097.

<sup>13</sup> *Amy v. Shelby County Taxing District*, 114 U. S. 387, 29 L. ed. 172.

<sup>14</sup> *Highway District No. 1 v. Fremont Co.*, 32 Ida. 473, 185 Pac. 66 (obligations payable by increase in taxation if necessary).

<sup>15</sup> *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Luehrman v. Taxing District*, 70 Tenn. (2 Lea.) 425.

<sup>1</sup> *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 4 L. ed. 629. See § 3660.

<sup>2</sup> *United States. Hamilton Gas, Light & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963; *People v. Cook*, 148 U. S. 397, 37 L. ed. 498; *Noble State Bank v. Haskell*, 219 U. S. 104, 32 L. R. A. (N.S.) 1062, 55 L. ed. 112; *Ramapo Water Co. v. New York*, 236 U. S. 579, 59 L. ed. 731; *Matthews v. Board of Corporation Commissioners of North Carolina*, 97 Fed. 400; *Union Pacific*

*Ry. v. Mason City & Fort Dodge Ry.*, 128 Fed. 230 [affirming, 124 Fed. 409]. *Arkansas. Davis v. Moore*, 130 Ark. 128, 197 S. W. 295.

*California. Limoneira Co. v. Railroad Commission of California*, 174 Cal. 232, 162 Pac. 1033.

*Kentucky. Supreme Council Catholic Knights of America v. Fenwick*, 169 Ky. 269, 183 S. W. 906.

*Maryland. Webster v. Cambridge Female Seminary*, 78 Md. 193, 28 Atl. 25.

*Mississippi. Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601.

*Missouri. State v. Eastin*, 270 Mo. 193, L. R. A. 1917D, 802, 192 S. W. 1006.

*Montana. Somerville v. St. Louis Mining & Milling Co.*, 46 Mont. 268, L. R. A. 1915B, 811, 127 Pac. 464.

*New York. People v. Beakes Dairy Co.*, 222 N. Y. 416, 119 N. E. 115.

*Pennsylvania. Wagner Free Institute v. Philadelphia*, 132 Pa. St. 612, 19 Am. St. Rep. 613, 19 Atl. 297.

*Utah. Murray v. Utah Light &*

such reservation is made, the state or an authorized public corporation may change the rates which a public utility was originally allowed to charge;<sup>3</sup> the right of a railroad to fix its rates of transportation may be taken away, if the rates fixed by the state are reasonable;<sup>4</sup> the power of fixing water rates may be given to a city, though the water company had previously been allowed to exercise it;<sup>5</sup> a greater liability for paving may be imposed upon a street railroad;<sup>6</sup> the personal liability of stockholders may be increased;<sup>7</sup> changes may be made with reference to the right to vote, at corporate elections;<sup>8</sup> a turnpike company may be forbid-

**Traction Co., — Utah —**, 191 Pac. 421.

Apparently *contra*, **Omaha Water Co. v. Omaha**, 147 Fed. 1, 12 L. R. A. (N. S.) 736.

See, *The Limitations of the Power of a State under a Reserved Right to Amend or Repeal Charters of Incorporation*, by Horace Stern, 44 *American Law Register* (N.S.) 1, 73, 145.

<sup>3</sup> **United States. Stanislaus County v. San Joaquin & King's River Canal & Irrigation Co.**, 192 U. S. 201, 48 L. ed. 406; **San Antonio Traction Co. v. Altgelt**, 200 U. S. 304, 50 L. ed. 491.

**California. Limoneira Co. v. Railroad Commission of California**, 174 Cal. 232, 162 Pac. 1033.

**Massachusetts. Commonwealth v. Boston & Northern St. Ry.**, 212 Mass. 82, 98 N. E. 1075.

**Missouri. State v. Eastin**, 270 Mo. 193, L. R. A. 1917D, 802, 192 S. W. 1006.

**Washington. State v. Superior Court**, 67 Wash. 37, L. R. A. 1915C, 287, 120 Pac. 861.

**Utah. Murray v. Utah Light & Traction Co., — Utah —**, 191 Pac. 421.

<sup>4</sup> **Minneapolis Eastern Ry. v. Minnesota**, 134 U. S. 467, 33 L. ed. 985; **Chicago, Burlington & Quincy Ry. v. Jones**, 149 Ill. 361, 41 Am. St. Rep. 278, 24 L. R. A. 141, 37 N. E. 247.

<sup>5</sup> **Freeport Water Co. v. Freeport**, 186 Ill. 179, 57 N. E. 862.

See, **City of Knoxville v. Knoxville**

**Water Co.**, 107 Tenn. 647, 61 L. R. A. 888, 64 S. W. 1075.

But a power to "regulate" water rates has been held not a power to reduce them below the contract rate. **City of Los Angeles v. Los Angeles City Water Co.**, 177 U. S. 558, 44 L. ed. 886.

<sup>6</sup> **Sioux City Street Ry. v. Sioux City**, 138 U. S. 98, 34 L. ed. 898 [affirming, **Sioux City Street R. Co. v. Sioux City**, 78 Ia. 367, 43 N. W. 224]; **Fair Haven & Westville Ry. v. New Haven**, 203 U. S. 379, 51 L. ed. 237; **Lincoln Street Ry. v. Lincoln**, 61 Neb. 109, 84 N. W. 802; **Storrie v. Houston City St. Ry.**, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796.

*Contra*, **Enid City Ry. v. Enid**, 43 Okla. 778, 144 Pac. 617.

<sup>7</sup> **Arkansas. Davis v. Moore**, 130 Ark. 128, 197 S. W. 295.

**California. McGowan v. McDonald**, 111 Cal. 57, 52 Am. St. Rep. 149, 43 Pac. 418.

**Michigan. Bissell v. Heath**, 98 Mich. 472, 57 N. W. 585.

**Mississippi. Pate v. Bank of Newton**, 116 Miss. 666, 77 So. 601.

**Montana. Somerville v. St. Louis Mining & Milling Co.**, 46 Mont. 268, L. R. A. 1915B, 811, 127 Pac. 464.

<sup>8</sup> **Lord v. Equitable Life Assurance Society**, 194 N. Y. 212, 22 L. R. A. (N. S.) 420, 87 N. E. 443.

den to keep up its toll-gates within city limits;<sup>9</sup> changes may be made with reference to taxation;<sup>10</sup> statutes granting exemptions from taxation may be repealed or amended,<sup>11</sup> and so may statutes fixing the rate of taxation on the gross receipts of the railway;<sup>12</sup> the right of eminent domain may be taken away;<sup>13</sup> a railroad company may be required to abolish grade crossings at its own expense;<sup>14</sup> a corporation may be required to file reports,<sup>15</sup> and an assessment insurance company may be changed to an old line company.<sup>16</sup> Where an appeal bond is given and subsequently the jurisdiction of the court is transferred by statute, the appeal bond is not invalidated thereby if the legislature had such power over the jurisdiction of the court when the appeal bond was given.<sup>17</sup>

The power to alter, amend, or repeal, reserved by the legislature, can not be so exercised as to divest vested property rights.<sup>18</sup> Where a statute imposed a tax on the gross earnings of a corporation in lieu of a tax on property, even a reserved power to amend, alter or repeal can not give the legislature the right to continue the tax on the gross earnings and at the same time restore the tax on property.<sup>19</sup>

<sup>9</sup> *Snell v. Chicago*, 133 Ill. 413, 8 L. R. A. 858, 24 N. E. 532.

<sup>10</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 32 L. R. A. (N.S.) 1062, 55 L. ed. 112; *Washington County Hospital Association v. Mealey*, 121 Md. 274, 48 L. R. A. (N.S.) 373, 88 Atl. 136.

<sup>11</sup> *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55; *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840 [affirming, *Deposit Bank v. Daveiss County*, 102 Ky. 174, 44 L. R. A. 825, 39 S. W. 1030 [which overruled, *Commonwealth v. Deposit Bank*, 97 Ky. 590, 31 S. W. 1013]; *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679; *Gulf & Ship Island Ry. v. Hewes*, 183 U. S. 66, 46 L. ed. 86; *Northern Bank v. Stone*, 88 Fed. 413; *State v. Northern Central Ry.*, 90 Md. 447, 45 Atl. 465.

<sup>12</sup> *Northern Central Ry. v. Maryland*, 187 U. S. 258, 47 L. ed. 167. (Even if passed to compromise a dispute as to the exemption of the railway from taxation.)

<sup>13</sup> *Adirondack Ry. v. New York*, 176 U. S. 335, 44 L. ed. 492.

<sup>14</sup> *New York & New England Ry. v. Bristol*, 151 U. S. 556, 38 L. ed. 269.

<sup>15</sup> *People v. Rose*, 207 Ill. 352, 69 N. E. 762.

<sup>16</sup> *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657, 48 L. ed. 832.

<sup>17</sup> *Mexican National Ry. Co. v. Mussette*, 86 Tex. 708, 24 L. R. A. 642, 26 S. W. 1075.

<sup>18</sup> *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162; *Duluth & Iron Range Ry. v. St. Louis County*, 179 U. S. 302, 45 L. ed. 201; *Smith v. Atchison, Topeka & Santa Fe Ry.*, 64 Fed. 272; *Bryan v. Board of Education*, 90 Ky. 322, 13 S. W. 276; *People v. International Bridge Co.*, 223 N. Y. 137, 119 N. E. 351 (obiter).

<sup>19</sup> *Duluth & Iron Range Ry. v. St. Louis County*, 179 U. S. 302, 45 L. ed. 201 [reversing, *State v. Duluth & Iron Range Ry.*, 77 Minn. 433; sub nomine, *St. Louis County v. Duluth & Iron Range Ry.*, 80 N. W. 626]; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162 [reversing, *State v. Stearns*, 72 Minn. 200, 75 N. W. 210].

**§ 3689. Effect on reserved power of contracts with third persons.** It has been said that the power of amendment can not be so exercised as to impair the obligation of contracts which have been entered into between such corporations and third persons.<sup>1</sup> A valid contract between telephone companies for connection of their lines in order to handle through business, can not be rendered invalid by a subsequent statute.<sup>2</sup> It has, however, been suggested that a contract which the corporation may make can not have any greater sanctity than its charter, and that such contracts must necessarily be subject to changes in the charter.<sup>3</sup> This suggestion seems worthy of more weight than has generally been accorded to it. If the existence of outstanding contracts prevents the exercise of the power to alter or amend, such power may prove of little practical value; and constitutional or statutory provisions may be overridden by subsequent private contracts. It has, accordingly, been held that contracts between corporations and their employes may be regulated.<sup>4</sup>

## VII

### POLICE POWER, ETC.

**§ 3690. Police power—General nature.** The police power extends to "the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state."<sup>1</sup> An exact definition, though often attempted, is impossible.<sup>2</sup> This is due, in part, to the fact that as new conditions arise,

<sup>1</sup> *Shields v. Ohio*, 95 U. S. 310, 24 L. ed. 357; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. ed. 961; *Omaha Water Co. v. Omaha*, 147 Fed. 1, 12 L. R. A. (N.S.) 736; *Buffalo & New York City Ry. v. Dudley*, 14 N. Y. 336.

<sup>2</sup> *Home Telephone Co. v. Sarcoux*, 236 Mo. 114, 36 L. R. A. (N.S.) 124, 139 S. W. 108.

<sup>3</sup> *Fifth Avenue Coach Co. v. New York*, 221 U. S. 467, 55 L. ed. 815 [affirming, 104 N. Y. 19, 21 L. R. A. (N.S.) 744, 86 N. E. 824].

<sup>4</sup> *Leep v. Railway*, 58 Ark. 407 [sub nomine, *Leep v. St. Louis, Iron Mountain & Southern Ry. Co.*, 41 Am. St. Rep. 109, 23 L. R. A. 264, 25 S. W. 75].

<sup>1</sup> *Ingram v. Colgan*, 106 Cal. 113, 38 Pac. 315; *Ingram v. Colgan*, 46 Am. St. Rep. 221, 28 L. R. A. 187, 38 Pac. 315, 39 Pac. 437.

"The police power is the power of the state coextensive with self-protection, and has been termed, not inaptly, 'the law of overruling necessity.' Such power is not prohibited by that clause of the Constitution of the United States which forbids the passage of laws impairing the obligation of contracts." *Chicago v. Washingtonian Home*, 289 Ill. 206, 124 N. E. 416.

<sup>2</sup> *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Fort Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51, 66 L.

the police power must be exercised in new ways.<sup>3</sup> From the nature of the police power it is clear that the legislature can neither contract away its police power nor authorize any agency of the state or any public corporation so to do,<sup>4</sup> and it is even clearer that

R. A. 238, 82 S. W. 163; *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 123 N. E. 631; *Chicago v. Washingtonian Home*, 289 Ill. 206, 124 N. E. 416; *Rosenberger v. Pacific Express Co.*, 258 Mo. 97, 167 S. W. 429; *Southwest Missouri Ry. Co. v. Public Service Commission*, 281 Mo. 52, 219 S. W. 380.

"With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides." *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112 [citing, *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828].

"The expression 'police power' is sometimes used in a very broad sense, including all legislation and almost every function of civil government. At other times it is used in a somewhat more restricted sense. The legislature can not arbitrarily prohibit either the making or the carrying out of all contracts under the claim of exercising police power. Thus, it is clear that the legislature could not declare that debtors could satisfy promissory notes by paying less than the amount called for by them, or that such notes should bear a greater or less rate of interest than that included in them, if valid when the contract was made. Other illustrations of contracts beyond the reach of interference by the legislature might be given. At the other extreme stand such contracts as those involved in the liquor and lottery cases above. Between these two extremes lies a legal territory where cases must be determined as they arise. No inflexible line can be drawn in advance as a test for the determination of what is

a legitimate exercise of the police power of the state, which does not conflict with the contract clause of the Constitution, and what is an arbitrary interference with the obligation of contracts, or with the liberty of contract." *Washington v. Atlantic Coast Line Ry. Co.*, 136 Ga. 638, 38 L. R. A. (N.S.) 867, 71 S. E. 1066.

See also, *Hudson Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828.

"The police power of the state, so far has not received a full and complete definition. It may be said, however, to be the right of the state, or state functionary, to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community which do not encroach on a like power vested in Congress by the Federal Constitution or which do not violate any of the provisions of the organic law. Of this power it may be said that it is known when and where it begins, but not when and where it terminates." *Champer v. Greencastle*, 138 Ind. 339, 351, 46 Am. St. Rep. 390, 24 L. R. A. 768, 35 N. E. 14.

<sup>3</sup> *State v. Lewis*, 187 Ind. 564, 120 N. E. 129.

<sup>4</sup> *Arkansas. Fort Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51, 66 L. R. A. 238, 82 S. W. 163.

*Illinois. Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210.

*Indiana. Grand Trunk & Western Ry. Co. v. South Bend*, 174 Ind. 203, 36 L. R. A. (N.S.) 850, 89 N. E. 885, 91 N. E. 809; *Winfield v. Public Service Commission*, 187 Ind. 53, 118 N. E. 531; *Farmers' & Merchants' Co-operative Telephone Co. v. Boswell Telephone Co.*, 187 Ind. 371, 119 N. E. 513.

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individuals can not do, collaterally by their private contracts, what the government can not do directly.<sup>5</sup> Still less does statutory authority to act imply an intention to grant away the police power.<sup>6</sup> Accordingly, since this clause of the constitution gives no additional validity to invalid contracts,<sup>7</sup> contracts which tend to restrict the police power unduly may be abrogated by subsequent legislation. Such legislation is not an impairment of the obligation of contracts.<sup>8</sup>

**Iowa.** *Aetna Insurance Co. v. Chicago Great Western Ry.*, — Ia. —, 180 N. W. 649.

**Maine.** *In re Guilford Water Company's Service Rates*, 118 Me. 367, 108 Atl. 446; *In re Searsport Water Co.*, 118 Me. 382, 108 Atl. 452.

**Missouri.** *Southwest Missouri Ry. Co. v. Public Service Commission*, 281 Mo. 52, 219 S. W. 390.

**Oregon.** *Woodburn v. Public Service Commission*, 82 Or. 114, L. R. A. 1917C, 98, 161 Pac. 391.

**Pennsylvania.** *Pennsylvania Ry. Co. v. Ewing*, 241 Pa. St. 581, 40 L. R. A. (N.S.) 977, 88 Atl. 775.

**Vermont.** *Waterbury v. Central Vermont Ry. Co.*, 93 Vt. 461, 108 Atl. 423.

"No one legislature can curtail the power of its successors to make such laws as they deem proper in matters of police." *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657, 668 [quoted in *Stone v. Mississippi*, 101 U. S. 814, 888, 25 L. ed. 876; so *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302].

<sup>5</sup> **California.** *Ex parte Barmore*, 174 Cal. 286, L. R. A. 1917D, 688, 163 Pac. 50.

**Iowa.** *Wabash Ry. Co. v. Peterson*, 187 Ia. 1331, 175 N. W. 523.

**New York.** *People v. Nixon*, 229 N. Y. 356, 128 N. E. 245; *People v. La Fetra*, 230 N. Y. 429, 130 N. W. 601.

**Pennsylvania.** *Schaper v. Cleveland & Erie Ry. Co.*, 265 Pa. St. 109, 108 Atl. 407.

**Texas.** *State v. Missouri, Kansas &*

*Texas Ry. Co.*, 90 Tex. 516, 5 L. R. A. (N.S.) 783, 91 S. W. 214.

**Washington.** *State v. Superior Court of Okanogan County*, 111 Wash. 615, 191 Pac. 805.

**West Virginia.** *Baltimore & Ohio Ry. Co. v. Public Service Commission*, 81 W. Va. 457, 94 S. E. 545; *Shrader v. Steubenville, East Liverpool & Beaver Valley Traction Co.*, — W. Va. —, 99 S. E. 207.

**Wisconsin.** *Borgnis v. Falk Co.*, 147 Wis. 327, 37 L. R. A. (N.S.) 489, 133 N. W. 209.

<sup>6</sup> *Chicago v. O'Connell*, 278 Ill. 591, 8 A. L. R. 916, 116 N. E. 210.

<sup>7</sup> See § 3655.

<sup>8</sup> **United States.** *Douglasa v. Kentucky*, 168 U. S. 488, 42 L. ed. 553; *Chicago, Burlington & Quincy Ry. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 9 A. L. R. 1420, 63 L. ed. 309.

**Alabama.** *Advertiser Co. v. State*, 193 Ala. 418, 69 So. 501; *Montgomery Light & Traction Co. v. Avant*, 202 Ala. 404, 3 A. L. R. 384, 80 So. 497.

**Arkansas.** *Fort Smith v. Hunt*, 72 Ark. 556, 105 Am. St. Rep. 51, 66 L. R. A. 238, 82 S. W. 163.

**California.** *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 27 L. R. A. (N.S.) 260, 93 Pac. 70; *Pinney v. Los Angeles Gas & Electric Corporation*, 168 Cal. 12, L. R. A. 1915C, 282, 141

**§ 3691. Regulation of public utilities.** The power of the state to regulate rates to be charged by public utilities can not be taken away by contracts entered into by such utilities; and subsequent

Pac. 620; *Ex parte Barmore*, 174 Cal. 286, L. R. A. 1917D, 688, 163 Pac. 50.

**Georgia.** *Washington v. Atlantic Coast Line Ry. Co.*, 136 Ga. 638, 38 L. R. A. (N.S.) 867, 71 S. E. 1066; *Railroad Commission v. Louisville & Nashville Ry. Co.*, 140 Ga. 817, L. R. A. 1915E, 902, 80 S. E. 327; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 142 Ga. 841, L. R. A. 1916E, 358, 83 S. E. 946; *Davis v. Savannah*, 147 Ga. 605, 95 S. E. 6; *State v. Killens*, 149 Ga. 735, 101 S. E. 911.

**Illinois.** *Chicago v. O'Connell*, 278 Ill. 591, 8 A. L. R. 916, 116 N. E. 210; *Hite v. Cincinnati, Indianapolis & Western Ry. Co.*, 284 Ill. 297, 119 N. E. 904; *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 123 N. E. 631; *Chicago v. Washingtonian Home*, 289 Ill. 206, 124 N. E. 416; *State Public Utilities Commission v. Quincy*, 290 Ill. 360, 125 N. E. 374; *Integrity Mutual Insurance Co. v. Boys*, 293 Ill. 307, 127 N. E. 748.

**Indiana.** *Jamieson v. Indiana Natural Gas & Oil Co.*, 128 Ind. 555, 28 N. E. 76; *Swartz v. Lake County*, 158 Ind. 141, 63 N. E. 31; *Grand Trunk Western Ry. Co. v. South Bend*, 174 Ind. 203, 36 L. R. A. (N.S.) 850, 89 N. E. 885, 91 N. E. 809; *State v. Lewis*, 187 Ind. 564, 120 N. E. 129.

**Iowa.** *State v. Meek*, 112 Ia. 338, 84 Am. St. Rep. 342, 51 L. R. A. 414, 84 N. W. 3; *Wabash Ry. Co. v. Peterson*, 187 Ia. 1331, 175 N. W. 523; *Aetna Insurance Co. v. Chicago Great Western Ry.*, — Ia. —, 180 N. W. 649.

**Kentucky.** *Baker v. Lexington (Ky.)*, 53 S. W. 16.

**Louisiana.** *New Orleans v. White*, 143 La. 487, 78 So. 745.

**Maine.** *In re Guilford Water Company's Service Rates*, 118 Me. 367, 106

Atl. 446; *In re Searsport Water Co.*, 118 Me. 382, 108 Atl. 452.

**Maryland.** *Cox v. Revelle*, 125 Md. 579, L. R. A. 1915E, 443, 94 Atl. 203; *Jones Hollow Ware Co. v. Crane*, 134 Md. 103, 3 A. L. R. 1658, 106 Atl. 274.

**Michigan.** *Grand Rapids & Indiana Ry. Co. v. Cobbs*, 203 Mich. 133, 168 N. W. 961.

**Missouri.** *Rosenberger v. Pacific Express Co.*, 258 Mo. 97, 167 S. W. 429; *Stegmann v. Weeke*, 270 Mo. 131, 5 A. L. R. 1060, 214 S. W. 137; *Southwest Missouri Ry. Co. v. Public Service Commission*, 281 Mo. 52, 219 S. W. 380.

**New York.** *People v. Nixon*, 229 N. Y. 356, 128 N. E. 245; *People v. La Fetra*, 230 N. Y. 429, 130 N. W. 601; *Gutttag v. Shatzkin*, — N. Y. —, 130 N. E. 929.

**Ohio.** *State v. Coleman*, 64 O. S. 377, 55 L. R. A. 105, 60 N. E. 568; *State v. Rendigs*, 98 O. S. 251, 120 N. E. 836.

**Oklahoma.** *Chicago, Rock Island & Pacific Ry. Co. v. Taylor*, 79 Okla. 142, 192 Pac. 349.

**Pennsylvania.** *Pennsylvania Ry. Co. v. Ewing*, 241 Pa. St. 581, 49 L. R. A. (N.S.) 977, 88 Atl. 775; *Schaper v. Cleveland & Erie Ry. Co.*, 265 Pa. St. 109, 108 Atl. 407.

**Tennessee.** *Knoxville v. Bird*, 80 Tenn. (12 Lea) 121, 47 Am. Rep. 326; *McMillan v. Knoxville*, 139 Tenn. 319, 202 S. W. 65.

**Texas.** *State v. Missouri, Kansas & Texas Ry. Co.*, 99 Tex. 516, 5 L. R. A. (N.S.) 783, 91 S. W. 214.

**Vermont.** *Rutland Ry., Light & Power Co. v. Burditt Bros.*, — Vt. —, 111 Atl. 582.

**Washington.** *Seattle v. Hurst*, 50 Wash. 425, 18 L. R. A. (N.S.) 169, 97 Pac. 454; *Raymond Lumber Co. v. Ray-*

legislation which modifies rates is valid even though prior contracts are thus abrogated.<sup>1</sup> State legislation which forbids issuing passes for free transportation, renders invalid prior contracts for such transportation.<sup>2</sup> While such legislation is valid, and while the covenant to issue passes can not be enforced specifically, nor can damages be recovered for breach thereof,<sup>3</sup> the adversary party may recover compensation in quasi-contract.<sup>4</sup>

mond Light & Water Co., 92 Wash. 330, L. R. A. 1917C, 574, 159 Pac. 133; State v. Superior Court of Okanogan County, 111 Wash. 615, 191 Pac. 805.

West Virginia. Baltimore & Ohio Ry. v. Public Service Commission, 81 W. Va. 457, L. R. A. 1918D, 268, 94 S. E. 545; Shrader v. Steubenville, East Liverpool & Beaver Valley Traction Co., — W. Va. —, 99 S. E. 207; Mill Creek Coal & Coke Co. v. Public Service Commission, — W. Va. —, 100 S. E. 557.

Wisconsin. Borgnis v. Falk Co., 147 Wis. 327, 37 L. R. A. (N.S.) 489, 133 N. W. 209.

<sup>1</sup> United States. Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 9 A. L. R. 1420, 63 L. ed. 309.

California. Pinney v. Los Angeles Gas & Electric Corporation, 168 Cal. 12, L. R. A. 1915C, 282, 141 Pac. 620.

Georgia. Railroad Commission v. Louisville & Nashville Ry. Co., 140 Ga. 817, L. R. A. 1915E, 902, 80 S. E. 327; Union Dry Goods Co. v. Georgia Public Service Corporation, 142 Ga. 841, L. R. A. 1916E, 358, 83 S. E. 946.

Michigan. Grand Rapids & Indiana Ry. Co. v. Cobbs, — Mich. —, 168 N. W. 961.

Oregon. Woodburn v. Public Service Commission, 82 Or. 114, L. R. A. 1917C, 98, 161 Pac. 391.

Utah. U. S. Smelting, Refining & Milling Co. v. Utah Power & Light Co., — Utah —, 197 Pac. 902.

Vermont. Rutland Ry., Light &

Power Co. v. Burditt Bros., — Vt. —, 111 Atl. 582.

Washington. Raymond Lumber Co. v. Raymond Light & Water Co., 92 Wash. 330, L. R. A. 1917C, 574, 159 Pac. 133.

West Virginia. Mill Creek Coal & Coke Co. v. Public Service Commission, — W. Va. —, 7 A. L. R. 1081, 100 S. E. 557.

Wisconsin. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Menasha Wooden Ware Co., 159 Wis. 130, L. R. A. 1915F, 732, 150 N. W. 411.

<sup>2</sup> Hite v. Cincinnati, Indianapolis & Western Ry. Co., 284 Ill. 297, 119 N. E. 904.

Kentucky. Kentucky Traction & Terminal Co. v. Murray, 176 Ky. 593, 195 S. W. 1119.

Nebraska. State v. Martin, 82 Neb. 225, 23 L. R. A. (N.S.) 217, 117 N. W. 719.

Pennsylvania. Schaper v. Cleveland & Erie Ry. Co., 265 Pa. St. 109, 108 Atl. 407.

West Virginia. Dorr v. Chesapeake & Ohio Ry. Co., 78 W. Va. 150, L. R. A. 1916E, 622, 88 S. E. 666; Shrader v. Steubenville, East Liverpool & Beaver Valley Traction Co., — W. Va. —, 99 S. E. 207 (bridge).

See § 2699.

<sup>3</sup> See § 2699.

<sup>4</sup> New York Central & Hudson River Ry. v. Gray, 239 U. S. 583, 60 L. ed. 451; Louisville & Nashville Ry. v. Crowe, 156 Ky. 27, 49 L. R. A. (N.S.) 848, 160 S. W. 759.

In spite of prior contracts which will be affected by subsequent legislation, the state has authority, under the police power, to forbid duplication of public utilities,<sup>5</sup> or to make proper orders for the distribution of railway cars,<sup>6</sup> or to make a railroad company liable for damage caused by fire from its locomotives,<sup>7</sup> or to impose liability on the initial carrier where it is alleged that goods were injured while in the custody of a connecting carrier, unless within thirty days after application it traces the damaged freight, and gives written information to the applicant when, where, how and by whom such freight was damaged, and the names of the parties by whom the truth of such facts can be established,<sup>8</sup> or to abolish grade crossings,<sup>9</sup> or to require a safe viaduct over railroad tracks at the crossing of an important street in a large city,<sup>10</sup> or to require a viaduct to be repaired,<sup>11</sup> or to require a railway to keep in order all bridges necessary, to enable public roads to cross the railway,<sup>12</sup> or to maintain and repair crossings over its roads,<sup>13</sup> or to require gates at grade crossings,<sup>14</sup> or to require a railway to drain its right of way,<sup>15</sup> or to restrain the right of a railroad company to lay tracks across a highway,<sup>16</sup> or to require railways to

<sup>5</sup> *Farmers' & Merchants' Co-operative Telephone Co. v. Boswell Telephone Co.*, 187 Ind. 371, 119 N. E. 513.

<sup>6</sup> *Baltimore & Ohio Ry. v. Public Service Commission*, 81 W. Va. 457, L. R. A. 1918D, 268, 94 S. E. 545.

<sup>7</sup> *St. Louis & San Francisco Ry. v. Mathews*, 165 U. S. 1, 41 L. ed. 611 [affirming, *Mathews v. Ry.*, 121 Mo. 298, 25 L. R. A. 161 24 S. W. 591]; *Lake Erie & Western Ry. v. Falk*, 61 O. S. 312, 56 N. E. 203.

The existence of a lease which provides that a railway is not liable for loss caused by fires which are negligently permitted to start on its right of way, does not prevent the legislature from making such provisions inoperative and from making such statute apply to existing leases. *Aetna Insurance Co. v. Chicago Great Western Ry.*, — Ia. —, 180 N. W. 649.

<sup>8</sup> *Central of Georgia Ry. v. Murphey*, 116 Ga. 863, 60 L. R. A. 817, 43 S. E. 265.

<sup>9</sup> *Erie Ry. v. Public Utility Commissioners*, 254 U. S. 394, — L. ed. —.

<sup>10</sup> *Chicago, Burlington & Quincy Ry. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948.

<sup>11</sup> *Chicago, Burlington & Quincy Ry. v. State*, 47 Neb. 549, 53 Am. St. Rep. 557, 41 L. R. A. 481, 66 N. W. 624.

<sup>12</sup> *Illinois Central Ry. v. Copiah County*, 81 Miss. 685, 33 So. 502.

<sup>13</sup> (*Town of*) *Clarendon v. Rutland Ry.*, 75 Vt. 6, 52 Atl. 1057.

Contra, if the railway has paid full damages for a right of way and the crossing is a private one. *Chamberlain v. Missouri Pacific Ry. Co.*, 107 Kan. 341, 12 A. L. R. 224, 191 Pac. 261.

<sup>14</sup> (*Inhabitants of*) *Palmyra Township v. Pennsylvania Ry.*, 63 N. J. Eq. 799, 52 Atl. 1132 [affirming, 62 N. J. Eq. 601, 50 Atl. 369].

<sup>15</sup> *Chicago & Alton Ry. v. Tranbarger*, 238 U. S. 67, 59 L. ed. 1204.

<sup>16</sup> *Pittsburgh, Fort Wayne & Chicago Ry. v. Chicago*, 159 Ill. 369, 42 N. E. 781.

connect their tracks,<sup>17</sup> or to forbid soliciting baggage and transfer business at depots,<sup>18</sup> or to prevent a railway from granting a monopoly to an express company,<sup>19</sup> or to control the schedules and equipment of street railways,<sup>20</sup> or to regulate its use of a portion of the highway on which its tracks are laid,<sup>21</sup> or to prevent it from constructing double tracks in a street, although an unused franchise has given it permission so to do,<sup>22</sup> or to prevent a street railroad from tearing up streets without permission from the aldermen,<sup>23</sup> or to require a street railway company to clean,<sup>24</sup> or to sprinkle,<sup>25</sup> the space between its tracks, or to require street cars to be so constructed as to give reasonable protection to their employees.<sup>26</sup> A prior contract can not prevent the state from exercising its power to regulate the pressure at which gas can be transported in pipes,<sup>27</sup> or to regulate water companies,<sup>28</sup> or to compel a water company to move its pipes which are located in a public street,<sup>29</sup> or to prevent the waters of a state from being diverted into another state,<sup>30</sup> or to require proper fishways in dams.<sup>31</sup>

<sup>17</sup> Wisconsin, *Minnesota & Pacific Ry. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194.

<sup>18</sup> *Ex parte Barmore*, 174 Cal. 286, L. R. A. 1917D, 688, 163 Pac. 50; *Seattle v. Hurst*, 50 Wash. 424, 18 L. R. A. (N.S.) 169, 97 Pac. 454.

<sup>19</sup> *State v. Missouri, Kansas & Texas Ry. Co.*, 90 Tex. 516, 5 L. R. A. (N.S.) 783, 91 S. W. 214.

<sup>20</sup> *Chicago v. O'Connell*, 278 Ill. 591, 8 A. L. R. 916, 116 N. E. 210.

<sup>21</sup> *Mason v. Ohio River Ry.*, 51 W. Va. 183, 41 S. E. 418.

<sup>22</sup> *Grand Trunk Western Ry. Co. v. South Bend*, 174 Ind. 203, 36 L. R. A. (N.S.) 850, 89 N. E. 885, 91 N. E. 809.

<sup>23</sup> *Westport v. Mulholland*, 159 Mo. 86, 53 L. R. A. 442, 60 S. W. 77.

<sup>24</sup> (*City of*) *Chicago v. Chicago Union Traction Co.*, 199 Ill. 259, 59 L. R. A. 666, 65 N. E. 243.

<sup>25</sup> *City & Suburban Ry. v. Mayor of City of Savannah*, 77 Ga. 731, 4 Am. St. Rep. 106; *State v. Canal & Claiborne Ry.*, 50 La. Ann. 1189, 56 L. R. A. 287, 24 So. 265.

<sup>26</sup> *State v. Smith*, 58 Minn. 35, 25 L. R. A. 759, 59 N. W. 545.

<sup>27</sup> *Jamieson v. Indiana Natural Gas Co.*, 128 Ind. 555, 12 L. R. A. 652, 28 N. E. 76.

Regulations of this sort may be unconstitutional as an attempt on the part of a state to interfere with interstate commerce. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 35 L. R. A. (N.S.) 1193, 55 L. ed. 716.

<sup>28</sup> *Topeka Water Co. v. Whiting*, 58 Kan. 639, 39 L. R. A. 90, 50 Pac. 877; *Du Bois Borough v. Du Bois City Water Works Co.*, 176 Pa. St. 430, 34 L. R. A. 92, 35 Atl. 248.

<sup>29</sup> *Anderson v. Fuller*, 51 Fla. 380, 120 Am. St. Rep. 170, 6 L. R. A. (N.S.) 1026, 41 So. 684.

<sup>30</sup> *Hudson Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828 [affirming, *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 695, 118 Am. St. Rep. 754, 14 L. R. A. (N.S.) 197, 65 Atl. 489].

<sup>31</sup> *State v. Meek*, 112 Ia. 338, 84 Am. St. Rep. 342, 51 L. R. A. 414, 84 N. W. 3.

**§ 3692. Insurance.** The charter of an insurance company does not prevent the state from exercising its power to regulate it,<sup>1</sup> as to authorize a change from a mutual company to a stock company,<sup>2</sup> or to require annual statements of the condition of the company to be filed,<sup>3</sup> or to make an insurance company liable on policies thereafter issued, for the face of the policy in case of total loss.<sup>4</sup> An insurance company which was entitled when its policies issued, to be subrogated to the claims of the insured against the railroad company for the full value of the property insured, can not complain because a subsequent statute restricts the liability of the railroad to the difference between the value of the property destroyed and the amount of insurance thereon, though such restriction defeats the right of subrogation.<sup>5</sup>

**§ 3693. State supervision and inspection.** A statute which provides for the inspection of a business by state officials,<sup>1</sup> or which provides that the books of a corporation shall be open to the stockholders,<sup>2</sup> does not impair the obligation of a contract although applied to businesses which were already in existence. Statutes which require previously incorporated corporations of certain kinds, such as railroads<sup>3</sup> or banks,<sup>4</sup> or corporations engaged in laying underground electric conductors,<sup>5</sup> to contribute to the salary of commissioners having general supervision over such corporations, do not impair the obligation of any contract contained in the charters of such corporations.

<sup>1</sup> *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 38 L. ed. 778 [affirming, 50 O. S. 252, 33 N. E. 1056; *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657, 48 L. ed. 832.

<sup>2</sup> *Grobe v. Erie County Mutual Ins. Co.*, 169 N. Y. 613, 62 N. E. 1096.

<sup>3</sup> *Eagle Ins. Co. v. Ohio*, 153 U. S. 446, 38 L. ed. 778 [affirming, 50 O. S. 252, 33 N. E. 1056]; *Sandel v. Atlanta Fire Ins. Co.*, 53 S. Car. 241, 31 S. E. 230.

<sup>4</sup> *Word v. Southern Mutual Ins. Co.*, 112 Ga. 585, 37 S. E. 897. (The charter of the corporation forbade it to insure property for more than three-fourths of its value.)

See § 355.

<sup>5</sup> *Leavitt v. Canadian Pacific Ry.*, 90 Me. 153, 38 L. R. A. 152, 37 Atl. 886.

<sup>1</sup> *Louisville v. Vreeland*, 140 Ky. 400, 131 S. W. 195; *Bank of Oxford v. Love*, 111 Miss. 699, 8 A. L. R. 894, 72 So. 133 [affirmed, *Bank of Oxford v. Love*, 250 U. S. 603, 63 L. ed. 1165].

<sup>2</sup> *Venner v. Chicago City Ry.*, 246 Ill. 170, 92 N. E. 643.

<sup>3</sup> *Charlotte, Columbia & Augusta Ry. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051.

<sup>4</sup> *Bank of Oxford v. Love*, 111 Miss. 699, 8 A. L. R. 894, 72 So. 133 [affirmed, *Bank of Oxford v. Love*, 250 U. S. 603, 63 L. ed. 1165].

<sup>5</sup> *New York v. Squire*, 145 U. S. 175, 36 L. ed. 666 [affirming, *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 893, 14 N. E. 820]. (The statute in question also required such corporations to file maps showing the location of such conductors.)

**§ 3694. Contracts of employment.** A contract between an employe of a railway and such railway by which the employe is to contribute to a relief fund out of which he may at his election receive compensation for injury, in which case he agrees to release his claim for injuries, is rendered invalid by the subsequent enactment of an Employers' Liability Act.<sup>1</sup>

A provision in a charter which exempts a railway from liability for the death of its employes even if due to its own negligence, may be terminated by subsequent legislation giving a right of action for death by wrongful act.<sup>2</sup>

Statutes which regulate hours of labor,<sup>3</sup> or which regulate the payment of wages,<sup>4</sup> or which forbid blacklisting,<sup>5</sup> are not invalid as impairing the obligation of prior contracts of employment.

The existence of a contract for the employment of convicts within the prison does not prevent the state from protecting their health by providing for their employment out-of-doors.<sup>6</sup>

**§ 3695. Workmen's Compensation Act.** A Workmen's Compensation Act is generally held to be applicable to existing contracts of employment, without impairing the obligation of such contracts.<sup>1</sup> This result is justified on the theory that the statute

<sup>1</sup> *Washington v. Atlantic Coast Line Ry. Co.*, 136 Ga. 638, 38 L. R. A. (N.S.) 867, 71 S. E. 1066; *Baltimore & Ohio Ry. Co. v. Miller*, 183 Ind. 323, 107 N. E. 545 (Federal state).

The Federal Employers' Liability Act which renders invalid a covenant in a contract between an employe and a railway whereby the employe agrees that if he accepts relief from the relief department he waives his claim for damages, renders invalid the remaining covenants of such contract and prevents the employe from asserting any claim against the relief department of such railway. *Baltimore & Ohio Ry. Co. v. Miller*, 183 Ind. 323, 107 N. E. 545.

This result was reached, however, in a case in which the employe had sued the railway for his injuries and had recovered damages; and he was now attempting to recover from the relief department of such railway in addition to his recovery in a tort action.

<sup>2</sup> *Texas & New Orleans Ry. v. Miller*, 221 U. S. 408, 55 L. ed. 789.

<sup>3</sup> *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383.

<sup>4</sup> *Commonwealth v. Reinecke Coal Mining Co.*, 117 Ky. 885, 79 S. W. 287; *State v. Brown Mfg. Co.*, 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246.

<sup>5</sup> *Commonwealth v. Reinecke Coal Mining Co.*, 117 Ky. 885, 79 S. W. 287.

<sup>6</sup> *Jones Hollow Ware Co. v. Crane*, 134 Md. 103, 3 A. L. R. 1658, 106 Atl. 274.

<sup>1</sup> *United States. Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685; *Thornton v. Duffy*, 254 U. S. 361, 65 L. ed. —.

*New Jersey. Troth v. Millville Bottle Works*, 89 N. J. L. 219, 98 Atl. 435 (voluntary act); *Crew v. Trainor*, 92 N. J. L. 512, 105 Atl. 893.

*North Dakota. State v. Hagen*, — N. D. —, 175 N. W. 372.

*Washington. State v. Postal-Tele-*

is intended to provide compensation for a tort, which has not yet happened and in which the parties have no vested interest.<sup>2</sup> A change in a Workmen's Compensation Act from one which permits the employer to make payment directly to the employes and to protect their rights by insurance, to a plan which compels him to contribute to a state insurance fund, is valid although it terminates existing contracts of indemnity insurance.<sup>3</sup>

It has been said that the Workmen's Compensation Act can not be retroactive so as to apply to accidents which had occurred before it took effect.<sup>4</sup> This result has been reached where the statute did not purport to be retroactive,<sup>5</sup> or where the right of action under the statute then in force had ceased to exist,<sup>6</sup> as by

graph-Cable Co., 101 Wash. 630, 172 Pac. 902.

**Wisconsin.** *Borgnis v. Falk Co.*, 147 Wis. 327, 37 L. R. A. (N.S.) 489, 133 N. W. 209 (optional with employe).

This is true as to the elective provisions of such act. *Leva v. Utah Fuel Co.*, — Utah —, 199 Pac. 659.

The question was avoided by the construction of the statute in *Hunter v. Colfax Consolidated Coal Co.*, — Ia. —, L. R. A. 1917D, 15, 154 N. W. 1037.

Such statutes constitute due process of law. *New York Central Ry. v. White*, 243 U. S. 188, 61 L. ed. 667.

<sup>2</sup> "But all this does not in any way affect the contract of employment. That remains absolutely unimpaired in all its terms. The right to bring an action in the future in case of a possible tort not yet committed is not part of the contract of employment. That right arises out of the relation of employer and employe, and is subject to change by the law-making power at any time. The employer does not contract that it shall remain intact. There is no vested right in a mere remedy for a hypothetical wrong. At most the law can not be said to do more than change the remedy for a tort which is yet to happen, and may never happen. The legislature may change the remedies for torts yet to be

committed at any time, and such changes can not be said to make any change in mere contracts of service existing between the parties. This seems very patent. The legislature has, at many times within the last two decades, passed laws very materially changing the liabilities of employers to employes for injuries resulting from the negligent acts of the employer, e. g., the laws requiring the protection of machinery, abolishing assumption of risk in such cases, abolishing the co-employee rule as to railway companies, and changing the rules as to contributory negligence. In no case has the claim ever been made that these laws in any way affected or impaired existing contracts of service for terms expiring in the future, although many cases must doubtless have occurred where those laws were applied to parties who were under such contracts." *Borgnis v. Falk Co.*, 147 Wis. 327, 37 L. R. A. (N.S.) 489, 133 N. W. 209.

<sup>3</sup> *Thornton v. Duffy*, 254 U. S. 361, 65 L. ed. —.

<sup>4</sup> *Gauthier v. Penobscot Chemical Fiber Co.*, — Me. —, 113 Atl. 28.

<sup>5</sup> *Bauer v. Common Pleas of Essex*, 88 N. J. L. 128, 95 Atl. 627.

<sup>6</sup> *Schmidt v. O. K. Baking Co.*, 90 Conn. 217, 96 Atl. 963.

reason of failure to give notice;<sup>7</sup> and it was held that a subsequent statute could not restore such right of action.

An amendment with reference to the right of action for death which takes effect between the accident and the death, has been held to apply on the ground that the right of action arose at the death and not at the time of the accident.<sup>8</sup> It has been held that an amendment might be applicable to a prior accident.<sup>9</sup>

**§ 3696. Other examples of police power.** The state has an interest in roads and streets which it can not barter away.<sup>1</sup> Prior contracts do not prevent a state from exercising its power to impose an additional tax on the business of dealing in intoxicating liquors,<sup>2</sup> or to restrain the sale of intoxicating liquors,<sup>3</sup> or to impose additional penalties for violation of prohibition legislation,<sup>4</sup> or to exercise its powers to suppress lotteries,<sup>5</sup> or to impose penalties on operating a house of prostitution,<sup>6</sup> or to regulate interest,<sup>7</sup> or to change the place for holding court,<sup>8</sup> or to impose occupation taxes,<sup>9</sup> or to impose new requirements for the practice of medicine, if reasonable,<sup>10</sup> or to impose new restrictions upon practicing law,<sup>11</sup> such as forbidding the soliciting of personal injury actions.<sup>12</sup> Prior contracts can not prevent the state from prescribing the capacity

<sup>7</sup> *Schmidt v. O. K. Baking Co.*, 90 Conn. 217, 96 Atl. 903.

<sup>8</sup> *State v. District Court*, 131 Minn. 96, 154 N. W. 661.

<sup>9</sup> *Talbot v. Industrial Insurance Commission*, 108 Wash. 231, 187 Pac. 410 (increase in compensation).

<sup>1</sup> *Northern Pacific Ry. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630; *Vandalia Ry. Co. v. State*, 166 Ind. 219, 117 Am. St. Rep. 370, 76 N. E. 980; *Indiana Ry. Co. v. Calvert*, 168 Ind. 321, 10 L. R. A. (N.S.) 730, 80 N. E. 961; *Elliott, Railroads*, 2d ed., § 1082; *Elliott, Roads and Streets*, §§ 741, 742, 758.

<sup>2</sup> *Rosenberger v. Pacific Express Co.*, 258 Mo. 97, 167 S. W. 429.

<sup>3</sup> *Kresser v. Lyman*, 74 Fed. 765.

<sup>4</sup> *State v. Killens*, 149 Ga. 735, 101 S. E. 911 (confiscation of vehicles used in liquor traffic).

<sup>5</sup> *Stone v. Mississippi*, 101 U. S. 814,

25 L. ed. 1079; *Douglass v. Kentucky*, 168 U. S. 488, 42 L. ed. 553 [affirming, *Commonwealth v. Douglass*, 100 Ky. 116, 66 Am. St. Rep. 328, 24 S. W. 233].

<sup>6</sup> *New Orleans v. White*, 143 La. 487, 78 So. 745.

<sup>7</sup> *St. John v. Iowa Business Men's Building & Loan Association*, 136 Ia. 448, 15 L. R. A. (N.S.) 503, 113 N. W. 863.

<sup>8</sup> *Swartz v. Lake County*, 158 Ind. 141, 63 N. E. 31.

<sup>9</sup> *Baker v. Lexington (Ky.)*, 53 S. W. 16 (attorney); *McMillan v. Knoxville*, 139 Tenn. 319, 202 S. W. 65 (employment agencies).

<sup>10</sup> *State v. Coleman*, 64 O. S. 377, 55 L. R. A. 105, 60 N. E. 568.

<sup>11</sup> *Wabash Ry. Co. v. Peterson*, 187 Ia. 1331, 175 N. W. 523.

<sup>12</sup> *Wabash Ry. Co. v. Peterson*, 187 Ia. 1331, 175 N. W. 523.

of measures or containers in which specified articles must be sold,<sup>13</sup> or from prohibiting the keeping of certain kinds of animals within certain areas in a city.<sup>14</sup> A statute which suspends the right of the landlord to evict after the termination of the lease is held not to impair the obligation of the contract, although the lease contains a covenant to surrender possession at the end of the term.<sup>15</sup>

**§ 3697. Limitations on police power.** Wide as is the police power, it nevertheless has its limits; and the attempt of the legislature to interfere with existing contracts on the theory that it was exercising the police power have occasionally met with failure.<sup>1</sup> The legislation must relate to the public health, safety, morals, and the like, or it can not affect prior contracts.<sup>2</sup> A contract by which a public utility agreed to furnish power without charge as a part of a transaction by which it acquired a right in a dam, can not be affected by subsequent legislation which forbids utilities to furnish services at less than specified rates.<sup>3</sup> Contracts for furnishing water for irrigation can not be affected by subsequent legislation which provides a means for fixing such rates,<sup>4</sup> on the theory that no public use exists.<sup>5</sup> A contract between two railways for a certain type of crossing system, can not be set aside by an order of the railway commission which authorizes the use of a cheaper type of crossing which is admitted not to be any

<sup>13</sup> *Stegmann v. Weeke*, 279 Mo. 131, 5 A. L. R. 1060, 214 S. W. 137.

<sup>14</sup> *Davis v. Savannah*, 147 Ga. 605, 95 S. E. 6.

<sup>15</sup> *Marcus Brown Holding Co. v. Feldman*, — U. S. —, 41 Sup. Ct. 465. See also *Block v. Hirsh*, — U. S. —, 41 Sup. Ct. 458.

<sup>1</sup> *California*. *Allen v. Railroad Commission*, 179 Cal. 68, 8 A. L. R. 249, 175 Pac. 466.

*Illinois*. *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 11 A. L. R. 454, 123 N. E. 631.

*New York*. *Boaswell v. Security Mutual Life Insurance Co.*, 193 N. Y. 465, 19 L. R. A. (N.S.) 946, 86 N. E. 532.

*North Carolina*. *State v. Seaboard*

*Air Line Ry. Co.*, — N. Car. —, 92 S. E. 150.

*Ohio*. *Interurban Ry. & Terminal Co. v. Public Utilities Commission*, 98 O. S. 287, 120 N. E. 831.

<sup>2</sup> *Allen v. Railroad Commission*, 179 Cal. 68, 8 A. L. R. 249, 175 Pac. 466; *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 11 A. L. R. 454, 123 N. E. 631.

<sup>3</sup> *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 11 A. L. R. 454, 123 N. E. 631.

<sup>4</sup> *Allen v. Railroad Commission*, 179 Cal. 68, 8 A. L. R. 249, 175 Pac. 466; *Central Oregon Irrigation Co. v. Public Service Commission*, — Or. —, 196 Pac. 832.

<sup>5</sup> *Allen v. Railroad Commission*, 179 Cal. 68, 8 A. L. R. 249, 175 Pac. 466.

better than that required by the contract.<sup>6</sup> Under its general power to regulate insurance, the legislature can not compel a reduction in the amounts paid to agents under existing contracts of employment.<sup>7</sup>

The absence of a definite standard or test for public health, moral, welfare, and the like, make it possible for courts which agree upon general principles, to disagree as to the application to concrete states of fact; and a comparison of the cases cited will show that this has been the practical result. In spite of the attendant confusion it is probably better to leave the question in an unsettled condition than to attempt to define, in advance, by constitutional amendment, the extent to which the legislature may go in the future in protecting society.

**§ 3698. Eminent domain.** A contract, like other property, is subject to the power of eminent domain; and the fact that a contract has been made can not prevent the state from exercising such power even if it prevents the performance of the contract.<sup>1</sup> Accordingly, the existence of a lease,<sup>2</sup> or of a contract for joint ownership,<sup>3</sup> does not prevent the exercise of the power of eminent domain with reference to such property. The supreme court has, however, avoided the question of the power of the state to enlarge the scope of eminent domain so as to include contract rights which were not within the scope of such power when the contract was made.<sup>4</sup>

**§ 3699. Escheat and forfeiture.** The fact that a corporation acquired realty which was not necessary for its business before the enactment of the constitutional and statutory provisions which authorize escheat proceedings in such cases, does not render such

<sup>6</sup> *State v. Seaboard Air Line Ry. Co.*, — N. Car. —, 92 S. E. 150.

<sup>7</sup> *Boswell v. Security Mutual Life Insurance Co.*, 193 N. Y. 465, 19 L. R. A. (N.S.) 946, 86 N. E. 532.

<sup>1</sup> *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 9 L. ed. 773; *West River Bridge Co. v. Dix*, 47 U. S. (6 How.) 507, 12 L. ed. 535; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165; *Offield v. New York, New Haven & Hartford Ry. Co.*, 203 U. S. 372, 51 L.

ed. 231; *Terre Haute v. Evansville & Terre Haute Ry.*, 149 Ind. 174, 37 L. R. A. 189, 46 N. E. 77; *Cox v. Revelle*, 125 Md. 579, L. R. A. 1915E, 443; 94 Atl. 203; *Wood v. Millville*, 89 N. J. L. 646, 98 Atl. 267.

<sup>2</sup> *Cox v. Revelle*, 125 Md. 579, L. R. A. 1915E, 443, 94 Atl. 203.

<sup>3</sup> *State v. Superior Court of Okanogan County*, — Wash. —, 191 Pac. 805.

<sup>4</sup> *Cincinnati v. Louisville & Nashville Ry.*, 223 U. S. 390, 56 L. ed. 481 [affirming, 82 O. S. 466, 92 N. E. 1111].

provisions unconstitutional as applied to such realty.<sup>1</sup> The interest of a party in a contract, like other property rights, is subject to the power of a state to regulate succession and escheats; and the fact that a bank has agreed to repay a deposit does not prevent the legislature from providing that, after a specified period of time, an unclaimed deposit must be paid to the state,<sup>2</sup> or to an administrator of the depositor if the latter is absent and unheard of.<sup>3</sup>

## VIII

## REMEDIES

**§ 3700. Change of remedy.** A remedy given by the law is no part of the obligation of a contract.<sup>1</sup> Neither party has such a

<sup>1</sup> *Commonwealth v. Clark County National Bank*, 187 Ky. 151, 219 S. W. 175.

<sup>2</sup> *Provident Institution for Savings v. Malone*, 221 U. S. 660, 34 L. R. A. (N.S.) 1129, 55 L. ed. 899 [affirming, 201 Mass. 23, 86 N. E. 912 (thirty years)]; *Germantown Trust Co. v. Powell*, 265 Pa. St. 71, 108 Atl. 441; *Commonwealth v. Dollar Savings Bank*, 259 Pa. St. 138, 1 A. L. R. 1048, 102 Atl. 569.

<sup>3</sup> *Savings Bank v. Weeks*, 110 Md. 78, 22 L. R. A. (N.S.) 221, 72 Atl. 475 (seven years).

<sup>1</sup> *United States. New Orleans City & Lake Railroad Co. v. Louisiana*, 157 U. S. 219, 39 L. ed. 679; *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, 57 L. ed. 221 [affirming, *Architectural Decorating Co. v. National Surety Co.*, 115 Minn. 382, 132 N. W. 280].

*Arizona. Germania Fire Insurance Co. v. Bally*, 19 Ariz. 580, 1 A. L. R. 488, 173 Pac. 1052.

*Colorado. Brown v. Challis*, 23 Colo. 145, 46 Pac. 679.

*Georgia. Harris v. Taylor*, 148 Ga. 663, 98 S. E. 86.

*Illinois. Templeton v. Horne*, 82 Ill. 491.

*Indiana. Terre Haute & Indianapolis Ry. v. State*, 159 Ind. 438, 65 N. E. 401.

*Louisiana. In re Lee's Tutorship*, 147 La. 231, 84 So. 598.

*Maine. Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *Barton v. Conley*, 119 Me. 581, 112 Atl. 670.

*Massachusetts. Devine's Case*, — Mass. —, 129 N. E. 414.

*Minnesota. Carlson v. Pearson*, 145 Minn. 125, 176 N. W. 346.

*Mississippi. Mississippi Centennial Exposition Co. v. Luderbach*, — Miss. —, 86 So. 517.

*Nebraska. Reed v. American Bonding Company of Baltimore*, 102 Neb. 113, L. R. A. 1918C, 63, 166 N. W. 196; *In re Davis*, 103 Neb. 703, 173 N. W. 695.

*New Jersey. Crew v. Trainor*, 92 N. J. L. 512, 105 Atl. 893.

*New York. Berkovitz v. Arbib*, — N. Y. —, 130 N. E. 288.

*Pennsylvania. Kuca v. Lehigh Valley Coal Co.*, — Pa. St. —, 110 Atl. 731.

*Tennessee. Synder v. Supreme Ruler of the Fraternal Mystic Circle*, 122 Tenn. 248, 45 L. R. A. (N.S.) 209, 122 S. W. 981.

*Utah. Salt Lake Electric Supply Co. v. West*, 54 Utah 564, 182 Pac. 215; *Lynch v. Jacobsen*, — Utah —, 184 Pac. 929.

*Wisconsin. State v. Milwaukee Elec-*

vested right therein that the legislature can not alter it.<sup>2</sup> If a sufficient remedy remains and the substantive rights of the parties are not altered, the legislature may substitute equitable remedies for legal remedies.<sup>3</sup>

On the other hand, the existence of some sufficient remedy is essential to the obligation of a contract. A change made by a written law, affecting a remedy in existence when the contract right arose which destroys or modifies the remedy, and does not supply an alternative remedy equally adequate and efficacious, or does not leave the remedy thus modified as efficacious as before, is an impairment of the obligation of contracts.<sup>4</sup> A change of remedy such "as substantially to impair and lessen the value of the contract" is forbidden by the constitution of the United States.<sup>5</sup>

A statute which modifies a remedy so that the original right is scarcely worth pursuing clearly impairs the obligation of contracts.<sup>6</sup>

*tric Ry & Light Co.*, 169 Wis. 183, 172 N. W. 230.

See, however, *obiter* in *Muller v. McCann*, 50 Okla. 710, 151 Pac. 621.

<sup>2</sup> *United States*. *Hill v. Merchants' Mutual Ins. Co.*, 134 U. S. 515, 33 L. ed. 994; *Baltzer v. North Carolina*, 161 U. S. 240, 40 L. ed. 684.

*California*. *Kerchoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 24 Pac. 648.

*Kansas*. *Groesbeck v. Barger*, 1 Kan. App. 61, 41 Pac. 204.

*Maine*. *Somerset Ry. Co. v. Pierce*, 88 Me. 86, 33 Atl. 772.

*Michigan*. *Brown v. Buck*, *Kalamazoo Circuit Judge*, 75 Mich. 274, 13 Am. St. Rep. 438, 5 L. R. A. 226, 42 N. W. 827.

*South Carolina*. *Sims v. Steadman*, 62 S. Car. 300, 40 S. E. 677.

*Utah*. *Kirkman v. Bird*, 22 Utah 100, 83 Am. St. Rep. 774, 58 L. R. A. 669, 61 Pac. 338.

<sup>3</sup> *Kitterman v. Wapello County*, 145 Ia. 22, 123 N. W. 740 (change from *mandamus* to *injunction*); *Paschall v. Whitsell*, 11 Ala. 472 (*obiter*).

<sup>4</sup> *United States*. *Edwards v. Kear-*

*zey*, 96 U. S. 595, 24 L. ed. 793; *Memphis v. United States*, 97 U. S. 293, 24 L. ed. 920; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N.S.) 954.

*Indiana*. *Lake Erie & Western Ry. v. Griffin (Ind.)*, 53 N. E. 1042.

*Kansas*. *Beverly v. Barnitz*, 55 Kan. 466, 49 Am. St. Rep. 257, 31 L. R. A. 74, 42 Pac. 725.

*North Dakota*. *Blakemore v. Cooper*, 15 N. D. 5, 4 L. R. A. (N.S.) 1074, 106 N. W. 566.

*Wisconsin*. *Second Ward Savings Bank v. Schranck*, 97 Wis. 250, 39 L. R. A. 569, 73 N. W. 31; *Norris v. Tower*, 102 Neb. 434, 107 N. W. 728 (*obiter*).

<sup>5</sup> *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Ducey v. Patterson*, 37 Colo. 216, 119 Am. St. Rep. 184, 9 L. R. A. (N.S.) 1066, 86 Pac. 109.

See also, *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N.S.) 954.

<sup>6</sup> *Teralta Land & Water Co. v. Shaffer*, 116 Cal. 518, 58 Am. St. Rep. 194, 48 Pac. 613.

The most extreme types of substantive rights on the one hand, and of remedy or procedure on the other, are so unlike that it is easy to apply the rule that the legislature may modify procedure or remedies but that it can not modify pre-existing contract rights. The difficult questions which are presented are those in which the substantive right is so connected with the remedy that the repeal of the remedy leaves a substantive right which has merely a moral value. For these reasons, a discussion of the different classes of changes in procedure, evidence, remedies, and the like, is necessary.<sup>1</sup>

The propositions in this section are true under the constitutional provision protecting the obligation of contracts. Other constitutional provisions may give different results. Thus under a provision, as in New Jersey, that the legislature shall not pass any law depriving any person of any remedy for enforcing a contract which existed when the contract was made, vested rights in remedies exist.<sup>2</sup>

**§ 3701. Contract for specific remedy.** The rule that a change of remedy is not an impairment of the obligation of pre-existing contracts is subject to one qualification. If the parties to a contract have specifically contracted for certain remedies and such contract is legal and valid, a subsequent change of statute can not take away the right to the remedy thus contracted for.<sup>1</sup> Impairment of the obligation of contracts "always happens where the parties make legal remedies a subject of their contract and subsequent legislation conflicts with what they have expressed in their agreement."<sup>2</sup> Where a trust deed contained a clause providing for a sale in default of the obligation which it secured, a subsequent statute which provides for a different notice and requires

<sup>1</sup> See §§ 3703 et seq.

<sup>2</sup> *Dexter v. Edmands*, 89 Fed. 467; *Western National Bank v. Reckless*, 96 Fed. 70.

<sup>1</sup> *Indiana. Lake Erie & Western Ry. v. Griffin*, — Ind. —, 53 N. E. 1042.

*Kentucky. Pool v. Young*, 23 Ky. (7 T. B. Mon.) 587.

*Minnesota. O'Brien v. Krenz*, 36 Minn. 136, 30 N. W. 458.

*Oklahoma. Muller v. McCann*, 50 Okla. 710, 151 Pac. 621.

*Pennsylvania. Breitenbach v. Bush*,

44 Pa. St. 313, 84 Am. Dec. 442; *Weist v. Wuller*, 210 Pa. St. 143, 59 Atl. 820; *Galey v. Guffey*, 248 Pa. St. 523, 94 Atl. 238.

*Texas. Thompson v. Cobb*, 95 Tex. 140, 65 S. W. 1090.

*Virginia. Taylor v. Stearns*, 59 Va. (18 Gratt.) 244.

<sup>2</sup> *Billmeyer v. Evans*, 40 Pa. St. 324, 327; *International Building & Loan Association v. Hardy*, 86 Tex. 610, 40 Am. St. Rep. 870, 24 L. R. A. 284, 26 S. W. 497.

the sale to be made in the county in which such real estate is situated, can not restrict such power of sale.<sup>3</sup> If a power of sale is given which does not require a notice, a subsequent statute providing for a notice can not affect such power.<sup>4</sup> If a deed of trust provides for a sale "at any time," a subsequent statute providing that such sales must be made on a certain day of the month is invalid as applying to such prior deeds.<sup>5</sup> A mortgage in which the mortgagor covenants to pay all assessments on all interests in the land mortgaged can not be affected by a subsequent statute providing for separate taxation of the different interests in mortgaged realty.<sup>6</sup> A statute which either lengthens<sup>7</sup> or shortens<sup>8</sup> the time fixed by an insurance policy for bringing an action on such policy, is invalid.

**§ 3702. Destruction of inoperative remedy.** If the so-called prior remedy gives no means of enforcing the contract, abolishing it without any substitute, does not impair the obligation of contract. A clause in the constitution giving the supreme court jurisdiction to hear claims against the state, and if it finds in favor of such claim to recommend to the state legislature that it should make an appropriation therefor, does not provide a remedy within the meaning of this rule; and a subsequent constitutional amendment abolishing this procedure and providing that the legislature shall not authorize payment or taxation for the payment of certain claims, including the one in question unless by a previous vote of the people, does not impair the obligation of contracts.<sup>1</sup>

<sup>3</sup> *International Building & Loan Association v. Hardy*, 86 Tex. 610, 40 Am. St. Rep. 870, 24 L. P. A. 284, 26 S. W. 497.

<sup>4</sup> *Smith v. Green*, 41 Fed. 455.

See also, *Muller v. McCann*, 50 Okla. 710, 151 Pac. 621.

<sup>5</sup> *Thompson v. Cobb*, 95 Tex. 140, 65 S. W. 1090.

<sup>6</sup> *Detroit Common Council v. Rentz*, 91 Mich. 78, 16 L. R. A. 59, 51 N. W. 787.

<sup>7</sup> *Farmers' Co-operative Creamery Co. v. Iowa State Ins. Co.*, 112 Ia. 608, 84 N. W. 904; *Kimball v. Masons' Fraternal Accident Association*, 90 Me. 183, 38 Atl. 102.

<sup>8</sup> Contra, that shortening the time affects the remedy merely. *Jones v. German Ins. Co.*, 110 Ia. 75, 46 L. R. A. 860, 81 N. W. 188.

<sup>1</sup> *Beers v. Arkansas*, 61 U. S. (20 How.) 527, 15 L. ed. 991; *Washington Bank v. Arkansas*, 61 U. S. (20 How.) 530, 15 L. ed. 993; *Railroad Company v. Tennessee*, 101 U. S. 337, 25 L. ed. 960; *Baltzer v. North Carolina*, 161 U. S. 240, 40 L. ed. 684 [affirming, 104 N. Car. 265, 10 S. E. 153]; *State v. State Dispensary Commission*, 79 S. Car. 316, 60 S. E. 928.

See also, *Railroad Company v. Alabama*, 101 U. S. 832, 25 L. ed. 973.

**§ 3703. Examples of change of remedy—Procedure in general.**

As long as the legislature leaves a sufficient remedy for enforcing pre-existing contract rights, it may alter procedure as it pleases.<sup>1</sup> A statute which gives an additional remedy,<sup>2</sup> as where a municipal corporation is allowed to enforce certain contracts by mandamus,<sup>3</sup> or where forfeiture of the corporate charter is made a remedy for breach of a prior duty to keep a road in repair,<sup>4</sup> or where a right to declare a forfeiture by judicial decree is given for failure to pay the interest on the purchase price of school lands sold by the state, in addition to the prior right to rescind for non-payment or to enforce a lien for the purchase price,<sup>5</sup> or changes the penalty,<sup>6</sup> or the landlord's remedy,<sup>7</sup> in case a tenant wrongfully holds over after his term, or which gives a remedy more efficacious than the pre-existing remedies,<sup>8</sup> or which takes away one out of several remedies,<sup>9</sup> or which changes a remedy from a right of self-redress to a suit at law,<sup>10</sup> or which provides that a decree providing for an accounting, or for enjoining or interfering with the prosecution of the business of any life insurance company or association can be

<sup>1</sup> Louisiana. *In re Lee's Tutorship*, 147 La. 231, 84 So. 598.

Nebraska. *Norris v. Tower*, 102 Neb. 434, 167 N. W. 728.

New York. *Berkovitz v. Arbib*, — N. Y. —, 130 N. E. 288.

Pennsylvania. *Kuca v. Lehigh Valley Coal Co.*, — Pa. St. —, 110 Atl. 731.

West Virginia. *Bogges v. Buxton*, 67 W. Va. 679, 69 S. E. 367.

<sup>2</sup> *Hill v. Merchants' Mutual Ins. Co.*, 134 U. S. 515, 33 L. ed. 994; *New Orleans City & Lake Railroad Co. v. Louisiana*, 157 U. S. 219, 39 L. ed. 679; *Germania Fire Insurance Co. v. Bally*, 19 Ariz. 580, 173 Pac. 1052; *Mississippi Centennial Exposition Co. v. Luderbach*, 123 Miss. 828, 86 So. 517; *Crew v. Trainor*, 92 N. J. L. 512, 105 Atl. 893.

<sup>3</sup> *New Orleans City & Lake Ry. v. Louisiana*, 157 U. S. 219, 39 L. ed. 679 [affirming, *State v. New Orleans City & Lake Ry.*, 42 La. Ann. 550, 7 So. 606].

<sup>4</sup> *Davis v. Vernon Shell Road Co.*, 103 Ga. 491, 29 S. E. 475 (even where no remedy was theretofore provided).

<sup>5</sup> *Standifer v. Wilson*, 93 Tex. 232, 54

S. W. 898; *Fristoe v. Blum*, 92 Tex. 76, 45 S. W. 988 (holding that in *Berrendo Stock Co. v. McCarty*, 85 Tex. 412, 21 S. W. 598, the court did not consider or pass upon this statute).

<sup>6</sup> *Woodward v. Winehill*, 14 Wash. 394, 44 Pac. 860.

<sup>7</sup> *Woods v. Soucy*, 166 Ill. 407, 47 N. E. 67.

<sup>8</sup> *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860; *Webb v. Moore*, 25 Ind. 4; *Fonda v. Clark*, 43 Ia. 300; *Lapsley v. Brashears*, 14 Ky. (4 Litt.) 47.

<sup>9</sup> *Mason v. Haile*, 25 U. S. (12 Wheat.) 370, 6 L. ed. 660; *Oriental Bank v. Freese*, 18 Me. 109, 36 Am. Dec. 701.

Mandamus may be taken away. *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610.

Imprisonment for debt may be abolished as to pre-existing debts. *Penniman's Case*, 103 U. S. 714, 26 L. ed. 602.

<sup>10</sup> *White v. Farmers' High Line Canal & Reservoir Co.*, 22 Colo. 191, 31 L. R. A. 828, 43 Pac. 1028.

granted only on the application of the attorney-general, except in certain named cases,<sup>11</sup> or which changes the method of summoning a jury,<sup>12</sup> or commissioners,<sup>13</sup> or which changes the tribunal before which the hearing is to be had,<sup>14</sup> as where the law in force at the time of the accident provides for a committee on arbitration, and the law in force when the hearing takes place provides for a hearing before a single member of the industrial board,<sup>15</sup> or where the powers of the state superintendent of banks are transferred to a state securities commission,<sup>16</sup> or which provides for arbitration,<sup>17</sup> or which changes the method of serving process on defendant,<sup>18</sup> or which changes the time for taking a bill of exceptions, if the original time has not elapsed,<sup>19</sup> or in serving notice of appeal,<sup>20</sup> or which requires a claim against a city to be presented to the council for allowance, and in case of disallowance requires the claimant if dissatisfied with the order of the council to give written notice of appeal, and furnish bond for costs,<sup>21</sup> or which requires an affidavit of proof of the necessary facts to be filed in a proceeding for foreclosure,<sup>22</sup> or which dispenses with appraisalment,<sup>23</sup> or which requires certain defenses to be specially pleaded, such as coverture,<sup>24</sup> or which destroys a pre-existing right of set-off,<sup>25</sup> or which gives an additional right of set-off,<sup>26</sup> affects the remedy only and does not impair the obligation of pre-existing contracts.<sup>27</sup> If

<sup>11</sup> *Swan v. Mutual Reserve Fund Life Association*, 155 N. Y. 9, 49 N. E. 258.

<sup>12</sup> *People v. Teague*, 106 N. Car. 576, 19 Am. St. Rep. 547, 11 S. E. 665.

<sup>13</sup> *Williamsport & Hudson Turnpike Co. v. Startzman*, 86 Md. 363, 39 L. R. A. 161, 38 Atl. 777.

<sup>14</sup> *Devine's Case*, — Mass. —, 129 N. E. 414; *Carlson v. Pearson*, 145 Minn. 125, 176 N. W. 346; *Kuca v. Lehigh Valley Coal Co.*, — Pa. St. —, 110 Atl. 731.

<sup>15</sup> *Devine's Case*, — Mass. —, 129 N. E. 414.

<sup>16</sup> *Carlson v. Pearson*, 145 Minn. 125, 176 N. W. 346.

<sup>17</sup> *Berkovitz v. Arbib*, — N. Y. —, 130 N. E. 288.

<sup>18</sup> *Connecticut Mutual Life Ins. Co. v. Spratley*, 99 Tenn. 322, 44 L. R. A. 442, 42 S. W. 145.

<sup>19</sup> *Tarnowski v. Lake Shore & Michi-*

*gan Southern Ry.*, 181 Ind. 202, 104 N. E. 16.

<sup>20</sup> *Oshkosh Waterworks Co. v. Oshkosh*, 109 Wis. 208, 95 Am. St. Rep. 870, 85 N. W. 376.

<sup>21</sup> *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 47 L. ed. 249 [affirming, *Oshkosh Waterworks Co. v. Oshkosh*, 109 Wis. 208, 95 Am. St. Rep. 870, 85 N. W. 376].

<sup>22</sup> *Barton v. Conley*, 119 Mo. 581, 112 Atl. 670.

<sup>23</sup> *Norris v. Tower*, 102 Neb. 434, 167 N. W. 728.

<sup>24</sup> *Howard v. Gibson (Ky.)*, 60 S. W. 491.

<sup>25</sup> *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. ed. 943.

<sup>26</sup> *Amy v. Shelby Co. Taxing District*, 114 U. S. 387, 29 L. ed. 172.

<sup>27</sup> *Charlotte Bank v. Hart*, 67 N. Car. 264.

a bond is conditioned upon the payment of the debt by the judgment debtor or upon his rendering his body in execution, and arrest and imprisonment for debt is subsequently forbidden by law, the sureties upon such bond are thereby discharged.<sup>28</sup>

**§ 3704. Parties.** A change in the necessary parties to an action does not impair the obligation of the contract if it does not affect the substantive rights of the parties.<sup>1</sup> A statute which permits an action against the personal representative of a deceased joint debtor before obtaining judgment against the surviving debtor, the prior law making the debt in legal effect joint and several, but providing that the surviving debtor must be sued first is valid.<sup>2</sup> A repeal of a statute which authorizes a sub-contractor to bring a joint action against the contractor and the public corporation, is said not to impair the obligation of a prior contract.<sup>3</sup> On the other hand, a statute which, under cover of a change of parties, changes a claim against one party into a number of separate claims against several is invalid.<sup>4</sup> A statute which provides that the release of a joint debtor shall not release the remaining debtors can not apply to a release which was given before the statute took effect.<sup>5</sup> A statute which provides that after the dissolution of a corporation no action can be maintained against it, but that its assets are to be administered for the benefit of its creditors and stockholders is valid as applying to pre-existing debts.<sup>6</sup> A statute giving a new trial as a matter of course may be repealed so as to take away such right from pre-existing causes of action, even if action has been begun, as long as the case has not been tried.<sup>7</sup> On the other hand, after a case has been tried, the existing rights of the parties respectively to have a motion for a new trial granted or refused can not be taken away by a subse-

<sup>28</sup> *Mason v. Haile*, 25 U. S. (12 Wheat.) 370, 6 L. ed. 660; *Brown v. Dillahunt*, 12 Miss. (4 Sm. & M.) 713, 43 Am. Dec. 499.

<sup>1</sup> *Salt Lake Electric Supply Co. v. West*, 54 Utah 564, 182 Pac. 215.

<sup>2</sup> *Island Savings Bank v. Galvin*, 20 R. I. 347, 39 Atl. 196, the court saying: "The change is simply in the time when the representatives may be sued and this is clearly a change of remedy only"; *Island Savings Bank v. Galvin*, 20 R. I. 347, 39 Atl. 196.

<sup>3</sup> *Salt Lake Electric Supply Co. v. West*, 54 Utah 564, 182 Pac. 215.

<sup>4</sup> *Dyett v. Hyman*, 129 N. Y. 351, 26 Am. St. Rep. 533, 29 N. E. 261.

<sup>5</sup> *Ducey v. Patterson*, 37 Colo. 216, 119 Am. St. Rep. 184, 9 L. R. A. (N.S.) 1066, 86 Pac. 109.

<sup>6</sup> *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

<sup>7</sup> *People v. District Court*, 28 Colo. 161, 63 Pac. 321.

quent statute.<sup>8</sup> After the lapse of the time limited for filing a bill of exceptions a statute authorizing the court to extend the time for filing such bill impairs the obligation of contracts as to such prior actions.<sup>9</sup>

**§ 3705. Costs.** Since the parties to a contract have no legal right to break it, and since costs are within the discretion of the legislature, a statute which increases costs for breach of a pre-existing contract,<sup>1</sup> such as a statute which allows attorney's fees as costs,<sup>2</sup> does not impair the obligation of such prior contracts.

**§ 3706. Change in procedure in actions against stockholders.** A number of questions have been presented by changes in legislation with reference to the method of enforcing the liability of stockholders. It is generally said that a change in the procedure or the nature of the action is immaterial as long as the substantive liability of the stockholder is not increased.<sup>1</sup> A statute providing that the liability of a stockholder may be adjudicated in the same action as that brought against the corporation for the corporate debt, instead of by a subsequent action as formerly,<sup>2</sup> or giving exclusive jurisdiction of actions on stock subscriptions to common-law courts, instead of to courts of equity as before,<sup>3</sup> or a statute

<sup>8</sup> *In re Handley's Estate*, 15 Utah 212, 62 Am. St. Rep. 926, 49 Pac. 829.

<sup>9</sup> *Johnson v. Gebhauer*, 159 Ind. 271, 64 N. E. 855.

<sup>1</sup> *Germania Fire Insurance Co. v. Bally*, 19 Ariz. 580, 1 A. L. R. 488, 173 Pac. 1052; *Reed v. American Bonding Co.*, 102 Neb. 113, L. R. A. 1918C, 63, 166 N. W. 196.

<sup>2</sup> *Germania Fire Insurance Co. v. Bally*, 19 Ariz. 580, 1 A. L. R. 488, 173 Pac. 1052; *Dowell v. Talbot Paving Co.*, 138 Ind. 675, 38 N. E. 389; *Reed v. American Bonding Co.*, 102 Neb. 113, L. R. A. 1918C, 63, 166 N. W. 196.

<sup>3</sup> *United States. Hill v. Merchants' Mutual Insurance Co.*, 134 U. S. 515, 33 L. ed. 994; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163; *Henley v. Myers*, 215 U. S. 373, 54 L. ed. 240 [*affirming, Henley v. Myers*, 76 Kan.

723, 17 L. R. A. (N.S.) 779, 93 Pac. 168].

*Georgia. Harris v. Taylor*, 148 Ga. 663, 98 S. E. 86.

*Maine. Johnson v. Libby*, 111 Me. 204, 88 Atl. 647.

*Minnesota. Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.*, 80 Minn. 125, 83 N. W. 36.

*New York. Story v. Furman*, 25 N. Y. 214.

*Utah. Lynch v. Jacobsen*, — Utah —, 184 Pac. 929.

*Virginia. Shickell v. Berryville Land & Improvement Co.*, 99 Va. 88, 37 S. E. 813.

<sup>2</sup> *Hill v. Merchants' Mutual Ins. Co.*, 134 U. S. 515, 33 L. ed. 994.

<sup>3</sup> *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468; *Shickell v. Berryville Land & Improvement Co.*, 99 Va. 88, 37 S. E. 813.

providing that assessments may be made upon the shares of stockholders in an insolvent corporation, and that an adjudication as to the amount of the debts and the amount due per share will be final, even as to stockholders not served personally,<sup>4</sup> are each valid as none impairs the obligation of prior contracts.

Statutes have been enacted which have provided that the liability of a stockholder is to be enforced by an action brought by the receiver of the corporation, instead of by the individual creditor. In a number of cases such a statute has been held not to impair the obligation of the contract between the creditors and the corporations or stockholders.<sup>5</sup> In other cases, a statute of this sort has been held to impair the obligation of the contract of the individual creditor, since it prevents him from bringing an action against the stockholders.<sup>6</sup> When this question was first presented to the supreme court of the United States, the court avoided it;<sup>7</sup> but in view of the subsequent decisions of this court,<sup>8</sup> the constitutionality of the statutes must be regarded as established. A statute which provides for enforcing stock liability by a suit in equity, to which all creditors who wish may be made parties, does not impair the obligation of prior contracts.<sup>9</sup> Under a constitutional provision which forbids the legislature to pass a law depriving any person of any remedy for enforcing a contract, which existed when the contract was made, the legislature can not make such a change in the method of enforcing stock liabilities.<sup>10</sup>

**§ 3707. Ancillary and provisional remedies.** Ancillary and provisional remedies are not a part of the obligation of a contract,

<sup>4</sup> *Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.*, 80 Minn. 125, 83 N. W. 36.

<sup>5</sup> *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163; *Henley v. Myers*, 215 U. S. 373, 54 L. ed. 240 [affirming, *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N.S.) 779, 93 Pac. 168]; *Harris v. Taylor*, 148 Ga. 663, 98 S. E. 86; *Story v. Furman*, 25 N. Y. 214.

<sup>6</sup> *Webster v. Bowers*, 104 Fed. 627; *Evans v. Nellis*, 101 Fed. 920; *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 1 L. R. A. (N.S.) 1171; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N.S.) 954; *Pusey v. Love*, 6 Penn. (Del.) 80, 11 L. R. A. (N.S.)

953, 66 Atl. 1013; *Douglass v. Loftus*, 85 Kan. 720, L. R. A. 1915B, 797, 119 Pac. 74.

<sup>7</sup> *Evans v. Nellis*, 187 U. S. 271, 47 L. ed. 177.

<sup>8</sup> *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163; *Henley v. Myers*, 215 U. S. 373, 54 L. ed. 240 [affirming, *Henley v. Myers*, 76 Kan. 723, 17 L. R. A. (N.S.) 779, 93 Pac. 168].

<sup>9</sup> *Pittsburg Steel Co. v. Baltimore Equitable Society*, 226 U. S. 455, 57 L. ed. 297 [affirming, *Pittsburg Steel Co. v. Baltimore Equitable Society*, 113 Md. 77, 77 Atl. 255].

<sup>10</sup> *Western National Bank v. Reckless*, 96 Fed. 70.

and may be altered if adequate remedies are left. A statute which strikes out a prior ground of attachment,<sup>1</sup> is held to affect the remedy only, and not to impair the obligation of prior contracts, even if an attachment has already been levied, as long as the claim has not been put in judgment.<sup>2</sup> This is true of federal statutes; but here, of course, is the additional consideration that Congress is not restrained by this provision.<sup>3</sup> A statute which gives an additional remedy by authorizing an attachment before the debt is due does not impair the obligation of pre-existing contract obligations.<sup>4</sup> A statute providing that if the trustee in garnishment pays a final judgment against the defendant in whole or in part, such payment shall to that extent discharge his liability as to plaintiff and defendant, is not invalid as impairing the obligation of prior debts due to a non-resident debtor.<sup>5</sup>

A statute which avoids a lien obtained by attachment,<sup>6</sup> or by levy and execution,<sup>7</sup> in the event of an assignment for the benefit of creditors within a specified time after such lien is obtained, is invalid as to debts contracted before such statute is passed. It will be noticed, however, that such a statute takes away every remedy whereby the creditor can obtain a priority through diligence, and leaves his only remedy that of presenting his claim to the assignee for the benefit of creditors. The same result has been reached as to a mortgage given before a state statute was passed avoiding mortgages given four months before insolvency proceedings were begun.<sup>8</sup> These cases have been placed by the courts, however, on the broad but unsafe principle that the remedy is a part of the contract.<sup>9</sup> A contrary result has been reached under section 67f of the National Bankrupt Act of 1898, the court holding that it did not impair the obligation of existing contracts to

<sup>1</sup> Day v. Madden, 9 Colo. App. 464, 48 Pac. 1053.

<sup>2</sup> Day v. Madden, 9 Colo. App. 464, 48 Pac. 1053.

<sup>3</sup> Evans-Snyder-Buel Co. v. McFadden, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900.

<sup>4</sup> Mosher v. Bay Circuit Judge, 108 Mich. 503, 66 N. W. 384.

<sup>5</sup> Cross v. Brown, 19 R. I. 220, 33 Atl. 147.

<sup>6</sup> Heath & Milligan Mfg. Co. v. Union Oil & Paint Co., 83 Fed. 776; Wilson v. Brochon, 95 Fed. 82; Peninsular Lead

& Color Works v. Union Oil & Paint Co., 100 Wis. 488, 69 Am. St. Rep. 934, 42 L. R. A. 331, 76 N. W. 359.

Contra, Baldwin v. Buswell, 52 Vt. 57.

<sup>7</sup> Second Ward Savings Bank v. Schranck, 97 Wis. 250, 39 L. R. A. 569, 73 N. W. 31.

<sup>8</sup> Chipman v. Peabody, 88 Me. 282, 34 Atl. 77.

<sup>9</sup> Peninsular Lead & Color Works v. Union Oil & Paint Co., 100 Wis. 488, 69 Am. St. Rep. 934, 42 L. R. A. 331, 76 N. W. 359.

provide that an adjudication of bankruptcy should discharge all liens obtained through legal proceedings within four months prior to the filing of the petition in bankruptcy against the debtor.<sup>10</sup> However, Congress is not subject to this constitutional provision, and the act would be valid even though it did impair the obligation of contracts.

**§ 3708. Collection of taxes and assessments.** Remedies for collecting taxes due and unpaid,<sup>1</sup> or on property unlawfully omitted from the assessment,<sup>2</sup> or for enforcing assessments for improvements made theretofore,<sup>3</sup> may be changed after the tax or assessment is levied. A statute may provide that the auditor shall place on the duplicate, taxes omitted before the passage of the act,<sup>4</sup> or may change the penalty for delinquencies.<sup>5</sup> A statute requiring lessees to pay the tax on the property leased and to deduct it from the rent is valid.<sup>6</sup> A statute which waives the right to collect certain omitted taxes, does not impair the obligation of a contract.<sup>7</sup> Transfer of taxes from one taxing district to another does not impair the obligation of a contract,<sup>8</sup> at least if it is not shown that such transfer will affect the ability of the district from which the transfer is made to pay its existing obligations.<sup>9</sup>

This rule is not especially applicable to taxes, since remedies for express contracts may be changed.<sup>10</sup>

**§ 3709. Change in the law of evidence—General principles.** It is generally said that no one has a vested right in rules of evidence; and this is correct as far as reasonable changes are concerned. Such changes may therefore be made applicable to pre-existing contracts without impairing the obligation thereof.<sup>1</sup> The

<sup>10</sup> *In re Rhoads*, 98 Fed. 399.

<sup>1</sup> *Flock v. Smith*, 65 N. J. L. 224, 47 Atl. 442; *Willis v. Highway*, 40 S. Car. 476, 19 S. E. 135.

<sup>2</sup> *State v. Weyerhauser*, 72 Minn. 519, 75 N. W. 718.

<sup>3</sup> *Hall v. Boston*, 177 Mass. 434, 59 N. E. 68.

<sup>4</sup> *Gager v. Prout*, 48 O. S. 89, 26 N. E. 1013.

<sup>5</sup> *Webster v. Auditor General*, 121 Mich. 668, 80 N. W. 705.

<sup>6</sup> *Vermont & Canada Ry. v. Vermont Central Ry.*, 63 Vt. 1, 29, 10 L. R. A. 562, 21 Atl. 262, 731.

<sup>7</sup> *Commonwealth v. United Cigarette Machine Co.*, 120 Va. 835, 92 S. E. 901.

<sup>8</sup> *Ancient Order of United Workmen v. Paragould Special School District No. 1*, — Ark. —, 222 S. W. 368.

<sup>9</sup> *Ancient Order of United Workmen v. Paragould Special School District No. 1*, — Ark. —, 222 S. W. 368.

<sup>10</sup> See §§ 3700 et seq.

<sup>1</sup> *United States. Callanan v. Hurley*, 93 U. S. 387, 23 L. ed. 931; *Reitler v. Harris*, 223 U. S. 437, 56 L. ed. 497 [affirming, *Reitler v. Harris*, 80 Kan. 148, 102 Pac. 249; *Bannon v. Burnes*, 39 Fed. 892.

law concerning the competency of witnesses in force at the time of the trial, and not that in force when the contract is entered into, controls,<sup>2</sup> whether the change in law qualifies a witness who was incompetent when the contract was made,<sup>3</sup> or whether it disqualifies a witness who was competent when the contract was made.<sup>4</sup> A conveyed to B, and B-married C. A died. The conveyance from A to B was attacked. C was held to be a competent witness because she was not a party to the contract or cause of action on trial.<sup>5</sup> The judgment below was reversed. Before the second trial a statute was passed providing that no party to a suit or proceeding whose right of action or defense is derived from one who is or, if living, would be incompetent to testify, shall be admitted to testify. This statute was held to apply to a new trial of this cause.<sup>6</sup>

On the other hand, "subsequent legislation which affects unreasonable changes in the rules of evidence" of a subsisting contract "impairs the obligations of the contract within the restriction of the federal constitution."<sup>7</sup> An unreasonable change in the rules of evidence is therefore void as applicable to pre-existing contracts.<sup>8</sup>

The difficulty in determining to what extent rules of evidence are interwoven with the substantive rights of the parties and the difficulty of distinguishing between a reasonable and an unreason-

Iowa. *Martin v. Cole*, 38 Ia. 141; *Immegart v. Gorgas*, 41 Ia. 439.

Kansas. *Morrill v. Douglass*, 17 Kan. 291.

Kentucky. *Supreme Council Catholic Knights of America v. Fenwick*, 169 Ky. 269, 183 S. W. 906.

Louisiana. *In re Douglas*, 41 La. Ann. 765, 6 So. 675.

Mississippi. *Griffin v. Dogan*, 48 Miss. 11; *Bell v. Coats*, 54 Miss. 538; *Virden v. Bowers*, 55 Miss. 1.

Maine. *Abbott v. Lindenbower*, 42 Mo. 162.

Missouri. *Raley v. Guinn*, 76 Mo. 263; *O'Bryan v. Allen*, 108 Mo. 227, 32 Am. St. Rep. 595, 18 S. W. 892.

New York. *Ensign v. Barse*, 107 N. Y. 320, 14 N. E. 400, 15 N. E. 401.

North Carolina. *Howell v. Hurley*, 170 N. Car. 401, 87 S. E. 107.

Wisconsin. *Smith v. Cleveland*, 17 Wis. 556; *Brown v. Slauson*, 23 Wis. 245.

<sup>2</sup> *Walthall v. Walthall*, 42 Ala. 450; *Wormley v. Hamburg*, 40 Ia. 22; *O'Bryan v. Allen*, 108 Mo. 227, 32 Am. St. Rep. 595, 18 S. W. 892.

<sup>3</sup> *Walthall v. Walthall*, 42 Ala. 450. <sup>4</sup> *O'Bryan v. Allen*, 108 Mo. 227, 32 Am. St. Rep. 595, 18 S. W. 892.

<sup>5</sup> *O'Bryan v. Allen*, 95 Mo. 68, 8 S. W. 225.

<sup>6</sup> *O'Bryan v. Allen*, 108 Mo. 227, 32 Am. St. Rep. 595, 18 S. W. 892.

<sup>7</sup> *Davis v. Supreme Lodge*, 165 N. Y. 159, 58 N. E. 891.

<sup>8</sup> *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 302; *Davis v. Supreme Lodge*, 165 N. Y. 159, 58 N. E. 891; *Blakemore v. Cooper*, 15 N. D. 5, 4 L. R. A. (N.S.) 1074, 106 N. W. 566.

able change in the law of evidence, have resulted in inconsistent decisions by courts which agree upon the general theory and the fundamental principles.

**§ 3710. Specific illustrations.** If a subsequent statute makes it impossible to prove a material or relevant fact, which under the law of evidence in force when the contract right was acquired could have been proved, it impairs the obligation of such prior contract.<sup>1</sup> If a contract is made when it can be proved by oral evidence, a subsequent statute which provides that such contracts can be proved only by written evidence is unconstitutional as applied to such prior contract.<sup>2</sup> A statute which provides that evidence of certain land claims shall not be admitted unless archived or recorded is unconstitutional as against prior claims the evidence of which consists of original public documents in the custody of the Mexican government, since the originals can not be obtained for record and the statute makes no provision for recording copies.<sup>3</sup>

If the change in the law of evidence does not make proof of the fact in question absolutely impossible, but does make it so burdensome as to be practically impossible, the statute is unconstitutional.<sup>4</sup> Certain bonds with detachable interest coupons had been issued by the state of Virginia. Many of these coupons had been detached and sold. A subsequent statute of Virginia provided that such coupons could be collected only on producing the original bond from which they had been cut. This requirement was held by the supreme court of the United States to be "an unreasonable condition, in many cases impossible to be performed," and hence

<sup>1</sup> A statute "which forbids the introduction of evidence of a prior contract, admissible and made necessary to the validity and existence of the contract by the law in force at the time it was made, unless it provides some other method of making sufficient proof of the necessary facts accessible to the person called upon to make the proof, it seems to us impairs the obligation of a contract as fully as though such subsequent law in terms declared that the contract should no longer be operative or be enforced through the

courts, for it destroys the only means through which the contract may be established or enforced." *Texas-Mexican Ry. v. Locke*, 74 Tex. 370, 390, 12 S. W. 80.

<sup>2</sup> *Saunders v. Carroll*, 14 La. Ann. 27.

<sup>3</sup> *Texas-Mexican Ry. v. Locke*, 74 Tex. 370, 12 S. W. 80.

<sup>4</sup> *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304.

See *The Coupon-Legislation of Virginia*, by Morris Gray, 23 *American Law Review* 924.

invalid.<sup>5</sup> This statute further forbade proof of the genuineness of the coupons by expert evidence. The state court had held such statute to be constitutional.<sup>6</sup>

In some cases changes in the law of evidence, making admissible evidence which before was inadmissible, is held to impair the obligation of contracts as to the party prejudiced thereby.<sup>7</sup> A statute providing that oral evidence is admissible to identify land insufficiently described in a written contract within the Statute of Frauds, can not apply to a prior contract.<sup>8</sup> This principle has even been applied to a change in rules affecting competency of witnesses. Thus where a physician was incompetent to testify as to knowledge acquired by him in professional confidence, and hence could not testify as to the cause of the death of certain relatives of the insured so as to defeat the policy by showing the falsity of certain statements in the application, a subsequent statute making him competent has been held not to apply to pre-existing contracts.<sup>9</sup>

**§ 3711. Presumptions.** A so-called *prima facie* presumption is generally regarded as a rule of evidence; and legislation which authorizes such inferences or presumptions and which makes them applicable to prior contracts, is not unconstitutional.<sup>1</sup> On the other hand, a rule that a *prima facie* inference of validity shall exist, under certain circumstances, is regarded as a part of the obligation of a contract which is entered into under such circumstances; and such *prima facie* presumption can not be abolished by subsequent legislation as to prior contracts.<sup>2</sup>

A conclusive presumption is really a rule of substantive law and not a rule of evidence, and a statute which creates, abolishes,

<sup>5</sup> *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304.

<sup>6</sup> *Cornwall v. Commonwealth*, 82 Va. 644, 3 Am. St. Rep. 121.

<sup>7</sup> *Lowe v. Harris*, 112 N. Car. 472, 22 L. R. A. 379, 17 S. E. 539.

<sup>8</sup> *Lowe v. Harris*, 112 N. Car. 472, 22 L. R. A. 379, 17 S. E. 539. (The contract in question was as follows: "Wilkesboro, N. C., Apr. 19, 1880. James Harris has paid the twenty dollars on his land. Owes me six more on it." The statute was passed in 1891).

<sup>9</sup> *Davis v. Supreme Lodge*, 165 N. Y.

159, 58 N. E. 891. The real point of this decision was that the subsequent statute was not intended to alter the former rule of evidence. This result was in part reached, however, because any other construction would have rendered the new statute unconstitutional.

<sup>1</sup> *Reitler v. Harris*, 223 U. S. 437, 56 L. ed. 497 [affirming, *Reitler v. Harris*, 80 Kan. 148, 102 Pac. 249; *State Board of Education v. Remick*, 160 N. Car. 562, 76 S. E. 627.

<sup>2</sup> *Blakemore v. Cooper*, 15 N. D. 5, 4 L. R. A. (N.S.) 1074, 106 N. W. 566 (tax sale).

or alters a conclusive presumption is really creating, abolishing or altering a rule of substantive law. If such statute would be unconstitutional as impairing the obligation of a prior contract, if it purported to affect the contract itself, it can not be made constitutional by the device of calling the rule a conclusive presumption instead of a rule of substantive law.<sup>3</sup> A statute which provides that a tax deed shall be conclusive evidence, is unconstitutional.<sup>4</sup>

The converse of this proposition has caused a conflict of authority. If a conclusive presumption arose under the facts when the contract was made, and the legislature subsequently provides that such presumption shall be prima facie only, some courts have held that this is a change of the law of evidence and not in substantive law; and that, accordingly, such subsequent legislation may apply to such prior transactions.<sup>5</sup> After a tax sale, a statute destroying the conclusive effect of a tax deed and making it prima facie only, does not impair the obligation of the contract with the purchaser.<sup>6</sup> In other jurisdictions a conclusive presumption is regarded as a part of the contract itself so that it can not be destroyed or turned into a prima facie inference without impairing the obligation of the contract.<sup>7</sup> Where this view obtains, a statute enacted after a

<sup>3</sup> Dawson v. Peter, 119 Mich. 274, 77 N. W. 997.

<sup>4</sup> Dawson v. Peter, 119 Mich. 274, 77 N. W. 997.

<sup>5</sup> Harris v. Harsch, 29 Or. 562, 46 Pac. 141; Strode v. Washer, 17 Or. 50, 16 Pac. 926.

<sup>6</sup> Harris v. Harsch, 29 Or. 562, 46 Pac. 141; Strode v. Washer, 17 Or. 50, 16 Pac. 926.

<sup>7</sup> Marx v. Hanthorn, 30 Fed. 579, 12 Sawy. 377 [point avoided in Marx v. Hanthorn, 148 U. S. 172, 37 L. ed. 410]; Tracy v. Reed, 38 Fed. 69, 2 L. R. A. 773; Smith v. Cleveland, 17 Wis. 556.

"The deed in question was executed on the 27th of November, and recorded on the 1st of December, 1858. At that time the title of the purchaser was valid and absolute as against the irregularities now urged, and remained so until the 19th day of March, 1859. Courts of justice must so have decided had the case then arisen. This was a

most material and important advantage to the purchaser, and could not have escaped his attention. It concerned the life and validity of the contract. Could the legislature afterwards step in and take it away, and thus remove the foundation of his right? Can the legislature say, as to contracts past and executed, that they shall mean one thing to-day and another to-morrow? That they shall have one construction or effect at the time of execution, and another afterwards? That the title of the purchaser by deed at first indefeasible shall afterwards be defeasible? If these things can be done, then certainly the protection afforded by the constitution to private rights is very slight and inadequate. But, as has already been often decided, the legislature is deprived of this power. The construction and effect given by law to a contract at the time of its execution

tax sale, which destroys the conclusive effect of the deed and makes it *prima facie* only, is unconstitutional.<sup>8</sup>

A statute which makes a tax deed conclusive as to all but jurisdictional facts is held to be valid,<sup>9</sup> as where it is made conclusive as to the fact that the tax is duly levied and that the necessary prerequisites have been complied with by the public officials,<sup>10</sup> or as to every fact necessary to its validity except that the tax has not been paid and that the realty is not exempt from taxation.<sup>11</sup> A statute which provides that a conclusive presumption which arises after the lapse of a certain period of time, has been upheld as to prior transactions if a reasonable time was given in which to comply with such statute.<sup>12</sup> This result is in accordance with the analogy of changes in the Statute of Limitations; since the legislature could have prevented the plaintiff from maintaining an action after the lapse of a reasonable time.<sup>13</sup>

**§ 3712. Damages.** The amount of damages given by the law in case of breach is looked upon as an element of the contract itself, so that a change in the measure of damages impairs the obligation of prior contracts.<sup>1</sup> While this rule is well settled, it is also held that a different remedy not involving damages may be given. Thus specific relief, as by mandamus,<sup>2</sup> or coercive enforcement as by forfeiture,<sup>3</sup> or a penalty,<sup>4</sup> may be added. A statute

inhere in and continue a part of it ever after, so that no future legislature can impair the obligations or divest the rights thus created. By this rule, then, the claims of the respective parties must be judged. They must stand or fall by the law as it existed at the time of the execution and recording of the tax deed." *Smith v. Cleveland*, 17 Wis. 556.

<sup>8</sup> *Marx v. Hanthorn*, 30 Fed. 579, 12 Sawy. 377 [point avoided in *Marx v. Hanthorn*, 148 U. S. 172, 37 L. ed. 410]; *Tracy v. Reed*, 38 Fed. 60, 2 L. R. A. 773; *Smith v. Cleveland*, 17 Wis. 556. For a discussion of this question by Judge Miller, in the federal court, in *Lord v. Milwaukee & Mississippi Ry. Co.*, see note 2, *Smith v. Cleveland*, 17 Wis. 556.

<sup>9</sup> *Roberts v. First National Bank*, 8 N. D. 604, 79 N. W. 1049.

<sup>10</sup> *Tiblier v. Land Trust*, 49 La. Ann. 1471, 22 So. 411.

<sup>11</sup> *State v. Whittlesey*, 17 Wash. 447, 50 Pac. 119.

<sup>12</sup> *Wilson v. Iseminger*, 185 U. S. 55, 46 L. ed. 804.

<sup>13</sup> See §§ 3423 et seq. and 3713.

<sup>1</sup> *Effinger v. Kenney*, 115 U. S. 566, 29 L. ed. 495.

<sup>2</sup> *New Orleans City & Lake Ry. v. Louisiana*, 157 U. S. 219, 39 L. ed. 679 [affirming, *State v. New Orleans City & Lake Ry. Co.*, 42 La. Ann. 550, 7 So. 606].

<sup>3</sup> *Davis v. Vernon Shell Road Co.*, 103 Ga. 401, 29 S. E. 475; *Standifer v. Wilson*, 93 Tex. 232, 54 S. W. 898.

<sup>4</sup> *Snyder v. Supreme Ruler of the Fraternal Mystic Circle*, 122 Tenn. 248, 45 L. R. A. (N.S.) 209, 122 S. W. 981.

which provides for the recovery of attorney's fees as costs is not regarded as affecting the measure of damages, but merely the costs; and such statute can, accordingly, be made applicable to a prior contract.<sup>5</sup>

**§ 3713. Change in statutes of limitation—Reduction in period—Reasonable time for action given.** A Statute of Limitations which restricts the time for bringing an action on pre-existing contract rights does not impair the obligation of such contracts if it gives a reasonable time after it is promulgated for bringing actions on such pre-existing contract rights.<sup>1</sup> What is a reason-

<sup>5</sup>*Dowell v. Talbot Paving Co.*, 138 Ind. 675, 38 N. E. 389.

See § 3705.

<sup>1</sup>*United States. Ross v. Duval*, 38 U. S. (13 Pet.) 45, 10 L. ed. 51; *Sohn v. Waterson*, 84 U. S. (17 Wall.) 596, 21 L. ed. 738; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808; *Gilfillan v. Union Canal Co.*, 109 U. S. 401, 27 L. ed. 977; *Mitchell v. Clark*, 110 U. S. 633, 28 L. ed. 279; *Wheeler v. Jackson*, 137 U. S. 245, 34 L. ed. 659; *Bear Lake & River Waterworks Co. v. Garland*, 164 U. S. 1, 41 L. ed. 327; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392 [affirming, *People v. Turner*, 145 N. Y. 451, 40 N. E. 400; s. c., 117 N. Y. 227, 22 N. E. 1022]; *Davis v. Mills*, 194 U. S. 451, 48 L. ed. 1067.

*Arkansas. Hill v. Gregory*, 64 Ark. 317, 42 S. W. 408; *Tipton v. Smythe*, 78 Ark. 392, 115 Am. St. Rep. 44, 7 L. R. A. (N.S.) 714, 94 S. W. 678.

*Georgia. Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488; *Boston v. Cummins*, 16 Ga. 102, 60 Am. Dec. 717.

*Illinois. Ryhiner v. Frank*, 105 Ill. 326.

*Indiana. Connecticut Mutual Life Insurance Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 586.

*Kansas. Elliott v. Lochneane*, 1 Kan. 126.

*Kentucky. Louisville & Nashville*

*Ry. v. Williams*, 103 Ky. 375, 45 S. W. 229; *Howard v. Kentucky & Louisville Mutual Ins. Co.*, 52 Ky. (13 B. Mon.) 282,

*Louisiana. Atchafalaya Land Co. v. F. B. Williams Cypress Co.*, 146 La. 1047, 84 So. 351.

*Maine. Kingley v. Cousins*, 47 Me. 91.

*Massachusetts. Lewis v. Crowell*, 205 Mass. 497, 91 N. E. 910.

*Michigan. Muirhead v. Sands*, 111 Mich. 487, 69 N. W. 826.

*Minnesota. Brown v. Pinkerton*, 95 Minn. 153, 111 Am. St. Rep. 448, 103 N. W. 807, 900.

*Mississippi. Watson v. Doherty*, 56 Miss. 628.

*Missouri. Cranor v. School District*, 81 Mo. App. 152.

*Montana. Guiterman v. Wishon*, 21 Mont. 458, 54 Pac. 566.

*North Dakota. Adams & Freese Co. v. Kenoyer*, 17 N. D. 302, 16 L. R. A. (N.S.) 681, 116 N. W. 98.

*Ohio. Bartol v. Eckert*, 50 O. S. 31, 33 N. E. 294.

*Oregon. State Land Board v. Lee*, 84 Or. 431, 165 Pac. 372.

*Pennsylvania. Kenyon v. Stewart*, 44 Pa. St. 179.

*Texas. Landa v. Obert*, 78 Tex. 33, 14 S. W. 297.

*Washington. Hanford v. King County*,— Wash. —, 192 Pac. 1013.

able time in the application of this rule depends on the circumstances of each particular case. Nine years,<sup>2</sup> three years,<sup>3</sup> one year,<sup>4</sup> ten months,<sup>5</sup> nine and one-half months,<sup>6</sup> or six months,<sup>7</sup> have each been held reasonable. If a reasonable time is in fact given, it is not necessary that its duration should be fixed when the Statute of Limitations is shortened.<sup>8</sup> In jurisdictions where time is counted from the passage of the act, a statute to go into effect when the revision of the statutes then pending, was completed, was held valid, such revision having been completed ten months after the statute was passed.<sup>9</sup>

The fact that the creditor does not know of the change in the period of limitations,<sup>10</sup> as where he is absent from the state when such change is made,<sup>11</sup> does not prevent such amendment from operating as a bar to his claim.

Changes in the Statute of Limitations will be regarded as *prima facie* prospective only,<sup>12</sup> especially if the statute does not fix any period of time within which actions may be brought upon pre-existing claims or those which would be barred under the statute as amended.<sup>13</sup> This result necessarily follows if the claim is already barred, since such an amendment would be unconstitu-

Wisconsin. *Lawton v. Waite*, 103 Wis. 244, 45 L. R. A. 616, 79 N. W. 321.

This rule applies to adverse possession. *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737.

See, however, *Jentzen v. Pruter*, — Minn. —, 180 N. W. 1004.

<sup>2</sup> *Bartol v. Eckert*, 50 O. S. 31, 33 N. E. 294.

<sup>3</sup> *Korn v. Browne*, 64 Pa. St. 55; *Clay v. Iseminger*, 190 Pa. St. 580, 42 Atl. 1039.

<sup>4</sup> *Lockhart v. Yeiser*, 65 Ky. (2 Bush.) 231.

<sup>5</sup> *Osborne v. Lindstrom*, 9 N. D. 1, 81 Am. St. Rep. 516, 46 L. R. A. 715, 81 N. W. 72.

<sup>6</sup> *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365.

<sup>7</sup> *Tipton v. Smythe*, 78 Ark. 392, 115 Am. St. Rep. 44, 7 L. R. A. (N.S.) 714, 94 S. W. 678.

Contra, *Morris v. Carter*, 46 N. J. L. 260.

<sup>8</sup> *Merchants' National Bank v.*

*Braithwaite*, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244.

<sup>9</sup> *Osborne v. Lindstrom*, 9 N. D. 1, 81 Am. St. Rep. 516, 46 L. R. A. 715, 81 N. W. 72.

Contra, that as to prior causes a definite time in which to sue must be given. *Ludwig v. Stewart*, 32 Mich. 27.

<sup>10</sup> *Tipton v. Smythe*, 78 Ark. 392, 115 Am. St. Rep. 44, 7 L. R. A. (N.S.) 714, 94 S. W. 678.

<sup>11</sup> *Tipton v. Smythe*, 78 Ark. 392, 115 Am. St. Rep. 44, 7 L. R. A. (N.S.) 714, 94 S. W. 678.

<sup>12</sup> *Adams & Freese Co. v. Kenoyer*, 17 N. D. 302, 16 L. R. A. (N.S.) 681, 116 N. W. 98; *Slover v. Union Bank*, 115 Tenn. 347, 1 L. R. A. (N.S.) 528, 89 S. W. 399; *Hanford v. King County*, — Wash. —, 192 Pac. 1013.

<sup>13</sup> *Adams & Freese Co. v. Kenoyer*, 17 N. D. 302, 16 L. R. A. (N.S.) 681, 116 N. W. 98; *Slover v. Union Bank*, 115 Tenn. 347, 1 L. R. A. (N.S.) 528, 89 S. W. 399.

tional if the legislature clearly intended it to apply to claims which were barred when the amendment was enacted.<sup>14</sup> A statute hastening the time of sale for delinquent taxes,<sup>15</sup> or for enforcing a mechanic's lien,<sup>16</sup> or one providing that the right to foreclose a mortgage is barred when the debt is barred,<sup>17</sup> or one providing that unless assignments of real estate mortgages are recorded within six months from the time that they are made, they can not be used in evidence against the mortgagor,<sup>18</sup> or one denying the right of attacking a judgment on the ground of mistake after three years if a bona fide purchaser has, in reliance on such judgment, acquired an interest in the realty,<sup>19</sup> or changing the time for suing on a judgment,<sup>20</sup> or the time for filing an abstract thereof so as to make it a lien on realty,<sup>21</sup> are not invalid as impairing the obligation of contracts.

**§ 3714. Reasonable time for action not given.** If, on the other hand, a change in the Statute of Limitations bars causes of action at the time that the statute is promulgated,<sup>1</sup> or does not give a reasonable time after its promulgation for enforcing a pre-existing contract right,<sup>2</sup> it is invalid as impairing the obligation of contracts. The legislature can not shorten the time for bringing an

<sup>14</sup> See § 1767, note 9.

<sup>15</sup> *Muirhead v. Sands*, 111 Mich. 487, 69 N. W. 826.

<sup>16</sup> *Bear Lake & River Waterworks Co. v. Garland*, 164 U. S. 1, 41 L. ed. 327.

<sup>17</sup> *Hill v. Gregory*, 64 Ark. 317, 42 S. W. 408.

<sup>18</sup> *Myers v. Wheelock*, 60 Kan. 747, 57 Pac. 956; and see on the same point, *Citizens' State Bank v. Julian*, 153 Ind. 655, 55 N. E. 1007.

<sup>19</sup> *Drew v. St. Paul*, 44 Minn. 501, 47 N. W. 158.

<sup>20</sup> *Ross v. Duval*, 38 U. S. (13 Pet.) 45, 10 L. ed. 51; *Bartol v. Eckert*, 50 O. S. 31, 33 N. E. 294.

<sup>21</sup> *Spencer v. Rippe*, 7 Okla. 608, 56 Pac. 1070.

<sup>1</sup> *Illinois. Rock Island National Bank v. Thompson*, 173 Ill. 593, 64 Am. St. Rep. 137, 50 N. E. 1089.

*Iowa. Casady v. Grimmelman*, 108 Ia. 695, 77 N. W. 1067; *Norris v. Tripp*, 111 Ia. 115, 82 N. W. 610.

*Minnesota. Jentzen v. Pruter*, — Minn. —, 180 N. W. 1004.

*New York. Gilbert v. Ackerman*, 159 N. Y. 118, 45 L. R. A. 118, 53 N. E. 753.

*Tennessee. Slover v. Union Bank*, 115 Tenn. 347, 1 L. R. A. (N.S.) 528, 89 S. W. 399.

<sup>2</sup> *United States. Sohn v. Waterson*, 84 U. S. (17 Wall.) 596, 21 L. ed. 737; *Wheeler v. Jackson*, 137 U. S. 245, 34 L. ed. 659.

*Illinois. Dobbins v. First National Bank*, 112 Ill. 553; *Rock Island National Bank v. Thompson*, 173 Ill. 593, 64 Am. St. Rep. 137, 50 N. E. 1089.

*Kentucky. Pearce v. Patton*, 46 Ky. (7 B. Mon.) 162, 45 Am. Dec. 61.

*Louisiana. Atchafalaya Land Co. v. F. B. Williams Cypress Co.*, 146 La. 1047, 84 So. 351 (obiter),

*Missouri. Cranor v. School District*, 151 Mo. 119, 52 S. W. 232.

*North Dakota. Osborne v. Lindstrom*, 9 N. D. 1, 81 Am. St. Rep. 516, 46 L. R. A. 715, 81 N. W. 72.

action to have a deed which is absolute on its face, declared to be a mortgage, if the debt which the deed secures does not fall due until after the expiration of the time thus limited.<sup>3</sup>

**§ 3715. Extension of period.** A change in statute extending the period of limitations is valid as to a claim not yet barred.<sup>1</sup>

If a cause of action has once been barred by limitations a subsequent statute can not extend the period for bringing action so as to revive such right.<sup>2</sup> If a right of action to recover usurious payments has been barred by the Statute of Limitations, such right of action can not be revived by a subsequent statute which extends the period for bringing such action.<sup>3</sup> A statute providing that a judgment and sale for taxes should not be set aside unless action was brought in nine months from the date of the sale, can not, by being repealed after that period has elapsed, deprive purchasers of its protection.<sup>4</sup> Some of the cases used to support this proposition are illustrations of non-claim of debts due from a decedent's estate.<sup>5</sup> This rule seems to apply to torts as well as to contracts.<sup>6</sup> A right of appeal, or of prosecuting error, which has once expired, can not be revived by subsequent statute.<sup>7</sup>

**Wisconsin.** *Relyea v. Tomahawk Paper & Pulp Co.*, 102 Wis. 301, 72 Am. St. Rep. 878, 78 N. W. 412.

<sup>3</sup>*Jentzen v. Pruter*, — Minn. —, 180 N. W. 1004.

<sup>1</sup>*Bowman v. Colfax*, 17 Wash. 344, 49 Pac. 551.

<sup>2</sup>**Florida.** *Bradford v. Shine*, 13 Fla. 393, 7 Am. Rep. 239.

**Illinois.** *Board of Education of Normal School District v. Blodgett*, 155 Ill. 441, 46 Am. St. Rep. 348, 31 L. R. A. 70, 40 N. E. 1025; *Fish v. Farwell*, 160 Ill. 236, 43 N. E. 367.

**Indiana.** *Right v. Martin*, 11 Ind. 123.

**New Hampshire.** *Woart v. Winnick*, 3 N. H. 473, 14 Am. Dec. 384.

**Oklahoma.** *Mires v. Hogan*, 79 Okla. 233, 192 Pac. 811.

**Utah.** *Ireland v. Mackintosh*, 22 Utah 296, 61 Pac. 901.

**Vermont.** *Wires v. Farr*, 25 Vt. 41.

**Wisconsin.** *Brown v. Parker*, 28 Wis. 21.

"A right of defense against a money demand, arising from the complete

running of the statute of limitations, is property within the protection of the constitutional guaranty of due process of law." *Fish v. Farwell*, 160 Ill. 236, 252, 43 N. E. 367.

<sup>3</sup>*Mires v. Hogan*, 79 Okla. 233, 192 Pac. 811.

<sup>4</sup>*Whitney v. Wegler*, 54 Minn. 235, 55 N. W. 927; *Kipp v. Elwell*, 65 Minn. 525, 33 L. R. A. 435, 68 N. W. 105; *Bowman v. Colfax*, 17 Wash. 344, 49 Pac. 551.

For other cases of tax liens, see *McCracken County v. Mercantile Trust Co.*, 84 Ky. 344, 1 S. W. 585.

<sup>5</sup>*Bradford v. Shine*, 13 Fla. 393, 7 Am. Rep. 239; *Ryder v. Wilson*, 41 N. J. L. 9.

<sup>6</sup>*Lawrence v. Louisville*, 96 Ky. 595, 49 Am. St. Rep. 309, 27 L. R. A. 560, 29 S. W. 460; *Mynatt v. Hubbs*, 53 Tenn. (6 Heisk.) 320; *Eingartner v. Illinois Steel Co.*, 103 Wis. 373, 74 Am. St. Rep. 871, 79 N. W. 433.

<sup>7</sup>*Atkinson v. Dunlap*, 50 Me. 111; *Germania Savings Bank v. Suspension Bridge*, 159 N. Y. 362, 54 N. E. 33;

A contrary rule, namely, that if the Statute of Limitations merely gives a defense and does not vest property rights, it may be extended so as to revive claims already barred, has been followed by the supreme court of the United States,<sup>8</sup> and by some of the state courts,<sup>9</sup> while in others it has been left an open question.<sup>10</sup>

**§ 3716. Contractual provision limiting time.** If a contract contains a valid provision limiting the time within which an action may be brought, a subsequent statute which renders such provision invalid is said to be constitutional if it is enacted before the breach of such contract, or before a right of action has arisen thereon.<sup>1</sup> If the right of action has arisen when the statute is enacted, it is said that such statute can not apply thereto,<sup>2</sup> especially if the right of action was barred by the terms of the contract when such statute was enacted.<sup>3</sup>

**§ 3717. Delay of judgment and execution.** Statutes which provide that an action can not be brought upon debts of certain classes or due from certain persons or that judgment can not be recovered for certain periods, have been held valid.<sup>1</sup> This holding is undoubtedly due in part to the fact that such statutes have generally been enacted on account of war. A statute giving the defendant in a foreclosure suit six months in which to answer is valid, even though applying to pre-existing mortgages.<sup>2</sup> Statutes which provide for the rendition of a judgment but for the stay of execution, have been held to be unconstitutional,<sup>3</sup> both as to judg-

Trim v. McPherson, 47 Tenn. (7 Cold.) 15.

<sup>8</sup> "No man promises to pay money with a view of being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says that time shall be no bar though such was the case when the contract was made." Campbell v. Holt, 115 U. S. 620, 628, 29 L. ed. 483 [quoted in Bates v. Cullum, 177 Pa. St. 633, 55 Am. St. Rep. 753, 34 L. R. A. 440, 35 Atl. 861].

<sup>9</sup> Swickard v. Bailey, 3 Kan. 507; Hulbert v. Clark, 128 N. Y. 295, 14 L. R. A. 59, 28 N. E. 638; Bates v. Cullum, 177 Pa. St. 633, 55 Am. St. Rep. 753, 34 L. R. A. 440, 35 Atl. 861.

So in a suit for back taxes. McEl-

downey v. Wyatt, 44 W. Va. 711, 45 L. R. A. 609, 30 S. E. 239.

<sup>10</sup> Prentice v. Dehon, 92 Mass. (10 All.) 353; Ball v. Wyeth, 99 Mass. 338.

<sup>1</sup> Smith v. Northern Neck Mutual Fire Association, 112 Va. 192, 38 L. R. A. (N.S.) 1016, 70 S. E. 482.

<sup>2</sup> Farmers' Co-operative Creamery Co. v. Iowa State Ins. Co., 112 Ia. 608, 84 N. W. 904.

<sup>3</sup> Sample v. London & Liverpool Fire Ins. Co., 46 S. Car. 401, 57 Am. St. Rep. 701, 47 L. R. A. 696, 24 S. E. 224.

<sup>1</sup> Barkley v. Glover, 60 Ky. (3 Met.) 44; Johnson v. Higgins, 60 Ky. (3 Met.) 566.

<sup>2</sup> Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 283.

<sup>3</sup> Strong v. Daniel, 5 Ind. 348; Web-

ments which were already rendered,<sup>4</sup> and as to pre-existing contracts.<sup>5</sup>

§ 3718. **Moratorium.** In time of war, legislation has been enacted which attempts to stay the prosecution of actions or the rendition of judgments against certain classes of persons or against all persons. Statutes of this sort which restrict the prosecution of the action, or which provides for a delay in rendering judgment, against persons who are in the military or naval service of the United States or of one of the states, are held to be valid as not impairing the obligation of such contracts.<sup>1</sup> Legislation which prevents foreclosure as against one who is in the military or naval service, is constitutional.<sup>2</sup> Even in cases of this sort, however, other rights under the contract,<sup>3</sup> such as rights of entry upon breach of condition,<sup>4</sup> the enforcement of which does not require an action at law or suit in equity, can not be suspended, since to do so would impair the obligation of the prior contract.

State statutes which suspend rights of action against debtors generally, have been held to be unconstitutional as impairing the obligation of prior contracts.<sup>5</sup>

*ster v. Rose*, 53 Tenn. (6 Heisk.) 93, 19 Am. Rep. 583.

*Contra*, *Holloway v. Sherman*, 12 Ia. 282, 79 Am. Dec. 537.

<sup>4</sup> *Stevens v. Andrews*, 31 Mo. 205; *Miller v. Gibson*, 63 N. Car. 635.

<sup>5</sup> *Stephenson v. Barrett*, 23 Ky. (7 T. B. Mon.) 50; *Dorrington v. Myers*, 11 Neb. 388, 9 N. W. 555.

<sup>1</sup> *Iowa*. *McCormick v. Rusch*, 15 Ia. 127, 83 Am. Dec. 401.

*Kentucky*. *Johnson v. Higgins*, 60 Ky. (3 Met.) 566.

*Missouri*. *Edmonson v. Ferguson*, 11 Mo. 344.

*North Dakota*. *Thress v. Zemple*, — N. D. —, 9 A. L. R. 1, 174 N. W. 85.

*Oregon*. *Pierrard v. Hoch*, 97 Or. 71, 191 Pac. 328.

*Pennsylvania*. *Coxe v. Martin*, 44 Pa. St. 322.

*South Dakota*. *Granger v. Luther*, 42 S. D. 636, 176 N. W. 1019 (obiter).

See also, *Konkel v. State*, 168 Wis. 335, 170 N. W. 715, in which the federal law was held to control where inconsistent with state law.

For a discussion of this subject, see *Moratoria*, by Paxton Blair, 20 Columbia Law Review 435 (abridgment of original article).

<sup>2</sup> *Pierrard v. Hoch*, 97 Or. 71, 184 Pac. 494.

<sup>3</sup> *Granger v. Luther*, 42 S. D. 636, 176 N. W. 1019.

<sup>4</sup> *Granger v. Luther*, 42 S. D. 636, 176 N. W. 1019.

<sup>5</sup> *Arkansas*. *Burt v. Williams*, 24 Ark. 91.

*Missouri*. *Stevens v. Andrews*, 31 Mo. 205.

*North Carolina*. *Jones v. Crittenden*, 4 N. Car. (1 Car. Law Repos.) 385, 6 Am. Dec. 531.

*South Carolina*. *State v. Carew*, 13 Rich. L. (S. Car.) 498, 91 Am. Dec. 245.

*Texas*. *Luter v. Hunter*, 30 Tex. 689, 98 Am. Dec. 494.

An additional reason for holding invalid legislation of this sort enacted by the confederate states during the Civil War, was the fact that such statutes frequently postponed the rendition of final judgment until a certain period

The distinction which the courts have seemed to make between actions between those in the military and naval service, on the one hand, and actions against other debtors, on the other hand, does not seem to be justified on the theory of the impairment of the obligation of contracts. If the states have no power to suspend the rendition of judgment, because of the general financial collapse which frequently follows a declaration of war, it would seem that they ought to have no greater power to protect a debtor who is in the military or naval service, although in the latter case other considerations might justify legislation for delaying judgment and execution against such a debtor. Such authority might well be included in the war power. A question would then arise as to the power of the states to take advantage thereof, if the legislation in question were enacted by a state; and if it were enacted by Congress the question of the impairment of obligation of contracts would not arise.

A distinction might well be made between a war which was carried on in the country of the enemy and one which is carried on by an invasion of the United States. Even if the states can not provide for delay in rendering judgment in case of war generally, it would seem that they should have such power if such state was invaded by a foreign army; and under such circumstances such legislation has been held to be valid.<sup>6</sup>

**§ 3719. Change in appraisement laws.** A change in statute providing for an appraisement if none was required before, the property not to be sold for less than a certain per cent. of the appraised value,<sup>1</sup> is said to impair the obligation of prior contracts. As this rule is justified on the theory that the existing remedy was a part of the contract,<sup>2</sup> it is not surprising that a different result

after peace between the confederate states and the United States; and such legislation was regarded as tending to aid the cause of the confederacy against the United States. *Garlington v. Priest*, 13 Fla. 559.

<sup>6</sup> *Johnson v. Duncan*, 3 Mart. (O. S., La.) 530, 6 Am. Dec. 675 (a case arising in the war of 1812, when the capture of New Orleans was threatened).

<sup>1</sup> *McCracken v. Hayward*, 43 U. S. (2 How.) 608, 11 L. ed. 397; *Rosier v. Hale*, 10 Ia. 470, 77 Am. Dec. 127; *Baily v. Gentry*, 1 Mo. 164, 13 Am.

Dec. 484; *Swinburne v. Mills*, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489 [citing, *McCracken v. Hayward*, 43 U. S. (2 How.) 608, 11 L. ed. 397]; *Dorrington v. Myers*, 11 Neb. 388, 9 N. W. 555 (obiter).

<sup>2</sup> "In placing the obligation of contracts under the protection of the constitution, its framers looked to the essentials of the contract more than to the forms and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it

is occasionally reached.<sup>3</sup> No attention seems to have been paid to the reasonable character of the change in law.

On the other hand, a statute which takes away a former right of appraisement is valid.<sup>4</sup>

**§ 3720. Change in exemption laws—Theory of substantive right.** Statutes which exempt from levy and sale on execution, property which was not exempt when the contract was entered into are held by the majority of our courts to be invalid as impairing the obligation of contracts.<sup>1</sup> A statute exempting wages,<sup>2</sup> or life

was left to the states to prescribe and shape the remedy to enforce it. The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence, any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution." *McCracken v. Hayward*, 43 U. S. (2 How.) 608, 11 L. ed. 397.

*Chadwick v. Moore*, 8 Watts & S. (Pa.) 49, 42 Am. Dec. 267.

<sup>4</sup> *Phelps-Bigelow Windmill Co. v.*

*North American Trust Co.*, 62 Kan. 529, 64 Pac. 63.

<sup>1</sup> *United States*. *Gunn v. Barry*, 82 U. S. (15 Wall.) 610, 21 L. ed. 212 [reversing, 44 Ga. 351]; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Kenner v. La Grange Mills*, 231 U. S. 215, 58 L. ed. 189; *Minden v. Clement*, — U. S. —, — L. ed. — [reversing, *Minden v. Clement*, 146 La. 385, 83 So. 664]; U. S. S. C. *Advance Opinions*, 1920-1921, 473.

*Alabama*. *Wilson v. Brown*, 58 Ala. 62, 29 Am. Rep. 727; *Adams v. Green*, 100 Ala. 218, 14 So. 54

*Iowa*. *Foster v. Byrne*, 76 Ia. 295, 35 N. W. 513, 41 N. W. 22; *Willard v. Sturm*, 96 Ia. 555, 65 N. W. 847.

*Louisiana*. *Crain v. Magee*, 132 La. 312, 61 So. 385.

*Minnesota*. *Dunn v. Stevens*, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348.

*Mississippi*. *Lessley v. Phipps*, 49 Miss. 790; *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388; *Rice v. Smith*, 72 Miss. 42, 16 So. 417.

*South Carolina*. *Trimmier v. Win-smith*, 41 S. Car. 109, 19 S. E. 283.

*South Dakota*. *Skinner v. Holt*, 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595.

*Virginia*. *Homestead Cases*, 63 Va. (22 Gratt.) 266, 12 Am. Rep. 507.

*Washington*. *In re Heilbron*, 14 Wash. 536, 35 L. R. A. 602, 45 Pac. 153.

<sup>2</sup> *Willard v. Sturm*, 96 Ia. 555, 65 N. W. 847.

insurance,<sup>3</sup> or a homestead,<sup>4</sup> as a homestead purchased with pension money,<sup>5</sup> or one restricting a written waiver of exemptions which had before that time been held valid,<sup>6</sup> are each unconstitutional. Such exemption laws are especially invalid if the claim is reduced to judgment before the law is passed, though an appeal is pending.<sup>7</sup> After a decree declaring the proceeds of certain life insurance policies to be a part of the estate of the insured, the rights of creditors can not be affected by a subsequent statute exempting life insurance policies from being applied to the debts of the insured.<sup>8</sup> On the same principle a statute restoring the common-law right of dower is invalid as to prior creditors of a married man.<sup>9</sup>

**§ 3721. Theory of remedy.** Some authorities of considerable numerical strength hold that exemption laws affect the remedy primarily and not the right; that they are not invalid as impairing the obligation of contracts, at least if they are reasonable in the extent of the protection which they afford to the debtor.<sup>1</sup> An

<sup>3</sup> *Minden v. Clement*, — U. S. —, — L. ed. — [reversing, *Minden v. Clement*, 146 La. 385, 83 So. 664]; U. S. S. C. Advance Opinions, 1920-1921, 473; *Rice v. Smith*, 72 Miss. 42, 16 So. 417; *Skinner v. Holt*, 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595.

A statute which provides that the proceeds of a life-insurance policy shall be exempt, and which applies to pre-existing contracts of insurance, was said to be valid: In re Succession of *Le Blanc*, 142 La. 27, L. R. A. 1917F, 1137, 76 So. 223; In re Succession of *Clement*, 146 La. 385, 83 So. 664; at least if such policy has not been pledged under a specific contract: In re Succession of *Le Blanc*, 142 La. 27, L. R. A. 1917F, 1137, 76 So. 223; and especially if the rights of the creditors arose after such statute was enacted: In re Succession of *Le Blanc*, 142 La. 27, L. R. A. 1917F, 1137, 76 So. 223.

The United States Supreme Court, reversing one of these judgments, held that a statute which provides that life-insurance policies shall be exempt from liability for the debts of the insured, impairs the obligation of prior policies

of insurance. *Minden v. Clement*, — U. S. —, — L. ed. — [reversing, *Minden v. Clement*, 146 La. 385, 83 So. 664]; U. S. S. C. Advance Opinions, 1920-1921, 473.

<sup>4</sup> *Dunn v. Stevens*, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348; *Trimmier v. Winsmith*, 41 S. Car. 109, 19 S. E. 283; *Homestead Cases*, 63 Va. (22 Gratt.) 266, 12 Am. Rep. 507.

<sup>5</sup> *Foster v. Byrne*, 76 Ia. 295, 35 N. W. 513, 41 N. W. 22.

<sup>6</sup> *Adams v. Creen*, 100 Ala. 218, 14 So. 54.

<sup>7</sup> *Skinner v. Holt*, 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595.

<sup>8</sup> *Skinner v. Holt*, 9 S. D. 427, 62 Am. St. Rep. 878, 69 N. W. 595; In re *Heilbron*, 14 Wash. 536, 35 L. R. A. 602, 45 Pac. 153.

<sup>9</sup> *Patton v. Asheville*, 109 N. Car. 685, 14 S. E. 92.

*Contra*, *Currier v. Elliott*, 141 Ind. 304, 39 N. E. 554.

<sup>1</sup> *Indiana*. *Taylor v. Stockwell*, 66 Ind. 505.

*Michigan*. *Rockwell v. Hubbell*, 2 Dougl. (Mich.) 197, 45 Am. Dec. 246.

exemption of a homestead,<sup>2</sup> or an exemption of personal earnings from attachment,<sup>3</sup> is not invalid as to prior debts.

Some authorities distinguish between the validity of exemption laws as applying to property then owned, or to that acquired after the statute takes effect, holding such laws valid as to the latter but invalid as to the former. A statute relieving the produce of a married woman's lands from liability for her husband's debts is valid as to products subsequently grown, though the debt in question was incurred before the statute was passed.<sup>4</sup> It may be here observed that the debtor has no vested right in his exemptions. Accordingly, a statute diminishing the amount which he may hold exempt does not impair the obligation of contracts.<sup>5</sup> A statute subjecting a homestead to a lien for materials furnished under a prior contract is valid.<sup>6</sup> If specific liens or other contracts are not affected, a statute which alters the amount of the husband's estate which the widow may hold exempt is constitutional.<sup>7</sup> If a spendthrift trust is created, a subsequent statute which abolishes it does not impair the obligation of the contract, if the instrument which created the trust did not contain an express provision that the income was not subject to the claims of creditors.<sup>8</sup>

**§ 3722. Change in redemption laws—General Principles.** The effect of a change in the law with reference to the redemption of property which has been sold at a judicial sale or other public sale, depends, in part, on the way in which the creditor obtained the lien which he is attempting to enforce. The lien may be given in accordance with the special agreement therefor, as in a case of

**Massachusetts.** *Bigelow v. Pritchard*, 38 Mass. (21 Pick.) 169.

**Tennessee.** *Dye v. Cooke*, 88 Tenn. 275, 17 Am. St. Rep. 882, 12 S. W. 631.

**Utah.** *Kirkman v. Bird*, 22 Utah 100, 83 Am. St. Rep. 774, 58 L. R. A. 669, 61 Pac. 338. In addition to the cases cited in this note, many early cases, taking this position, have been overruled by the cases cited in § 3720, note 1. *Folsom v. Asper*, 25 Utah 299, 71 Pac. 315.

<sup>2</sup> *Dye v. Cooke*, 88 Tenn. 275, 17 Am. St. Rep. 882, 12 S. W. 631.

<sup>3</sup> *Kirkman v. Bird*, 22 Utah 100, 83 Am. St. Rep. 774, 58 L. R. A. 669, 61 Pac. 338.

<sup>4</sup> *Niles v. Hall*, 64 Vt. 453, 25 Atl. 479.

*Contra*, *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388.

<sup>5</sup> *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860; *Leak v. Gay*, 107 N. Car. 468, 482, 12 S. E. 312, 315.

<sup>6</sup> *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860.

<sup>7</sup> *Oster's Executor v. Ohlman*, 187 Ky. 341, 219 S. W. 187.

<sup>8</sup> *Brearley School v. Ward*, 201 N. Y. 358, 40 L. R. A. (N.S.) 1215, 94 N. E. 1001.

a mortgage. It may be given by the law without any special agreement therefor, but as a means of enforcing a contract obligation, as in case of a judgment rendered in an action upon a contract. It may be given by the law without any reference to any prior agreement of the parties, as in case of a judgment in an action upon a tort, or in a tax sale, and the like. The effect of such change also depends, in part, on the question of what is the contract, the obligation of which it is sought to protect from impairment. If the property is not bought by the creditor, but by a third person, the contract of such purchaser arises at a later time than that at which the original obligation is incurred. If the original obligation was not based upon contract, the contract of the purchaser is the only one which arises out of the sale, and its impairment alone is to be considered. If the original obligation arose out of contract, the impairment of the original contract, as well as the impairment of the contract of the purchaser, must be considered. A statute passed after the original obligation is incurred and before the sale is invalid on this ground, if at all, only as impairing the contract of the original creditor. If passed after the sale, it may also be invalid as impairing the contract of the purchaser at such sale. If the lien was created by agreement, as in the case of a mortgage, and the property is bought by the creditor, another question to be determined is whether he is holding by virtue of his original contract or by virtue of the contract by which he purchased the property.

**§ 3723. Effect on original contract.** A statute which authorizes the redemption of property, sold on execution or foreclosure in satisfaction of a former contract, where such right of redemption did not exist before, impairs the obligation of the contract in satisfaction of which the foreclosure or execution is sought.<sup>1</sup> A change in the terms of redemption, prejudicial to the creditor, impairs the obligation of his contract.<sup>2</sup> If a mortgagee was authorized to take possession on condition broken, under the law in force when the mortgage was given, a subsequent statute which provides that if the mortgagee is in possession, and bids in the estate on foreclosure for less than the amount due on the mortgage, and

<sup>1</sup>Foreclosure. *Bronson v. Kinzie*, 42 U. S. (1 How.) 311, 11 L. ed. 143; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93; *State v. Hurlburt*, 93 Or. 34, 182 Pac. 169.

<sup>2</sup>*Bradley v. Lightcap*, 195 U. S. 1, 49 L. ed. 65; *Canadian & American Mortgage & Trust Co. v. Blake*, 24 Wash. 102, 85 Am. St. Rep. 946, 63 Pac. 1100.

the mortgagor does not redeem, the mortgagee must take a deed to the property within a certain time, under penalty of forfeiting his interest therein to the mortgagor, is unconstitutional as impairing the obligation of such contract,<sup>3</sup> as a change which extends the time allowed for such redemption,<sup>4</sup> as from six months to one year.<sup>5</sup> The same objection applies to a statute increasing the time that must elapse between the rendition of a judgment and a sale of the land.<sup>6</sup>

While this rule is sanctioned by the supreme court of the United States whose views are conclusive on this question, it has not always been acquiesced in by the state courts.<sup>7</sup> In some cases, the right of the mortgagee is regarded as the only right which is impaired by a change in the statutes relating to redemption.<sup>8</sup> Where this theory obtains, a statute which is passed before the sale, but after the mortgage is given, may give a right of redemption,<sup>9</sup> or it may extend the time therefor,<sup>10</sup> or it may reduce the

<sup>3</sup>Bradley v. Lightcap, 195 U. S. 1, 49 L. ed. 65 [reversing, Bradley v. Lightcap, 201 Ill. 511, 66 N. E. 546].

<sup>4</sup>United States. Foreclosure. Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93.

California. Allen v. Allen, 95 Cal. 184, 16 L. R. A. 646, 30 Pac. 213; Welch v. Cross, 146 Cal. 621, 106 Am. St. Rep. 63, 81 Pac. 229 (after rendition of judgment).

Idaho. Wilder v. Campbell, 4 Ida. 695, 43 Pac. 677.

Indiana. Scobey v. Gibson, 17 Ind. 572.

Kansas. Bixby v. Bailey, 11 Kan. 359; Ogden v. Walters, 12 Kan. 283.

Kentucky. Collins v. Collins, 70 Ky. 88.

Maine. Phinney v. Phinney, 81 Me. 450, 10 Am. St. Rep. 266, 4 L. R. A. 348, 17 Atl. 405.

Oregon. State v. Hurlburt, 93 Or. 34, 182 Pac. 169.

South Dakota. Hollister v. Donahoe, 11 S. D. 497, 78 N. W. 959.

Washington. Swinburne v. Mills, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489.

Wisconsin. Northwestern Mutual Life Ins. Co. v. Neeves, 46 Wis. 147, 49 N. W. 832 (obiter).

<sup>5</sup>Welch v. Cross, 146 Cal. 621, 106 Am. St. Rep. 63, 81 Pac. 229.

<sup>6</sup>Swinburne v. Mills, 17 Wash. 611, 61 Am. St. Rep. 932, 50 Pac. 489.

<sup>7</sup>Moore v. Martin, 38 Cal. 428 (foreclosure); Anderson v. Anderson, 120 Ind. 573, 28 Am. St. Rep. 211, 29 N. E. 35.

<sup>8</sup>Connecticut Mutual Life Insurance Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648; Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046 [affirming, 137 Cal. 663, 99 Am. St. Rep. 17, 70 Pac. 778]; Cowley v. Shields, 180 Ala. 48, 60 So. 267; Jones v. Kelly, 203 Ala. 170, 82 So. 420.

<sup>9</sup>Cowley v. Shields, 180 Ala. 48, 60 So. 267; Jones v. Kelly, 203 Ala. 170, 82 So. 420; Templeton v. Horne, 82 Ill. 491.

<sup>10</sup>Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046 [affirming, 137 Cal. 663, 99 Am. St. Rep. 17, 70 Pac. 778]; Turner v. Watkins, 31 Ark. 429.

rate of interest to be paid on redemption.<sup>11</sup> A statute reducing the rate of interest to be paid on redemption is valid as to prior debts, bearing by agreement a rate of interest still lower than that fixed by statute.<sup>12</sup> A statute allowing the judgment debtor to keep possession of the homestead until the end of the redemption period has been held to be valid as to a pre-existing debt not a lien on the realty which was subsequently put into judgment, the realty being sold after the statute was passed.<sup>13</sup> This case was decided on the theory that since the property sold for more than the amount of the judgment debt, the rights of the original creditor were discharged, while the rights of the purchaser at the judicial sale did not originate until after the statute had been passed. This ignores the theory that the rights of the judgment creditor or mortgagee pass to the purchaser.<sup>14</sup>

This question has caused some courts a great deal of trouble. In Kansas such statutes were first held unconstitutional,<sup>15</sup> but, on rehearing, were held to be constitutional.<sup>16</sup> The judgment last rendered was reversed by the supreme court of the United States, which held such statutes unconstitutional.<sup>17</sup> In Montana such statutes were at first held to be constitutional,<sup>18</sup> but on rehearing this judgment was reversed.<sup>19</sup> The same thing happened in Oregon.<sup>20</sup>

If the statute does not increase the period between the time that the suit is begun or the decree is rendered, and the time that the right of redemption expires, a change in the apportionment of time does not impair the obligation of prior contracts.<sup>21</sup> A mortgage was given when the statute provided that property could not

<sup>11</sup> Connecticut Mutual Life Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648.

<sup>12</sup> Robertson v. Van Cleave, 129 Ind. 217, 15 L. R. A. 68, 29 N. E. 781, 26 N. E. 899.

<sup>13</sup> Wilson v. Wold, 21 Wash. 398, 75 Am. St. Rep. 846, 58 Pac. 223.

<sup>14</sup> Hillebert v. Porter, 28 Minn. 496, 11 N. W. 84.

<sup>15</sup> Watkins v. Glenn, 55 Kan. 417, 40 Pac. 316; Beverly v. Barnitz, 55 Kan. 451, 40 Pac. 325.

<sup>16</sup> Beverly v. Barnitz, 55 Kan. 466, 49 Am. St. Rep. 257, 31 L. R. A. 74, 42 Pac. 725.

<sup>17</sup> Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93.

<sup>18</sup> State v. Gilliam, 18 Mont. 94, 31

L. R. A. 721, 44 Pac. 394, 45 Pac. 661 [following, Beverly v. Barnitz, 55 Kan. 466, 49 Am. St. Rep. 257, 31 L. R. A. 74, 42 Pac. 725].

<sup>19</sup> State v. Gilliam, 18 Mont. 109, 33 L. R. A. 556, 45 Pac. 661, 44 Pac. 394 [following Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93].

<sup>20</sup> State v. Sears, 29 Or. 580, 43 Pac. 482, holding such statutes constitutional, was reversed on rehearing; State v. Sears, 29 Or. 580, 54 Am. St. Rep. 808, 46 Pac. 785; to follow Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93.

<sup>21</sup> State Savings Bank v. Matthews, 123 Mich. 56, 81 N. W. 918.

be sold on foreclosure until one year after the bill was filed. Before foreclosure the statute was modified so that sale might be had in six months after the bill was filed, and a redemption period of six months after the sale was given. As the total period was not lengthened it was held that the new statute did not impair the obligation of the prior contract, but applied to it and controlled it.<sup>22</sup>

A statute taking away a pre-existing right of redemption is invalid.<sup>23</sup> A statute which reduces the time for redemption has been held to be valid.<sup>24</sup> A debt was incurred at a time when a judgment debtor or mortgagor could not retain possession after execution sale without accounting for the rents and profits. Subsequently the statute was changed to allow the judgment debtor or mortgagor to keep possession of a homestead during the period of redemption. Such later statute was held unconstitutional as applied to a pre-existing mortgage.<sup>25</sup> A statute which imposes a greater burden on the party who is entitled to redeem, than existed when he gave a mortgage, is said to impair the obligation of such contract.<sup>26</sup> A statute which provides that the purchaser may insure and which provides that the premium shall be repaid on redemption, impairs the obligation of a prior mortgage.<sup>27</sup>

**§ 3724. Effect on contract of purchaser.** After sale on execution an additional contract right exists, that of the purchaser at such sale. Subsequent statutes can not change the period of redemption.<sup>1</sup> This is true even if the sale was not based on contract rights, such as a tax sale.<sup>2</sup> It is especially true if the subsequent

<sup>22</sup> *State Savings Bank v. Matthews*, 123 Mich. 56, 81 N. W. 918.

<sup>23</sup> *Moore v. Irby*, 69 Ark. 102, 61 S. W. 371.

The court refused to decide the question whether a statute reducing the redemption period is valid, in *Spo-  
kane County v. Northern Pacific Ry.*, 5 Wash. 89, 31 Pac. 420.

<sup>24</sup> *Turk v. Mayberry*, 32 Okla. 86, 121 Pac. 665.

<sup>25</sup> *Canadian & American Mortgage & Trust Co. v. Blake*, 24 Wash. 102, 85 Am. St. Rep. 946, 63 Pac. 1100.

<sup>26</sup> *Whitbeck v. McClenahan*, 40 S. D. 246, 167 N. W. 144.

<sup>27</sup> *Whitbeck v. McClenahan*, 40 S. D. 246, 167 N. W. 144.

<sup>1</sup> *Arkansas. Smith v. Spillman*, 135 Ark. 279, 1 A. L. R. 136, 205 S. W. 107.  
*California. Thresher v. Atchison*, 117 Cal. 73, 59 Am. St. Rep. 150, 48 Pac. 1020.

*Florida. Hull v. State*, 29 Fla. 79, 30 Am. St. Rep. 95, 16 L. R. A. 308, 11 So. 97.

*New Mexico. Pace v. Wight*, 25 N. M. 276, 181 Pac. 430.

*Wisconsin. Robinson v. Howe*, 13 Wis. 341.

<sup>2</sup> *Arkansas. Hogg v. Nichols*, 134 Ark. 280, 204 S. W. 211; *Smith v. Spillman*, 135 Ark. 279, 1 A. L. R. 136, 205 S. W. 107.

statute is enacted after the expiration of the redemption period which was in force when the sale was made,<sup>3</sup> even if such sale has not yet been confirmed,<sup>4</sup> and still more so if it has been confirmed.<sup>5</sup> One who has bought a tax certificate from the state is protected against such legislation if enacted after he has bought it,<sup>6</sup> although the state could have waived its own right by extending the period of redemption, and one who has bought from the state after such period is extended, can not claim any greater right than the state.<sup>7</sup>

However, in analogy to the rule controlling statutes of limitations, a subsequent statute may require deeds for lands sold for taxes to be made within a specified time after the sale, and if a reasonable time is given for obtaining such deeds after the passage of the statute, it will be valid.<sup>8</sup> A statute which requires notice to be given of various steps connected with a judicial sale is valid if a reasonable time for giving such notice is allowed, without reference to the source of the original lien.<sup>9</sup> A statute which requires notice to be given by a purchaser at a foreclosure sale before he takes his deed,<sup>10</sup> or which requires notice of redemption to be recorded, instead of being filed, as heretofore,<sup>11</sup> is valid as to subsequent sales in foreclosure proceedings under prior mortgages,

**Florida.** *Hull v. State*, 29 Fla. 79, 30 Am. St. Rep. 95, 16 L. R. A. 308, 11 So. 97.

**Massachusetts.** *Solis v. Williams*, 205 Mass. 350, 91 N. E. 148.

**New Mexico.** *Pace v. Wight*, 25 N. M. 276, 181 Pac. 430.

**Wisconsin.** *Robinson v. Howe*, 13 Wis. 341.

<sup>3</sup> *Smith v. Spillman*, 135 Ark. 279, 1 A. L. R. 136, 205 S. W. 107.

<sup>4</sup> *Smith v. Spillman*, 135 Ark. 279, 1 A. L. R. 136, 205 S. W. 107.

<sup>5</sup> *Collier v. Smith*, 132 Ark. 309, 200 S. W. 1008.

Such statute is invalid if passed after the sale, even as against one who purchases such tax certificate after the statute is enacted. *Robinson v. Howe*, 13 Wis. 341.

<sup>6</sup> *State v. Bradshaw*, 39 Fla. 137, 22 So. 296.

<sup>7</sup> *Adkin v. Pillen*, 136 Mich. 682, 100 N. W. 176.

<sup>8</sup> *Tuttle v. Block*, 104 Cal. 443, 38 Pac. 109.

<sup>9</sup> **California.** *Oullahan v. Sweeney*, 79 Cal. 537, 12 Am. St. Rep. 172, 21 Pac. 960.

**Illinois.** *Gage v. Stewart*, 127 Ill. 207, 11 Am. St. Rep. 116, 19 N. E. 702.

**Kansas.** *Warner v. Pile*, 105 Kan. 724, 185 Pac. 1041.

**North Dakota.** *Heitsch v. Minneapolis Threshing Machine Co.*, 29 N. D. 94, L. R. A. 1915D, 349, 150 N. W. 457.

**South Dakota.** *Clark Implement Co. v. Wadden*, 34 S. D. 550, L. R. A. 1915C, 414, 149 N. W. 424.

<sup>10</sup> *Clark Implement Co. v. Wadden*, 34 S. D. 550, L. R. A. 1915C, 414, 149 N. W. 424.

<sup>11</sup> *Heitsch v. Minneapolis Threshing Machine Co.*, 29 N. D. 94, L. R. A. 1915D, 349, 150 N. W. 457.

if a reasonable time for giving such notice is allowed. A statute subsequent to the tax sale, but before a deed issues, may require notice to be given to the original owner as a condition precedent to taking possession of the property thus sold.<sup>12</sup> The rate of interest to be paid on redemption can not be changed to the prejudice of a purchaser at a prior judicial sale.<sup>13</sup>

## IX

## WHO CAN RAISE OBJECTION

**§ 3725. Who can object to constitutionality of statute.** The objection that a statute impairs the obligation of contracts can be made only by one who is prejudiced thereby. Parties whose rights are only incidentally affected can not object.<sup>1</sup> An act of the legislature ending a contract between the state and a canal company, to the possible prejudice of the United States, can not be attacked as invalid by one whose sole interest was the benefit incidentally received because of the proximity of his lands to the canal.<sup>2</sup> A corporation,<sup>3</sup> or stockholders thereof,<sup>4</sup> who have voluntarily accepted a statutory modification of the corporate charter, can not thereafter object that such modification impairs the obligation of their contracts and no one else can make such objection.

<sup>12</sup> Oullahan v. Sweeney, 79 Cal. 537, 12 Am. St. Rep. 172, 21 Pac. 960; Gage v. Stewart, 127 Ill. 207, 11 Am. St. Rep. 116, 19 N. E. 702; Warner v. Pile, 105 Kan. 724, 185 Pac. 1041.

<sup>13</sup> Bauer Grocer Co. v. Zelle, 172 Ill. 407, 50 N. E. 238.

<sup>1</sup> United States. Williams v. Eggleston, 170 U. S. 304, 42 L. ed. 1047; Vought v. Columbus, Hocking Valley & Athens Ry., 176 U. S. 481, 44 L. ed. 554 [affirming, Vought v. Columbus, Hocking Valley & Athens Ry., 58 O. S. 123, 50 N. E. 442]; Hooker v. Burr, 194 U. S. 415, 48 L. ed. 1046; City of Worcester v. Worcester Consolidated Street Ry. Co., 196 U. S. 539, 49 L. ed. 591.

Georgia. Globe & Rutgers Fire Ins. Co. v. Walker, 150 Ga. 163, 103 S. E. 407.

Illinois. Burke v. Snively, 208 Ill. 328, 70 N. E. 327.

Massachusetts. Browne v. Turner, 176 Mass. 9, 56 N. E. 969.

New York. People v. Brooklyn, Flatbush & Coney Island Ry., 89 N. Y. 75.

North Carolina. St. George v. Hardie, 147 N. Car. 88, 60 S. E. 920.

<sup>2</sup> Vought v. Columbus, Hocking Valley & Athens Ry., 176 U. S. 481, 44 L. ed. 554 [affirming, Vought v. Columbus, Hocking Valley & Athens Ry., 58 O. S. 123, 50 N. E. 442].

<sup>3</sup> St. John v. Iowa Business Men's Bldg. & Loan Association, 136 Ia. 448, 15 L. R. A. (N.S.) 503, 113 N. W. 863; Phinney v. Sheppard and Enoch Pratt Hospital, 88 Md. 633, 42 Atl. 58.

<sup>4</sup> State v. Montgomery Light Co., 102 Ala. 594, 15 So. 347.

One whose rights, in the particular case, are not affected by a statutory provision, can not attack its validity on the ground that it impairs the obligation of a contract.<sup>5</sup> After a mortgage was given a law was passed affecting the right of redemption. Subsequently the property was sold at foreclosure sale and bought in by one other than the mortgagee. It was held that whatever the rights of the mortgagee might have been, such purchaser could not attack such statute as impairing the obligation of his contract.<sup>6</sup> A municipal corporation can not object to the constitutionality of a statute or order which alters the rates to be charged by a public utility, even if such change affects a contract between such municipal corporation and such utility.<sup>7</sup> Public corporations can not set up their existing obligations, as against statutes which change such public corporations, if the creditors do not complain, at least if the rights of such creditors can be adjusted so as to avoid inflicting any loss upon them.<sup>8</sup>

<sup>5</sup> *Globe & Rutgers Fire Ins. Co. v. Walker*, 150 Ga. 163, 103 S. E. 407. 37, L. R. A. 1915C, 287, 120 Pac. 861.

<sup>6</sup> *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046. <sup>8</sup> *Special School District v. Special School District*, 111 Ark. 379, 163 S. W. 1164; *Krause v. Thompson*, 138 Ark. 571, 211 S. W. 925 (contracts of teachers).

<sup>7</sup> *Richmond v. Chesapeake & Potomac Telephone Co.*, 127 Va. 612, 105 S. E. 127; *State v. Superior Court*, 67 Wash.

## CHAPTER XCVI

### STATUTORY PROHIBITION OF SUBSEQUENT CONTRACTS

- § 3726. Constitutional right to contract—History of doctrine.
- § 3727. Present condition of doctrine—The Police power
- § 3728. Statutes restricting hours of labor—Private contracts—Theory of invalidity.
- § 3729. Theory of validity.
- § 3730. Employment of women.
- § 3731. Employment of children.
- § 3732. Hours within which labor permitted.
- § 3733. Public contracts.
- § 3734. Statutes regulating medium of payment of wages.
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- § 3736. Statutes regulating rate of wages—Public employment.
- § 3737. Private employment.
- § 3738. Statutes regulating time of payment of wages.
- § 3739. Statutes protecting employes.
- § 3740. Statutes protecting union labor.
- § 3741. Statutes regulating discharge of employe.
- § 3742. Statutes regulating employment of aliens.
- § 3743. Statutes concerning liens.
- § 3744. Statutes concerning public utilities—Rates.
- § 3745. Liability.
- § 3746. Other forms of control.
- § 3747. Statutes concerning sales—Brokers, tickets, etc.
- § 3748. Department stores, trading stamps, etc.
- § 3749. Food.
- § 3750. Drugs.
- § 3751. Prevention of fraud.
- § 3752. Weights, measures, etc.
- § 3753. Intoxicating liquor and tobacco.
- § 3754. Monopolies and unfair discriminations.
- § 3755. Other restrictions on sales.
- § 3756. Statutes regulating rents.
- § 3757. Statutes concerning insurance.
- § 3758. Statutes restricting right to engage in business.
- § 3759. Statutes making breach of contract a crime.
- § 3760. Other statutory restrictions.
- § 3761. Effect on theory of contract and illegality of doctrines discussed in this chapter.

**§ 3726. Constitutional right to contract—History of doctrine.**

The clause of the constitution protecting the obligation of contracts from impairment does not apply to contracts which are made after the passage of the law which affects them.<sup>1</sup> For a long time it was assumed that the clause which protects the obligation of pre-existing contracts from impairment was the only constitutional provision which restricted the legislature from regulating the right to contract; and accordingly it was felt that the power of the legislature was sharply limited in dealing retrospectively with pre-existing contracts, while it was practically unlimited in dealing prospectively with future contracts.

The fifth amendment to the constitution of the United States provided that no person should "be deprived of life, liberty or property without due process of law." This restriction, it is true, applied only to the legislation of Congress; and comparatively little legislation of Congress affected the validity of contracts in general. It was not until 1868 that the fourteenth amendment to the constitution of the United States was adopted, which provided, "nor shall any state deprive any person of life, liberty or property without due process of law." There had, however, always been a strong tendency on the part of American judges to set up their own ideals of natural law and justice as against the rules which the legislature saw fit to set up. In order to justify the court in declaring a statute unconstitutional, it was felt necessary to bring it within the prohibition of some constitutional provision. A striking illustration of this tendency is found in the way in which a supreme court stretched the provision with reference to impairing the obligation of contracts, so as to protect property before the fourteenth amendment.<sup>2</sup>

It was almost twenty years after the fourteenth amendment was adopted, before the judges began to apply the provision which forbids taking property or liberty without due process of law, so as to render invalid legislation which prohibited certain types of

<sup>1</sup> See §§ 3676 et seq.

<sup>2</sup> Mr. Justice Johnson tells us in a note that the Supreme Court "has had more than once to toil uphill, in order to bring within the restriction on the states to pass laws violating the obligation of contracts, the most obvious cases to which the constitution was

intended to extend its protection." See his note in 27 U. S. (2 Pet.) 681, to *Satterlee v. Matthewson*, 27 U. S. (2 Pet. 380, 7 L. ed. 458.

For illustrations of the application of the impairment of obligation clause to executed transactions, see §§ 3659 et seq.

contracts specifically.<sup>3</sup> When this provision was invoked for this purpose, it seemed at first as though the courts intended to set up their ideas of natural law, under the name of due process of law, against legislation which restricted the right to make contracts; and it seemed as though their ideas of natural justice would forbid humanitarian or progressive legislation which was intended to protect the health, welfare or morals of society, or of particular classes or groups.<sup>4</sup>

In striking contrast to the attitude of some of the state courts was that of the supreme court of the United States, which refused to interfere with much of the legislation that the state courts were declaring to be unconstitutional,<sup>5</sup> on the theory that every presumption should be made in favor of the validity of legislation; and that the court had no power to declare a statute to be unconstitutional on the ground that it was unwise or unnecessarily oppressive in its method of reaching its purpose, if the purpose itself was a proper one.<sup>6</sup>

<sup>3</sup> *Frorer v. People*, 141 Ill. 171; *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 22 L. R. A. 340, 35 N. E. 62; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 6 L. R. A. 621, 10 S. E. 285.

<sup>4</sup> On this question see, *The Doctrine of Due Process of Law before the Civil War*, by Edward S. Corwin, 24 *Harvard Law Review*, 386, 460, and, *The Evolution of Due Process of Law in the Decisions of the United States Supreme Court*, by Francis W. Bird, 13 *Columbia Law Review*, 37.

See also, *The Construction of the Fourteenth Amendment*, by Charles R. Pence, 25 *American Law Review*, 536; *Protection to Contracts by the Due Process of Law* *Clauses in the Federal Constitution*, by John G. Egan, 36 *American Law Review*, 70, and, *Due Process of Law*, by Hannis Taylor, 41 *American Law Review*, 354.

<sup>5</sup> *Barbier v. Connolly*, 113 U. S. 27,

28 L. ed. 923; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

<sup>6</sup> "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it can not adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. *Mugler v. Kansas*, 123 U. S. 623, 661.

An even more dangerous assumption of power was made by some of the courts whose judges proceeded on the theory that a

The court is unable to affirm that this legislation has no real or substantial relation to such objects.

"It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court can not say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. 'Every possible presumption,' Chief Justice Waite said, speaking for the court in *Sinking Fund Cases*, 99 U. S. 700, 718, 'is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' See, also, *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 128, 3 L. ed. 162; *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 625, 4 L. ed. 629; *Livingston v. Darlington*, 101 U. S. 407.

"Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public

health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty and property, and while, according to the principles upon which our institutions rest, 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself'; yet, 'in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the

statute might be unconstitutional as opposed to the general spirit of the constitution, although not in conflict with any single provision thereof. Vague as the expression "due process of law" might be, it was definite and stable compared with the theory of the "spirit of the constitution."

Fortunately, an antidote as powerful and as vague as the theory of due process of law was discovered in the police power. While the legislature is not free to forbid contracts arbitrarily, it has a wide and ill-defined power to forbid contracts which are injurious to the health, morals or welfare of society.

The result of this development of the theory of the power of the legislature is that cases must be divided into three chronological groups, and the cases from one group can not be used as precedents at any other period. While the different states have varied

public judgment, exercised either in the pressure of public opinion or by means of the suffrage.' *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220. The case before us belongs to the latter class. The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of government.

"It is argued in behalf of the defendant that if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution. This duty, the court has said, is always one of extreme delicacy; for, apart from the necessity of avoiding conflicts between co-ordinate branches of the government, whether state or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislature. Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the state legislature, under the pretence of guarding

somewhat, in the point of time at which they have expressed these different ideas and in the extent to which they have carried them, it may be said roughly that up to 1885 inclusive, the validity of legislation which regulated future contracts was assumed; that for a period of fifteen years, more or less, many of the state courts applied the theory of liberty of contract or freedom of contract so as to render invalid all legislation which was contrary to the ideas of natural rights and justice which the courts entertained; and that in the following period, the theory of the police power, and of the necessity of making every presumption in favor of the constitutionality of legislation, has prevailed against the doctrine of freedom of contract. Accordingly, in addition to a lack of harmony among the different states, the decisions of the same state vary according to the period of development which had been reached when the decision was rendered. Roughly speaking, the recent decisions are far more inclined to uphold legislation as against the theory of freedom of contract than the decisions of a quarter of a century ago.

Many of the cases of the second stage of development and of the third stage agree in using the same general formula, which is, that the legislature has power to make reasonable restrictions upon subsequent contracts, in the interest of society, or of the members thereof, but that it has no power to make unreasonable restrictions. The difference in actual results is due to the fact that in the later period of development, courts are ready to treat restrictions as reasonable, which, in an earlier period, they would have treated as unreasonable.<sup>7</sup>

the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land.

"The objection that the statute is repugnant to the clause of the Fourteenth Amendment forbidding the denial by the State to any person within its jurisdiction of the equal protection of the laws, is untenable. The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell,

the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145; *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512, 519, 29 L. ed. 463." *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

<sup>7</sup> "The legislation having been passed in the exercise of the reserved power of the State, is it valid, notwithstanding it prohibits both the plaintiff and its employees from contracting against

When the courts first began to apply the theory of freedom of contract to legislation, they appeared to have decided the relation of the legislation in question to the public morals, health and welfare as if they were questions of law; or as if they were questions of fact of which the courts took judicial notice, and which they decided without reference to the facts of actual life or to the opinions of experts in those lines of investigation. Rigid and arbitrary rules as to what public welfare demanded were thus laid down without reference to the facts of life itself.<sup>6</sup> Along with the willingness of the court to extend the scope of the police power, and to balance it against freedom of contract, and, in part, the cause of such tendency, has been the growing willingness of the court to regard the facts of life and views of experts as worthy of consideration, and not to be brushed aside in order to make way for arbitrary and mechanical rules. The present tendency of courts, in questions of this sort, is to treat the practical operation of the statute as a matter of fact, to be determined by evidence which is submitted to the trial court, like evidence on other issues of fact, and to extend the practical operation of the statute and its adaptation to the needs of public health, morals and welfare as a matter of fact and not a matter to be determined by arbitrary

its provisions? Plaintiff asserts the negative and attempts to sustain the assertion by a very comprehensive argument in which a number of decisions of this court and of other courts are cited and reviewed. They illustrate by various instances the fundamental and indisputable principle that personal liberty includes the power to make contracts. But liberty of making contracts is subject to conditions in the interest of the public welfare, and which shall prevail—principle or condition—can not be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legis-

lation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. *Chicago, Burlington & Quincy Ry. v. McGuire*, 219 U. S. 549, 565, 55 L. ed. 328; *German Alliance Insurance Co. v. Kansas*, ante, page 389." *Erie Ry. v. Williams*, 233 U. S. 685, 58 L. ed. 1155.

<sup>6</sup> Even where the courts upheld legislation, their original theory was that they were not to determine the questions of fact on which the validity of

rules of law.<sup>9</sup> Where the last theory prevails, however, cases which uphold certain classes of statutes, or which declare them to be unconstitutional, are of little value as precedents, since upon another trial in another jurisdiction different evidence may be adduced; and, indeed, the conditions which made such statute constitutional in one jurisdiction or even in one part of a jurisdiction, may be lacking in another jurisdiction, or even in another part of the same jurisdiction.<sup>10</sup>

The inability of the courts to agree upon fundamental principles of economic and social problems have frequently resulted in decisions of great constitutional questions by divided courts; decisions which are unsatisfactory, if the statute is held to be constitutional; and somewhat more unsatisfactory if it is held to be unconstitutional, especially in view of the formula so often used by the courts, to the effect that the courts will declare a statute to be unconstitutional only when it is clearly in violation of constitutional provisions. This problem, however, goes far beyond the question of freedom of contract, and can not be discussed in detail here.<sup>11</sup>

**§ 3727. Present condition of doctrine—The police power.** In the present stage of development, the courts recognize the fact

the statutes depended; but that they were to regard the finding of the legislature as conclusive unless it was clearly wrong. *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

<sup>9</sup> For the modern method of treating this question, see *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551 [affirming, *State v. Muller*, 48 Or. 252, 120 Am. St. Rep. 805, 85 Pac. 855].

An illustration of the application of this principle is found in two New York cases, in the first of which (*People v. Williams*, 189 N. Y. 131, 121 Am. St. Rep. 854, 12 L. R. A. [N.S.] 1130, 81 N. E. 778) the court held legislation restricting the hours within which women might labor to be invalid; while in the second case (*People v. Charles Schweinler Press*, 214 N. Y. 395, L. R. A. 1918A, 1124, 108 N. E.

639) similar legislation was upheld for the reason that the court had before it in the second case sufficient evidence to justify the conclusion that the statute was intended for the protection of health and welfare.

See discussion in *Constitutional Limitations and Labor Legislation*, by Ernst Freund, 4 *Illinois Law Review*, 608 (623), and, *New Methods in Due Process Cases*, by Albert M. Kales, 12 *American Political Science Review*, 241.

<sup>10</sup> *Stettler v. O'Hara*, 69 Or. 519, L. R. A. 1917C, 944, 139 Pac. 743; *Bonnett v. Vallier*, 136 Wis. 193, 17 L. R. A. (N.S.) 486, 116 N. W. 885.

<sup>11</sup> See *Constitutional Decisions by a bare Majority of the Court*, by Robert Eugene Cushman, 19 *Michigan Law Review* 771.

that the right to make contracts is protected by the constitutional provisions which protect property<sup>1</sup> and liberty.<sup>2</sup> At the same time

<sup>1</sup> **United States.** *Coppage v. Kansas*, 236 U. S. 1, L. R. A. 1915C, 960, 59 L. ed. 441; *Adams v. Tanner*, 244 U. S. 590, L. R. A. 1917F, 1163.

**California.** *Ex parte Farb*, 178 Cal. 592, 3 A. L. R. 301, 174 Pac. 320.

**Florida.** *Georgia Home Insurance Co. v. Hoskins*, 71 Fla. 282, 71 So. 285; *Continental Casualty Co. v. Bows*, 72 Fla. 17, 72 So. 278.

**Idaho.** *Hyatt v. Blackwell Lumber Co.*, 31 Ida. 452, 1 A. L. R. 1663, 173 Pac. 1083.

**Massachusetts.** *In re Opinion of Justices*, 220 Mass. 627, L. R. A. 1917B, 1119, 108 N. E. 807; *Bogni v. Perotti*, 224 Mass. 152, 112 N. E. 853.

**Mississippi.** *Jones v. Mississippi Farms Co.*, 116 Miss. 295, 76 So. 880.

**Ohio.** *In re Steube*, 91 O. S. 135, L. R. A. 1916E, 377, 110 N. E. 250.

**Texas.** *St. Louis Southwestern Ry. Co. v. Griffin*, 106 Tex. 477, L. R. A. 1917B, 1108, 171 S. W. 703.

"The right to acquire and possess property necessarily includes the right to contract." *Leep v. Railway Co.*, 58 Ark. 407, 415 [sub nomine, *Leep v. St. Louis, Iron Mountain & Southern Ry. Co.*, 41 Am. St. Rep. 109, 23 L. R. A. 264, 25 S. W. 75; quoted in *Dugger v. Ins. Co.*, 95 Tenn. 245, 252; 28 L. R. A. 796, 32 S. W. 5].

"The 'liberty' mentioned in the 14th Amendment means 'not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be

proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.' *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832 [quoted in *Hyatt v. Blackwell Lumber Co.*, 31 Ida. 452, 1 A. L. R. 1663, 173 Pac. 1083]."

"As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint, not immunity from reasonable regulation to safeguard the public interest, the question is whether the restrictions of the statute have reasonable relation to a proper purpose." *Miller v. Wilson*, 236 U. S. 373, 380, L. R. A. 1915F, 829, 59 L. ed. 628, 630 [quoted in *Ex parte Farb*, 178 Cal. 592, 3 A. L. R. 301, 174 Pac. 320].

For discussions of this question, see *Liberty of Contract*, by Roscoe Pound, 18 Yale Law Journal 454; "Liberty," *The True Meaning of the Term*, in *those Clauses in the Federal and State Constitutions which Protect "Life, Liberty and Property,"* by Charles E. Shattuck, 4 Harvard Law Review 365; *Freedom of Contract*, by J. C. Knowlton, 3 Michigan Law Review 617.

<sup>2</sup> **United States.** *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832; *Coppage v. Kansas*, 236 U. S. 1, L. R. A. 1915C, 960, 59 L. ed. 441.

**Arkansas.** *Leep v. Railway Co.*, 58 Ark. 407 [sub nomine, *Leep v. St. Louis, Iron Mountain & Southern Ry. Co.*, 41 Am. St. Rep. 109, 23 L. R. A. 264, 25 S. W. 75].

**California.** *Ex parte Farb*, 178 Cal. 592, 3 A. L. R. 301, 174 Pac. 320.

**Florida.** *Georgia Home Insurance Co. v. Hoskins*, 71 Fla. 282, 71 So. 285; *Continental Casualty Co. v. Bows*, 72 Fla. 17, 72 So. 278.

**Idaho.** *Hyatt v. Blackwell Lumber Co.*, 31 Ida. 452, 1 A. L. R. 1663, 173 Pac. 1083.

the legislature has a wide and indefinite power to declare subsequent contracts illegal or void on the ground that they intend to injure public health, welfare or morals.<sup>3</sup> This power is at least as wide as the police power, and it is assumed to be the same thing.<sup>4</sup> The difficulty of giving an exact legal definition of the

**Illinois.** *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 52 L. R. A. 283, 58 N. E. 1007.

**Kentucky.** *Black v. O'Hara*, 175 Ky. 623, 194 S. W. 811.

**Louisiana.** *State v. Barba*, 132 La. 768, 45 L. R. A. (N.S.) 546, 61 So. 784.

**Massachusetts.** In re opinion of Justices, 220 Mass. 627, L. R. A. 1917B, 1119, 108 N. E. 807.

**Minnesota.** *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495.

**Mississippi.** *Jones v. Mississippi Farms Co.*, 116 Miss. 295, 76 So. 880.

**Missouri.** *State v. Missouri Tie & Timber Co.*, 181 Mo. 536, 103 Am. St. Rep. 614, 65 L. R. A. 588, 80 S. W. 933.

**Texas.** *St. Louis Southwestern Ry. Co. v. Griffin*, 106 Tex. 477, L. R. A. 1917B, 1108, 171 S. W. 703.

<sup>3</sup>**United States.** *Rast v. Ven Deman & Lewis Co.*, 240 U. S. 342, L. R. A. 1917A, 421, 60 L. ed. 679; *Hall v. Geiger-Jones Co.*, 242 U. S. 539, L. R. A. 1917F, 514.

**Arkansas.** *Arkansas Stave Co. v. State*, 94 Ark. 27, 27 L. R. A. (N.S.) 255, 125 S. W. 1001; *State v. Crowe*, 130 Ark. 272, L. R. A. 1918A, 567, 197 S. W. 4; *Terry Dairy Co. v. Nalley*, 146 Ark. 448, 12 A. L. R. 1208, 225 S. W. 887.

**California.** *Ex Parte Ballestra*, 173 Cal. 657, 161 Pac. 120; *Binford v. Boyd*, 177 Cal. 458, 174 Pac. 56.

**Louisiana.** *State v. Rogers*, — La. —, 87 So. 504.

**Michigan.** *People v. Brazee*, 183 Mich. 259, L. R. A. 1916E, 1146, 149 N. W. 1053.

**Minnesota.** *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495.

**Missouri.** *Heller v. Lutz*, 254 Mo.

704, L. R. A. 1915B, 191, 164 S. W. 123.

**North Dakota.** *Wanberg v. National Union Fire Ins. Co.*, — N. D. —, 179 N. W. 666.

**Ohio.** *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney*, 95 O. S. 64, L. R. A. 1917D, 641, 115 N. E. 505.

**Oregon.** *Stettler v. O'Hara*, 69 Or. 519, L. R. A. 1917C, 944, 139 Pac. 743; *State v. Bunting*, 71 Or. 259, L. R. A. 1917C, 1162, 139 Pac. 731.

**Tennessee.** *Moyers v. Memphis*, 135 Tenn. 263, 186 S. W. 105.

<sup>4</sup>**California.** *Ex Parte Ballestra*, 173 Cal. 657, 161 Pac. 120; *Binford v. Boyd*, 177 Cal. 456, 174 Pac. 56.

**Louisiana.** *State v. Rogers*, — La. —, 87 So. 504.

**Michigan.** *People v. Brazee*, 183 Mich. 259, L. R. A. 1916E, 1146, 149 N. W. 1053.

**Minnesota.** *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495.

**Missouri.** *Heller v. Lutz*, 254 Mo. 704, L. R. A. 1915B, 191, 164 S. W. 123.

**Nebraska.** *Davison v. Chicago & North Western Ry. Co.*, 100 Neb. 462, L. R. A. 1917C, 135, 160 N. W. 877.

**Ohio.** *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney*, 95 O. S. 64, L. R. A. 1917D, 641, 115 N. E. 505.

**Oregon.** *Stettler v. O'Hara*, 69 Or. 519, L. R. A. 1917C, 944, 139 Pac. 743.

**Rhode Island.** *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818, 48 L. R. A. 775, 46 Atl. 234.

**Tennessee.** *Moyers v. Memphis*, 135 Tenn. 263, 186 S. W. 105.

See Administrative Exercise of the Police Power, by Thomas Reed Powell, 24 Harvard Law Review 268, 333, 441;

police power has been noted frequently.<sup>5</sup> By putting a special emphasis upon the police power, it has been said that liberty of

The Police Power, a Product of the Rule of Reason; by George W. Wickersham, 27 Harvard Law Review 297; Is There Federal Police Power, by Paul Fuller, 4 Columbia Law Review 563; Police Power and Civil Liberty, by S. Whitney Dunscomb, Jr., 6 Columbia Law Review 93; What is the Police Power, by Walter W. Cook, 7 Columbia Law Review 322; Stare Decisis and the Fourteenth Amendment, by Charles Wallace Collins, 12 Columbia Law Review 603; Justice Holmes and the Fourteenth Amendment, by Fletcher Dobyns, 13 Illinois Law Review 71; The Scope and Meaning of Police Power, by Charles Bufford, 4 California Law Review 269; Liberty of Contract under the Police Power, by Frederick N. Judson, 25 American Law Review 871; Police Power, Proper and Improper Meanings, by L. Dee Mallonee, 50 American Law Review 861; and "Police Regulations"—Essentials of Unconstitutionality, by L. Dee Mallonee, 51 American Law Review 187.

<sup>5</sup> "It would be presumptuous for any court to attempt to formulate an exact legal definition of the term 'police power of the state.' \* \* \* But for all practical purposes the police power of the state may be shortly defined to be the power of the legislature to make such regulations relating to the personal and property rights as look to the public health, the public safety, and the public morals." *State v. Dalton*, 22 R. I. 77, 80, 84 Am. St. Rep. 818, 48 L. R. A. 775, 46 Atl. 234.

"There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and with-

out, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *In re Kemmler*, 136 U. S. 436, 34 L. ed. 519; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620; *In re Converse*, 137 U. S. 624, 34 L. ed. 796.

"The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employe), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a

contract is not a fundamental constitutional right.<sup>6</sup> While the theory of the police power seems to be the same whether the question is one of the power of the legislature to pass a statute impairing the obligation of a contract,<sup>7</sup> or to forbid contracts in the future,<sup>8</sup> it is, as a rule, much easier to uphold a statute which forbids contracts in the future than it is to uphold one which impairs the obligation of pre-existing contracts. Whatever the theory, we must conclude either that the police power means more when it comes to regulating future contracts than it does with reference to pre-existing contracts, or that the power of the legislature to regulate future contracts is wider than the police power.

With the exact nature of the police power in doubt, and with a further doubt as to whether the power of the legislature to prohibit future contracts is any wider than the police power, it follows that it is practically impossible to lay down in advance rules which will determine whether the legislature possesses this power in reference to specific types of contract. A discussion of the validity of specific statutes, to be next undertaken, will show a conflict of authority upon the questions of the validity of the particular types of statutes; a conflict which increases the difficulty of laying down abstract rules even beyond that arising from the nature of the subject, and which is not only jurisdictional but chronological.

certain time prescribed by the State." *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937 [reversing, 177 N. Y. 145, 69 N. E. 373].

§ "We think there is some confusion in the minds of the bar and bench upon the so-called inalienable constitutional right to make contracts—to sell and to buy labor—and the lack of legislative authority to limit this right in the interest of the public welfare. The liberty to contract is not a fundamental constitutional right. The distinction is clearly stated thus: 'But the liberty of contract, like all other civil liberty, is subject to restraint and regulation on behalf of the public welfare, and to speak of a constitutional liberty of contract without careful qualification is a vague and meaningless phrase.

The liberty of contract yields readily to any of the acknowledged purposes of the police power, and it differs from fundamental constitutional rights, from the liberty of the body or person, from the right of property (including the obligation of existing contracts), from the right of equality, and from the political liberty, in that it is neither a vested right, nor a right of definite content, nor a right protected by specific constitutional guaranties.' Freund, *Pol. Power*, § 499, p. 537." *State v. J. J. Newman Lumber Co.*, 103 Miss. 263 (268), 45 L. R. A. (N.S.) 858, 60 So. 215 [rehearing to 102 Miss. 802, 45 L. R. A. (N.S.) 851, 59 So. 923].

<sup>7</sup> See §§ 3690 et seq.

<sup>8</sup> See note 4, ante this section.

The legislature can not avoid the application of these constitutional provisions by declaring that the right to enter into contracts, or to enter into certain kinds of contracts, is not a property right.<sup>9</sup>

The theory of freedom of contract does not apply to contracts which are illegal or invalid, or otherwise inoperative when they were made;<sup>10</sup> but this principle can not be applied so as to uphold the unlimited power of the legislature to make future contracts illegal, since it begs the question of the constitutionality of such statutes.<sup>11</sup>

Many of the specific statutes by which the legislature has attempted to regulate prospective contracts have already been discussed in connection with illegal and void contracts.<sup>12</sup> In this chapter we will, for the most part, consider other types of contract about which there has been a greater divergence of judicial opinion.

Freedom of contract is said not to apply to contracts of children of tender years who are said to have no absolute right to make contracts.<sup>13</sup>

**§ 3728. Statutes restricting hours of labor—Private contracts—Theory of invalidity.** Statutes restricting the number of hours per day or per week for which persons may contract to work are not uncommon. The validity of such statutes depends in the first instance on whether the contract is with a private person for private purposes, or whether it is with a public corporation, or with a contractor for work for a public corporation. Statutes which restrict the number of hours per day for which persons may contract to labor with private persons for private purposes,<sup>1</sup> or mak-

<sup>9</sup> *Bogni v. Perotti*, 224 Mass. 152, 112 N. E. 853.

<sup>10</sup> *Gwathmey v. Burgiss*, 104 S. Car. 280, 88 S. E. 816.

<sup>11</sup> "Courts have not hesitated to sustain statutes enacted in pursuance of the police power, having the legitimate function of protecting the health or morals of certain classes, but they have been equally ready to apply constitutional rules to the overthrow of laws which, under the guise of such regulation, have interfered with the freedom of contract." *Ex parte Farb*, 178 Cal. 592, 3 A. L. R. 301, 174 Pac. 320.

<sup>12</sup> See chapters XX et seq.

<sup>13</sup> *Terry Dairy Co. v. Nalley*, 146 Ark.

448, 12 A. L. R. 1208, 225 S. W. 887. (The statute in this case, which forbids the employment of minors under fourteen years, during vacations, except by the parents, might have been upheld without denying to minors the constitutional power to make contracts.)

<sup>1</sup> *United States. Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937 (in bakery; not over ten hours a day or over sixty hours a week) [reversing, 177 N. Y. 145, 69 N. E. 373].

*California. Ex parte Kuback*, 85 Cal. 274, 20 Am. St. Rep. 226, 9 L. R. A. 482, 24 Pac. 737.

*Colorado. In re Eight Hours Bill*, 21

ing a violation of such statute a crime,<sup>2</sup> or providing that the employer shall pay double wages for work overtime,<sup>3</sup> were generally held unconstitutional under the second theory of liberty of contract. Even a statute forbidding women employed in factories to work more than eight hours a day has been held invalid.<sup>4</sup>

In some cases the reason for holding such a statute invalid is that it "violates the right of parties to make their own contracts—a right guaranteed by our bill of rights,"<sup>5</sup> or that it deprives the employe of a property right.<sup>6</sup>

There have often been special reasons, quite apart from these, for holding such contracts invalid. Thus such statutes often discriminate unfairly against certain classes of employers or employes, as where they apply only to certain kinds of factories,<sup>7</sup> or as to

Colo. 29, 39 Pac. 328; *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 47 L. R. A. 52, 58 Pac. 1071.

Illinois. *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 29 L. R. A. 79, 40 N. E. 454.

Louisiana. *State v. Barba*, 132 La. 768, 45 L. R. A. (N.S.) 546, 61 So. 784; *State v. Legendre*, 138 La. 154, L. R. A. 1916B, 1270, 70 So. 70.

Nebraska. *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, 24 L. R. A. 702, 59 N. W. 362.

New York. *People v. Williams*, 189 N. Y. 131, 12 L. R. A. (N.S.) 1130, 81 N. E. 778.

Ohio. *Wheeling Bridge & Terminal Ry. v. Gilmore*, 8 Ohio C. C. 658.

See on this question, *Due Process of Law and the Eight-Hour Day*, by Learned Hand, 21 Harvard Law Review 406; *The Constitutionality of the Eight-Hour Railroad Law*, by Malcolm H. Lauchheimer, 16 Columbia Law Review 554; *The Eight-Hour Law*, by James H. Hayden, 2 Yale Law Journal 197; *State Regulation of the Contract of Employment*, by C. B. Labatt, 27 American Law Review 857; and *Statutory Limitations of Freedom of Contract between Employer and Employee*, by Frederic C. Woodward, 29 American Law Review 236.

<sup>2</sup> *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937 [reversing, 177 N. Y. 145, 97 N. E. 367]; *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 29 L. R. A. 79, 40 N. E. 454; *State v. Legendre*, 138 La. 154, L. R. A. 1916B, 1270, 70 So. 70; *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, 24 L. R. A. 702, 59 N. W. 362.

A statute which provides that a fireman for a stationary engine shall not work more than eight hours in one day consecutively, is held to be invalid. *State v. Barba*, 132 La. 768, 45 L. R. A. (N.S.) 546, 61 So. 784.

See also, *State v. Legendre*, 138 La. 154, L. R. A. 1916B, 1270, 70 So. 70.

<sup>3</sup> *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, 24 L. R. A. 702, 59 N. W. 362.

<sup>4</sup> *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 29 L. R. A. 79, 40 N. E. 454.

<sup>5</sup> *In re Eight Hours Bill*, 21 Colo. 29, 32, 39 Pac. 328.

See also, *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 29 L. R. A. 79, 40 N. E. 454.

<sup>6</sup> *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 29 L. R. A. 79, 40 N. E. 454.

<sup>7</sup> *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 29 L. R. A. 79, 40 N. E.

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only workmen in underground mines and smelters,<sup>8</sup> or as to all laborers except farm laborers and domestic servants,<sup>9</sup> or as to women.<sup>10</sup>

**§ 3729. Theory of validity.** Under the third theory of liberty of contract and its relation to the police power, statutes which impose reasonable restrictions upon hours of labor are held to be valid.<sup>1</sup> Restrictions to ten hours,<sup>2</sup> or to eight hours,<sup>3</sup> have been upheld. Congress has been held to have power to fix an eight-hour day for employes of railways, engaged in interstate commerce, at least if such legislation is necessary to prevent a general strike, and if Congress also provides for the appointment of a commission to investigate and to report thereon.<sup>4</sup> A state may provide that train dispatchers, and the like, shall not remain on

454; *State v. Legendre*, 138 La. 154, L. R. A. 1916B, 1270, 70 So. 70.

<sup>8</sup> *In re Morgan*, 26 Colo. 415, 77 Am. St. Rep. 269, 47 L. R. A. 52, 58 Pac. 1071.

<sup>9</sup> *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, 24 L. R. A. 702, 59 N. W. 362.

<sup>10</sup> *Ritchie v. People*, 155 Ill. 98, 46 Am. St. Rep. 315, 29 L. R. A. 79, 40 N. E. 454.

<sup>1</sup> *United States. Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780 (under the constitution of Utah [affirming, *State v. Holden*, 14 Utah 96, 37 L. R. A. 108, 46 Pac. 1105; and *State v. Holden*, 14 Utah 71, 46 Pac. 756; sub nomine, *Holden v. Hardy*, 37 L. R. A. 103]); *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551 [affirming, *State v. Muller*, 48 Or. 252, 120 Am. St. Rep. 805, 85 Pac. 855]; *Wilson v. New*, 243 U. S. 332, L. R. A. 1917E, 938, 61 L. ed. 755.

*Illinois. Ritchie v. Wayman*, 244 Ill. 509, 27 L. R. A. (N.S.) 994, 91 N. E. 695.

*Kansas. In re Dalton*, 61 Kan. 257, 47 L. R. A. 380, 59 Pac. 336.

*Massachusetts. State v. Hamilton Manufacturing Co.*, 120 Mass. 383; *Opinion of the Justices*, 163 Mass. 589 [sub nomine, *In re House Bill 1230*, 28 L. R. A. 344, 40 N. E. 713].

*Nevada. Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1.

*Oregon. State v. Bunting*, 71 Or. 259, L. R. A. 1917C, 1162, 139 Pac. 731; *Stettler v. O'Hara*, 69 Or. 519, L. R. A. 1917C, 944, 139 Pac. 743.

*Utah. State v. Holden*, 14 Utah 96, 37 L. R. A. 108, 46 Pac. 1105.

<sup>2</sup> *State v. Hamilton Manufacturing Co.*, 120 Mass. 383; *State v. J. J. Newman Lumber Co.*, 102 Miss. 802, 45 L. R. A. (N.S.) 851, 59 So. 923; *State v. Bunting*, 71 Or. 259, L. R. A. 1917C, 1162, 139 Pac. 731.

<sup>3</sup> *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780 (under the constitution of Utah [affirming, *State v. Holden*, 14 Utah 96, 37 L. R. A. 108, 46 Pac. 1105; and *State v. Holden*, 14 Utah 71, 46 Pac. 756; sub nomine, *Holden v. Hardy*, 37 L. R. A. 103]); *Wilson v. New*, 243 U. S. 332, L. R. A. 1917E, 938, 61 L. ed. 755; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1; *People v. Erie Ry. Co.*, 198 N. Y. 369, 29 L. R. A. (N.S.) 240, 91 N. E. 849; *State v. Holden*, 14 Utah 96, 37 L. R. A. 108, 46 Pac. 1105.

<sup>4</sup> *Wilson v. New*, 243 U. S. 332, L. R. A. 1917E, 938, 61 L. ed. 755.

See *The Adamson Act Decision*, by Frank W. Hackett, 52 *American Law Review* 25.

duty more than eight out of every twenty-four hours.<sup>5</sup> The Utah statute applied to laborers in underground mines and smelters.<sup>6</sup> A restriction of the hours of labor for bakers to sixty hours a week,<sup>7</sup> or for employes of a public service corporation to ten hours out of the twenty-four, to be employed within twelve consecutive hours,<sup>8</sup> have each been held valid.

**§ 3730. Employment of women.** Statutes which regulate the hours of labor for women have been upheld more readily than those which regulate the hours of labor for men.<sup>1</sup> Statutes limiting the hours for which women may be employed in any "mechanical or mercantile establishment, laundry, hotel or restaurant,"<sup>2</sup> to ten hours a day,<sup>3</sup> or to sixty hours a week and not over ten hours a day,<sup>4</sup> or to eight hours a day and forty-eight hours a week,<sup>5</sup> have been held valid. Power to fix maximum hours of labor for women may be delegated to a commission.<sup>6</sup>

Under the second theory of freedom of contract, statutes which provided for an eight-hour day for women who worked in factories and workshops were held unconstitutional.<sup>7</sup>

<sup>1</sup> *People v. Erie Ry. Co.*, 198 N. Y. 369, 29 L. R. A. (N.S.) 240, 91 N. E. 849 [reversed in, *Erie Railroad Co. v. People*, 233 U. S. 671, 52 L. R. A. (N.S.) 266, 58 L. ed. 1149 (on theory that congressional legislation is exclusive)].

<sup>2</sup> *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780 [affirming, *State v. Holden*, 14 Utah 71, 46 Pac. 756; sub nomine, *Holden v. Hardy*, 37 L. R. A. 103, and *State v. Holden*, 14 Utah 96, 37 L. R. A. 108, 46 Pac. 1105]; *Short v. Bullion-Beck & Champion Mining Co.*, 20 Utah 20, 45 L. R. A. 603, 57 Pac. 720.

A similar act was held valid in Nevada. *In re Boyce*, 27 Nev. 299, 75 Pac. 1.

<sup>3</sup> *People v. Lochner*, 177 N. Y. 145, 69 N. E. 373 [reversed, *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937].

<sup>4</sup> Opinion to the Governor (*In re Ten-Hour Law*), 24 R. I. 603, 61 L. R. A. 612, 54 Atl. 602 (applying to employes of a street railway).

<sup>5</sup> *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551 [affirming, *State v. Muller*, 48 Or. 252, 120 Am. St. Rep. 805, 85 Pac. 855]; *Miller v. Wilson*, 236 U. S.

373, L. R. A. 1915F, 829, 59 L. ed. 628; *Riley v. Massachusetts*, 232 U. S. 671, 58 L. ed. 788 [affirming, 210 Mass. 387, 97 N. E. 367].

<sup>2</sup> *State v. Buchanan*, 29 Wash. 602, 92 Am. St. Rep. 930, 59 L. R. A. 342, 70 Pac. 52; *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551 [affirming, *State v. Muller*, 48 Or. 252, 120 Am. St. Rep. 805, 85 Pac. 855]; *Ritchie v. Wayman*, 244 Ill. 509, 27 L. R. A. (N.S.) 994, 91 N. E. 695.

<sup>3</sup> *State v. Buchanan*, 29 Wash. 602, 92 Am. St. Rep. 930, 59 L. R. A. 342, 70 Pac. 52; *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551 [affirming, *State v. Muller*, 48 Or. 252, 120 Am. St. Rep. 805, 85 Pac. 855]; *Ritchie v. Wayman*, 244 Ill. 509, 27 L. R. A. (N.S.) 994, 91 N. E. 695.

<sup>4</sup> *Wenhan v. State*, 65 Neb. 394, 58 L. R. A. 825, 91 N. W. 421.

<sup>5</sup> *Miller v. Wilson*, 236 U. S. 373, L. R. A. 1915F, 829, 59 L. ed. 628.

<sup>6</sup> *Stettler v. O'Hara*, 69 Or. 519, L. R. A. 1917C, 944, 139 Pac. 743.

<sup>7</sup> *Ritchie v. People*, 155 Ill. 98, 40 Am. St. Rep. 315, 29 L. R. A. 79, 40 N. E. 454.

**§ 3731. Employment of children.** Statutes which regulate the employment of children are generally held to be valid.<sup>1</sup> The legislature may provide that children under certain specified reasonable ages,<sup>2</sup> such as fifteen,<sup>3</sup> or sixteen,<sup>4</sup> shall not be employed in certain specified hazardous occupations. A statute forbidding their employment without an employment certificate,<sup>5</sup> or forbidding their employment in vacation except by their parents,<sup>6</sup> has been held to be valid.

**§ 3732. Hours within which labor permitted.** The legislature has in some cases fixed the hours within which employes or certain classes thereof may work, or within which certain classes of business may be carried on. In most cases the statutes are passed for the benefit of the employes, but in some cases the interests of those who live near the business in question have been considered. A statute which forbade women to work in factories before six A. M. or after nine P. M. was held to be invalid;<sup>1</sup> but on a more thorough presentation of the considerations which led to such legislation the same court upheld a statute which forbade women to work before six A. M. or after ten P. M.<sup>2</sup> A statute which provides that a schedule for hours of labor for women shall be agreed upon in advance, between the employer and the employe, and which provides a penalty for permitting an employe to work outside of such hours, is valid.<sup>3</sup>

<sup>1</sup> *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U. S. 320, L. R. A. 1915A, 1196, 58 L. ed. 245 [affirming, 250 Ill. 303, 95 N. E. 204]; *Terry Dairy Co. v. Nalley*, 146 Ark. 448, 12 A. L. R. 1208, 225 S. W. 887; *State v. Shorey*, 48 Or. 396, 24 L. R. A. (N.S.) 1121, 86 Pac. 881; *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. St. 311, 12 L. R. A. (N.S.) 461, 67 Atl. 642; *Commonwealth v. Wormser*, 260 Pa. St. 44, 103 Atl. 500.

<sup>2</sup> *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U. S. 320, L. R. A. 1915A, 1196, 58 L. ed. 245 [affirming, 250 Ill. 303, 95 N. E. 204]; *Lenahan v. Pittston Coal Mining Co.*, 218 Pa. St. 311, 12 L. R. A. (N.S.) 461, 67 Atl. 642.

<sup>3</sup> *Lenahan v. Pittston Coal Mining*

*Co.*, 218 Pa. St. 311, 12 L. R. A. (N.S.) 461, 67 Atl. 642.

<sup>4</sup> *Sturges & Burn Manufacturing Co. v. Beauchamp*, 231 U. S. 320, L. R. A. 1915A, 1196, 58 L. ed. 245 [affirming, 250 Ill. 303, 95 N. E. 204].

<sup>5</sup> *Commonwealth v. Wormser*, 260 Pa. St. 44, 103 Atl. 500.

<sup>6</sup> *Terry Dairy Co. v. Nalley*, 146 Ark. 448, 12 A. L. R. 1208, 225 S. W. 887.

<sup>1</sup> *People v. Williams*, 189 N. Y. 131, 121 Am. St. Rep. 854, 12 L. R. A. (N.S.) 1130, 81 N. E. 778.

<sup>2</sup> *People v. Charles Schweinler Press*, 214 N. Y. 395, L. R. A. 1918A, 1124, 108 N. E. 639.

<sup>3</sup> *Riley v. Massachusetts*, 232 U. S. 671, 58 L. ed. 788 [affirming, 210 Mass. 387, 97 N. E. 367].

An ordinance which forbids labor in a public laundry between six P. M. and seven A. M.,<sup>4</sup> or between ten P. M. and six A. M.,<sup>5</sup> is a proper exercise of the police power.

**§ 3733. Public contracts.** Statutes restricting the hours of labor of persons employed by or on behalf of the public have been held valid.<sup>1</sup> This holding is based on the theory "that the work, being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done."<sup>2</sup> State statutes,<sup>3</sup> and federal statutes,<sup>4</sup> providing for an eight-hour day for persons working on public works, have been held to be valid.

Other courts have reached an opposite conclusion as to statutes limiting the number of hours of labor by persons employed by or on behalf of the public, and requiring such stipulations to be inserted in contracts with public contractors,<sup>5</sup> or providing that a public contractor who violates such provision shall forfeit his contract,<sup>6</sup> especially if the statute requires the wages to be not less than those prevailing for a legal day's work.<sup>7</sup>

Even if such provision has been incorporated in a contract between a city and a public contractor it has been held that it can not be enforced,<sup>8</sup> though if the bids are made and the contract awarded after the decision of the court of last resort declaring the law unconstitutional has been pronounced, and the city has given notice that it will not enforce such provision, it must be presumed

<sup>4</sup> *Ex parte Wong Wing*, 167 Cal. 109, 51 L. R. A. (N.S.) 361, 138 Pac. 695.

<sup>5</sup> *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923.

<sup>1</sup> *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148 [affirming, *State v. Atkin*, 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519, which followed *In re Dalton*, 61 Kan. 257, 47 L. R. A. 380, 59 Pac. 336]; *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047 (eight-hour day); *Keefe v. People*, 37 Colo. 317, 8 L. R. A. (N.S.) 131, 87 Pac. 791.

<sup>2</sup> *Atkin v. Kansas*, 191 U. S. 207 (224), 48 L. ed. 148.

<sup>3</sup> *Keefe v. People*, 37 Colo. 317, 8 L. R. A. (N.S.) 131, 87 Pac. 791.

<sup>4</sup> *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047.

<sup>5</sup> *Cleveland v. Clements Bros. Construction Co.*, 67 O. S. 197, 93 Am. St. Rep. 670, 59 L. R. A. 775, 65 N. E. 885; *Seattle v. Smyth*, 22 Wash. 327, 79 Am. St. Rep. 939, 60 Pac. 1120.

<sup>6</sup> *Fiske v. People*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985.

<sup>7</sup> *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 52 L. R. A. 814, 59 N. E. 716.

<sup>8</sup> *People v. Coler*, 166 N. Y. 1, 82 Am. St. Rep. 605, 52 L. R. A. 814, 59 N. E. 716 (breach consisted in not paying the contract rate of wages); *Cleveland v. Clements Bros. Construction Co.*, 67 O.

that the contract price was not increased by reason of such provision, and hence the awarding of such contract should not be set aside.<sup>3</sup>

**§ 3734. Statutes regulating medium of payment of wages.** Statutes which regulated the medium in which employes could be paid were among the first to come up for adjudication, after the courts had begun to apply the phrase "due process of law," so as to secure liberty of contract. The earlier cases held that statutes which provided that employes must be paid in money,<sup>1</sup> or that, if paid in orders on stores for goods, such orders must be redeemed in money,<sup>2</sup> were invalid.

The more recent cases, however, uphold statutes which provide that wages must be paid in money,<sup>3</sup> or that, if paid in orders on stores, such orders must be redeemed in cash.<sup>4</sup>

S. 197, 93 Am. St. Rep. 670, 59 L. R. A. 775, 65 N. E. 885 (breach consisted in requiring work overtime).

<sup>3</sup> *People v. Featherstonhaugh*, 172 N. Y. 112, 60 L. R. A. 768, 64 N. E. 802.

<sup>1</sup> *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Missouri Tie & Timber Co.*, 181 Mo. 536, 103 Am. St. Rep. 614, 65 L. R. A. 588, 80 S. W. 933; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, 25 Am. St. Rep. 891, 6 L. R. A. 359, 10 S. E. 288.

<sup>2</sup> *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State v. Missouri Tie & Timber Co.*, 181 Mo. 536, 103 Am. St. Rep. 614, 65 L. R. A. 588, 80 S. W. 933; *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 6 L. R. A. 621, 10 S. E. 285.

A statute forbidding a person, firm or corporation engaged in mining and manufacturing, and interested in merchandising, knowingly and wilfully to

sell supplies to any employe at a greater profit than when selling supplies of like quality, character and quantity to other customers buying for cash, has been held to be unconstitutional. *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188, 25 Am. St. Rep. 891, 6 L. R. A. 359, 10 S. E. 288.

<sup>3</sup> *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55 [affirming, *Harbison v. Iron Co.*, 103 Tenn. 421, 76 Am. St. Rep. 682, 56 L. R. A. 316, 53 S. W. 955]; *Keokee Consolidated Coke Co. v. Taylor*, 234 U. S. 224, 58 L. ed. 1288; *Seelyville Coal & Mining Co. v. McGlosson*, 166 Ind. 561, 117 Am. St. Rep. 396, 77 N. E. 1044; *New York Central & Hudson River Ry. Co. v. Williams*, 199 N. Y. 108, 35 L. R. A. (N.S.) 549, 92 N. E. 404; *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000 [affirmed by an equally divided court].

<sup>4</sup> *Keokee Coal Co. v. Taylor*, 234 U. S. 224, 58 L. ed. 1288; *Skinner v. Garnett Gold-Mining Co.*, 96 Fed. 735; *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. Rep. 396, 6 L. R. A. 576, 23 N. E. 253; *Shaffer v. Union Mining Co.*, 55 Md. 74; *State v. Peel Splint Coal Co.*,

These statutes are generally in terms applicable only to manufacturing or mining concerns, and on that account are sometimes held invalid for unreasonable discrimination,<sup>5</sup> as where applicable only to merchants on the one hand and coal miners on the other.<sup>6</sup>

**§ 3735. Statutes regulating method of ascertaining amount due.** Statutes providing that if employes in coal mines are paid in proportion to the amount of coal mined, the amount of coal mined must be determined in a certain specified manner,<sup>1</sup> as where the coal is to be weighed before it is screened,<sup>2</sup> or is to be weighed at the mines in the miners' cars,<sup>3</sup> were at one time held invalid. Some decisions turn on unreasonable discrimination in the statutes, as where such provision applies only to coal to be shipped away and not to coal to be sold at the mine.<sup>4</sup> In other jurisdictions such statutes are held valid,<sup>5</sup> at least as to corporations.<sup>6</sup>

**§ 3736. Statutes regulating rate of wages—Public employment.** Statutes which fix the rate of compensation to be paid by the state or a subdivision thereof, are generally held to be valid.<sup>1</sup> Statutes fixing the rate of wages for laborers employed by the state,<sup>2</sup> or by a city,<sup>3</sup> are valid. A statute which makes it a penal offense to pay

36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000 (judgment of lower court affirmed by an evenly divided court).

<sup>5</sup> State v. Loomis, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350.

<sup>6</sup> Dixon v. Poe, 159 Ind. 492, 95 Am. St. Rep. 309, 60 L. R. A. 308, 65 N. E. 518.

<sup>1</sup> Harding v. People, 160 Ill. 459, 52 Am. St. Rep. 344, 32 L. R. A. 445, 43 N. E. 624; Ramsey v. People, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631.

<sup>2</sup> In re House Bill 203, 21 Colo. 27, 39 Pac. 431; Ramsey v. People, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; In re Preston, 63 O. S. 428, 81 Am. St. Rep. 642, 52 L. R. A. 523, 59 N. E. 101.

<sup>3</sup> Harding v. People, 160 Ill. 459, 52

Am. St. Rep. 344, 32 L. R. A. 445, 43 N. E. 624.

<sup>4</sup> Harding v. People, 160 Ill. 459, 52 Am. St. Rep. 344, 32 L. R. A. 445, 43 N. E. 624.

<sup>5</sup> State v. Wilson, 61 Kan. 32, 47 L. R. A. 71, 58 Pac. 981 [affirming, 7 Kan. App. 428, 53 Pac. 371]; State v. Peel Splint Coal Co., 36 W. Va. 802, 17 L. R. A. 385, 15 S. E. 1000 (decided by an evenly divided court).

<sup>6</sup> Woodson v. State, 69 Ark. 521, 65 S. W. 465.

<sup>1</sup> Bopp v. Clark, 165 Ia. 697, 52 L. R. A. (N.S.) 493, 147 N. W. 172; Clark v. State, 142 N. Y. 101, 36 N. E. 817; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599.

<sup>2</sup> Clark v. State, 142 N. Y. 101, 36 N. E. 817.

<sup>3</sup> Ryan v. New York, 177 N. Y. 271, 69 N. E. 599.

less than a minimum wage to school teachers does not interfere with any constitutional right to liberty or property.<sup>4</sup>

Statutes fixing the rate of wages to be paid by public contractors, providing that public contracts shall be void unless the contractor agrees to pay a certain wage, were formerly held to be invalid.<sup>5</sup> The validity of such statutes has been assumed, where the rate of wages thus fixed was, either by express terms or in actual result, the market rate;<sup>6</sup> and it has been held that such statute is valid although the rate which is fixed is substantially above the market rate.<sup>7</sup>

**§ 3737. Private employment.** The strongly marked tendency of recent adjudications to defer to the judgment of the legislature in matters involving the exercise of the police power has led a number of courts to hold that statutes which provide for fixing a minimum rate of wages are valid even as between a private employer and his employes.<sup>1</sup> Such statutes usually regulate minimum wages of women,<sup>2</sup> or women and minors.<sup>3</sup> Questions of this sort may be entrusted by the legislature to a commission, with power

<sup>4</sup>Bopp v. Clark, 165 Ia. 697, 52 L. R. A. (N.S.) 493, 147 N. W. 172.

<sup>5</sup>Street v. Varney Electrical Supply Co., 160 Ind. 338, 98 Am. St. Rep. 325, 61 L. R. A. 154, 66 N. E. 895; People v. Coler, 166 N. Y. 1, 82 Am. St. Rep. 605, 52 L. R. A. 814, 59 N. E. 716.

<sup>6</sup>Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148 [affirming, State v. Atkin, 64 Kan. 174, 97 Am. St. Rep. 343, 67 Pac. 519]; Norris v. Lawton, — Okla. —, 148 Pac. 123.

<sup>7</sup>Malette v. Spokane, 77 Wash. 205, 51 L. R. A. (N.S.) 686, 137 Pac. 496 (25 per cent.).

A public contract which provides for a minimum wage for the employes of the contractor is held not to violate the constitutional rights of the property owners, although such improvement is to be paid for by special assessment, the minimum wage thus fixed is above the market rate of wages, and such provision thus results in an increase in the cost of the improvement and in the rate of the as-

essment. Malette v. Spokane, 77 Wash. 205, 51 L. R. A. (N.S.) 686, 137 Pac. 496.

<sup>1</sup>Wilson v. New, 243 U. S. 332, L. R. A. 1917E, 938, 61 L. ed. 755; State v. Crowe, 130 Ark. 272, L. R. A. 1918A, 567, 197 S. W. 4; Williams v. Evans, 139 Minn. 32, L. R. A. 1918F, 542, 165 N. W. 495; Stettler v. O'Hara, 69 Or. 519, L. R. A. 1917C, 944, 139 Pac. 743 [affirmed by evenly divided court, 243 U. S. 629, 61 L. ed. 937]; Simpson v. O'Hara, 70 Or. 261, 141 Pac. 158 [affirmed by evenly divided court, 243 U. S. 629, 61 L. ed. 937]; Larsen v. Rice, 100 Wash. 642, 171 Pac. 1037.

<sup>2</sup>State v. Crowe, 130 Ark. 272, L. R. A. 1918A, 567, 197 S. W. 4.

See, Judicial Regulation of Rates of Wage for Women, by W. Jethro Brown, 28 Yale Law Journal, 236.

<sup>3</sup>Williams v. Evans, 139 Minn. 32, L. R. A. 1918F, 542, 165 N. W. 495; Stettler v. O'Hara, 69 Or. 519, L. R. A. 1917C, 944, 139 Pac. 743.

to investigate and to fix minimum wages.<sup>4</sup> A federal statute which was passed to prevent a general railway strike, and which, in effect, fixed minimum wages temporarily, pending the appointment of a commission to investigate and report, has been upheld.<sup>5</sup>

Statutes forbidding deductions from wages of employes except for certain specified purposes are generally held invalid.<sup>6</sup> A statute providing that the employer of persons engaged in weaving can not hold back wages for defects in work is invalid.<sup>7</sup>

Whether an act of Congress regulating the percentage of the amount which an attorney may receive for securing an appropriation to pay a private claim, is valid as applicable to claims which were placed in his hands before such statute was passed, is a question on which the courts have differed.<sup>8</sup>

**§ 3738. Statutes regulating time of payment of wages.** Statutes regulating the time at which wages must be paid were originally held to be invalid,<sup>1</sup> but some of these statutes are held invalid because they apply to corporations only,<sup>2</sup> or to certain classes of corporations.<sup>3</sup>

The trend of modern authority is to uphold such statutes, if reasonable,<sup>4</sup> even if religious, literary and charitable societies

<sup>4</sup> *Williams v. Evans*, 139 Minn. 32, L. R. A. 1918F, 542, 165 N. W. 495; *Stettler v. O'Hara*, 69 Or. 519, L. R. A. 1917C, 944, 139 Pac. 743.

<sup>5</sup> *Wilson v. New*, 243 U. S. 332, L. R. A. 1917E, 938, 61 L. ed. 755.

This statute is held not to apply to an insolvent railroad, acting under a special contract with its employes, by which they receive a lower wage than that fixed by statute; at least, if the employes wish to perform such contract. *Ft. Smith & Western Ry. v. Mills*, 253 U. S. 206, 64 L. ed. 862.

<sup>6</sup> *Kellyville Coal Co. v. Harrier*, 207 Ill. 624, 69 N. E. 927.

<sup>7</sup> *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533, 14 L. R. A. 325, 28 N. E. 1126.

See, *Legislative Control over Contracts of Employment—The Weavers' Fines Bill*, by H. H. Darling, 6 *Harvard Law Review*, 85.

<sup>8</sup> That such statute is valid, see,

*Black v. Crouch*, 85 W. Va. 22, 100 S. E. 749.

That such statute is invalid, see, *Black v. O'Hara*, 175 Ky. 623, 194 S. W. 811.

<sup>1</sup> *Leep v. Railway Co.*, 58 Ark. 407 [sub nomine, *Leep v. St. Louis, Iron Mountain & Southern Ry. Co.*, 41 Am. St. Rep. 109, 23 L. R. A. 264, 25 S. W. 75]; *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 22 L. R. A. 340, 35 N. E. 62; *Republic Iron & Steel Co. v. State*, 160 Ind. 379, 62 L. R. A. 136, 66 N. E. 1005.

<sup>2</sup> *Johnson v. Goodyear Mining Co.*, 127 Cal. 4, 78 Am. St. Rep. 17, 59 Pac. 304.

<sup>3</sup> *Braceville Coal Co. v. People*, 147 Ill. 66, 37 Am. St. Rep. 206, 22 L. R. A. 340, 35 N. E. 62; *Davidow v. Wadsworth Mfg. Co.*, — Mich. —, 12 A. L. R. 605, 178 N. W. 776.

<sup>4</sup> *United States. Erie Ry. v. Williams*, 233 U. S. 685, 51 L. R. A. (N.S.) 1097, 58 L. ed. 1155 (semi-monthly).

are excepted from its operation,<sup>5</sup> or even if applicable only to railroads.<sup>6</sup> A federal statute forbidding payment of wages to a seaman in advance, making such payment a misdemeanor, and providing that such payment shall not absolve the vessel or its master from full payment of wages actually earned,<sup>7</sup> or providing that on demand, one-half of the wages which he has earned shall be paid to him,<sup>8</sup> is valid. Statutes providing that on discharge of an employe of a railway company he must be paid all wages owing to him, even if not then due by the terms of his contract of employment, without any deduction on account of such payment in advance, have been held valid.<sup>9</sup> It has been held that such statute is valid as applying to corporations in view of the power of the state over corporations, although it might not be valid as applied to natural persons.<sup>10</sup> On the other hand, such statute has been held unconstitutional where applicable only to railroads, and to employes who leave voluntarily as well as those who are discharged by their employer.<sup>11</sup>

**Arkansas.** *Arkansas Stave Co. v. State*, 94 Ark. 27, 27 L. R. A. (N.S.) 255, 125 S. W. 1001 (semi-monthly payment).

**Indiana.** *International Text-book Co. v. Weissinger*, 160 Ind. 349, 98 Am. St. Rep. 334, 65 N. E. 521; *Seelyville Coal & Mining Co. v. McGlosson*, 166 Ind. 561, 117 Am. St. Rep. 396, 77 N. E. 1044 (semi-monthly payment in money).

**Massachusetts.** Opinion of the Justices, 163 Mass. 589 [sub nomine, In re House Bill 1230, 28 L. R. A. 344, 40 N. E. 713].

**New York.** *New York Central & Hudson River Ry. Co. v. Williams*, 199 N. Y. 108, 35 L. R. A. (N.S.) 549, 92 N. E. 404 (semi-monthly).

**Vermont.** *Lawrence v. Rutland Ry. Co.*, 80 Vt. 370, 15 L. R. A. (N.S.) 350, 67 Atl. 1091 (weekly payment).

<sup>5</sup> *State v. Brown & Sharpe Mfg. Co.*, 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246.

<sup>6</sup> *Erie Ry. v. Williams*, 233 U. S. 685, 51 L. R. A. (N.S.) 1097, 58 L. ed. 1155;

*New York Central & Hudson River Ry. Co. v. Williams*, 199 N. Y. 108, 35 L. R. A. (N.S.) 549, 92 N. E. 404.

<sup>7</sup> *Patterson v. The Eudora*, 190 U. S. 169; 47 L. ed. 1002.

<sup>8</sup> *Strathearn Steamship Co. v. Dillon*, 252 U. S. 348, 64 L. ed. 607; *Thompson v. Lucas*, 252 U. S. 358, 64 L. ed. 613.

<sup>9</sup> *Leep v. Railway Co.*, 58 Ark. 407 [sub nomine, *Leep v. St. Louis, Iron Mountain & Southern Ry. Co.*, 41 Am. St. Rep. 109, 23 L. R. A. 264, 25 S. W. 75]; *St. Louis Iron Mountain & Southern Ry. Co. v. Paul*, 64 Ark. 83, 62 Am. St. Rep. 154, 37 L. R. A. 504, 40 S. W. 705; *Shortall v. Puget Sound Co.*, 45 Wash. 290, 122 Am. St. Rep. 899, 9 L. R. A. (N.S.) 748, 88 Pac. 212.

<sup>10</sup> *Leep v. Railway Co.*, 58 Ark. 407, [sub nomine, *Leep v. St. Louis, Iron Mountain & Southern Ry. Co.*, 41 Am. St. Rep. 109, 23 L. R. A. 264, 25 S. W. 75].

<sup>11</sup> *Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Schuler*, 182 Ind. 57, L. R. A. 1915A, 884, 105 N. E. 567.

A statute which imposes attorney's fees, as costs, if a railway fails to pay claims for personal services within thirty days, has been held to be unconstitutional.<sup>12</sup> Statutes of this sort are objectionable, not only as taking property without due process of law, but also as denying equal protection of the laws to certain classes of employers. A statute forbidding the assignment by an employe of wages to become due and making invalid any agreement whereby an employer is relieved from paying to his employe his full wages weekly, has been held valid.<sup>13</sup>

**§ 3739. Statutes protecting employes.** Statutes which provide for compensation to employes injured in the course of their employment, without reference to the negligence of the employer, are constitutional.<sup>1</sup> Such statute may be compulsory,<sup>2</sup> or it may provide that release in advance of injury shall be invalid,<sup>3</sup> or it may abolish certain defenses, as against employers who do not elect to take advantage of such statute.<sup>4</sup> A state may make a Workmen's Compensation Act compulsory as to certain hazardous employments, such as coal mining, elective as

<sup>12</sup> *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 41 L. ed. 666.

<sup>13</sup> *International Text-book Co. v. Weissinger*, 160 Ind. 349, 98 Am. St. Rep. 334, 65 N. E. 521.

<sup>1</sup> *United States. New York Central Ry. v. White*, 243 U. S. 188, L. R. A. 1917D, 1, 61 L. ed. 667; *Thornton v. Duffy*, 254 U. S. 361, — L. ed. —; *Lower Vein Coal Co. v. Industrial Board*, — U. S. —, — L. ed. —, 41 S. Ct. 252; U. S. S. C. Advance Opinions, 1920-1921, 383.

*Illinois. Chicago Railways Co. v. Industrial Board of Illinois*, 276 Ill. 112, 114 N. E. 534; *Grand Trunk Western Ry. Co. v. Industrial Commission*, 291 Ill. 167, 125 N. E. 748.

*Iowa. Hunter v. Colfax Consolidated Coal Co.*, — Ia. —, L. R. A. 1917D, 15, 154 N. W. 1037.

*Michigan. Wood v. Detroit*, 188 Mich. 547, L. R. A. 1916C, 388, 155 N. W. 592.

*Ohio. State v. Creamer*, 85 O. S. 349, 39 L. R. A. (N.S.) 694, 97 N. E. 602.

*Pennsylvania. Anderson v. Carnegie Steel Co.*, 255 Pa. St. 33, 99 Atl. 215.

*Washington. State v. Clausen*, 65 Wash. 156, 37 L. R. A. (N.S.) 466, 117 Pac. 1101; *State v. Mountain Timber Co.*, 75 Wash. 581, L. R. A. 1917D, 10, 135 Pac. 645.

*Wisconsin. Borgnis v. Falk Co.*, 147 Wis. 327, 37 L. R. A. (N.S.) 489, 133 N. W. 209.

See, however, *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 34 L. R. A. (N. S.) 162, 94 N. E. 431.

Such statute can not discriminate against non-residents. *Quong Ham Wah Co. v. Industrial Accident Commission*, — Cal. —, 12 A. L. R. 1190, 192 Pac. 1021.

<sup>2</sup> *New York Central Ry. v. White*, 243 U. S. 188, L. R. A. 1917D, 1, 61 L. ed. 667.

<sup>3</sup> *Anderson v. Carnegie Steel Co.*, 255 Pa. St. 33, 99 Atl. 215.

<sup>4</sup> *Borgnis v. Falk Co.*, 147 Wis. 327, 37 L. R. A. (N.S.) 489, 133 N. W. 209.

to most of the other occupations; and it may exclude certain classes of occupations, such as railways.<sup>5</sup> It may apply to a public corporation which has the power to draw up its own charter.<sup>6</sup> Prompt payment of awards may be enforced by the imposition of penalties.<sup>7</sup> The legislature may abolish the defense of contributory negligence,<sup>8</sup> or the fellow-servant rule.<sup>9</sup> Statutes which forbid an employe to agree to assume certain risks which the law places upon the employer are valid.<sup>10</sup> Statutes forbidding a corporation to make contracts with its employes whereby they agree in case of personal injury that they will either insist on their claims for personal injury and waive all right to aid from relief insurance, or will accept relief from the relief department of such corporation and waive claims for personal injuries, are generally held to be valid.<sup>11</sup> Assignment

<sup>5</sup> *Lower Vein Coal Co. v. Industrial Board*, — U. S. —, — L. ed. —, 41 S. Ct. 252; U. S. S. C. Advance Opinions, 1920-1921, 383.

<sup>6</sup> *Wood v. Detroit*, 188 Mich. 547, L. R. A. 1916C, 388, 155 N. W. 592.

<sup>7</sup> *United States Fidelity & Guaranty Co. v. Wickline*, 103 Neb. 21, 170 N. W. 193.

<sup>8</sup> *Caspar v. Lewin*, 82 Kan. 604, 49 L. R. A. (N.S.) 526, 109 Pac. 657.

<sup>9</sup> *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322.

<sup>10</sup> *England. Groves v. Wimborne* [1898], 2 Q. B. 402; *Baddeley v. Earl Granville*, L. R. 19 Q. B. Div. 423.

*United States. Chicago, Burlington & Quincy Ry. v. McGuire*, 219 U. S. 549, 55 L. ed. 328; *Second Employers' Liability Cases*, 223 U. S. 1 [sub nomine, *Mondou v. New York, New Haven & Hartford Ry. Co.*, 38 L. R. A. (N.S.) 44, 56 L. ed. 327]; *Narramore v. Cleveland, Cincinnati, Chicago & St. Louis Ry.*, 96 Fed. 298, 48 L. R. A. 68, 37 C. C. A. 499.

*Georgia. Washington v. Atlantic Coast Line Ry. Co.*, 136 Ga. 638, 38 L. R. A. (N.S.) 867, 71 S. E. 1066.

*Indiana. Davis Coal Co. v. Pollard*, 158 Ind. 607, 92 Am. St. Rep. 319, 62 N. E. 492.

*Missouri. Durant v. Lexington Coal Mining Co.*, 97 Mo. 62, 10 S. W. 484.

*North Carolina. Greenlee v. Southern Ry.*, 122 N. Car. 977, 65 Am. St. Rep. 734, 41 L. R. A. 390, 30 S. E. 115.

*South Carolina. Keels v. Atlantic Coast Line Ry. Co.*, 104 S. Car. 497, 89 S. E. 388.

*Vermont. Kilpatrick v. Grand Trunk Ry.*, 74 Vt. 288, 93 Am. St. Rep. 887, 52 Atl. 531.

See, *The Federal Employers' Liability Act of 1908—Is it Constitutional?* by Frank Warren Hackett, 22 Harvard Law Review, 38.

<sup>11</sup> *Second Employers' Liability Cases*, 223 U. S. 1 [sub nomine, *Mondou v. New York, New Haven & Hartford Ry. Co.*, 38 L. R. A. (N.S.) 44, 56 L. ed. 327]; *Washington v. Atlantic Coast Line Ry. Co.*, 136 Ga. 638, 38 L. R. A. (N.S.) 867, 71 S. E. 1066; *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Montgomery*, 152 Ind. 1, 71 Am. St. Rep. 300, 49 N. E. 582; *Baltimore & Ohio Southwestern Railroad Co. v. Bailey*, 99 O. S. 312, 124 N. E. 195; *Keels v. Atlantic Coast Line Ry. Co.*, 104 S. Car. 497, 89 S. E. 388.

*Contra, Shaver v. Pennsylvania Co.*, 71 Fed. 931.

of wages may be forbidden,<sup>12</sup> or the consent of the employer<sup>13</sup> and the wife of the employe,<sup>14</sup> may be required.

A statute providing for a free employment agency at public expense and forbidding those in charge to furnish names of applicants for service to employers whose employes are on a strike, though such names must be furnished to other employers, is invalid.<sup>15</sup>

Reasonable provisions for appliances for the aid of injured employes may be made by the legislature.<sup>16</sup>

A statute intended to abolish sweatshops and the like, which forbade the manufacture of cigars in tenement houses containing more than three families, was held unconstitutional.<sup>17</sup>

**§ 3740. Statutes protecting union labor.** Statutes forbidding the discharge or non-employment of an employe because he is a member of a union are invalid.<sup>1</sup>

<sup>12</sup>International Text-book Co. v. Weissinger, 160 Ind. 349, 98 Am. St. Rep. 334, 65 N. E. 521; Mutual Loan Co. v. Martell, 200 Mass. 482, 43 L. R. A. (N.S.) 746, 86 N. E. 916; Heller v. Lutz, 254 Mo. 704, L. R. A. 1915B, 191, 164 S. W. 123.

See § 2260.

<sup>13</sup>Mutual Loan Co. v. Martell, 200 Mass. 482, 43 L. R. A. (N.S.) 746, 86 N. E. 916.

<sup>14</sup>Mutual Loan Co. v. Martell, 200 Mass. 482, 43 L. R. A. (N.S.) 746, 86 N. E. 916.

<sup>15</sup>Mathews v. People, 202 Ill. 389, 95 Am. St. Rep. 241, 63 L. R. A. 73, 67 N. E. 28.

<sup>16</sup>Wolf v. Smith, 149 Ala. 457, 9 L. R. A. (N.S.) 338, 42 So. 824.

<sup>17</sup>In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

<sup>1</sup>United States. Adair v. United States, 208 U. S. 161, 52 L. ed. 436; Coppage v. Kansas, 236 U. S. 1, L. R. A. 1915C, 960, 59 L. ed. 630.

Illinois. Gillespie v. People, 188 Ill. 176, 80 Am. St. Rep. 176, 52 L. R. A. 283, 58 N. E. 1007.

Kansas. Coffeyville Brick Co. v.

Perry, 69 Kan. 297, 66 L. R. A. 185, 76 Pac. 848.

Missouri. State v. Julow, 129 Mo. 163, 50 Am. St. Rep. 443, 29 L. R. A. 257, 31 S. W. 781.

New York. People v. Marcus, 185 N. Y. 257, 113 Am. St. Rep. 902, 7 L. R. A. (N.S.) 282, 77 N. E. 1073.

Wisconsin. State v. Kreutzberg, 114 Wis. 530, 91 Am. St. Rep. 934, 90 N. W. 1098.

"Here a non-trade union man or non-labor union man could be discharged without ceremony, without let or hindrance, whenever the employer so desired, with or without reason therefor, while in the case of a trade union or labor union man he could not be discharged if such discharge rested on the ground of his being a member of such an organization. In other words, the legislature have undertaken to limit the power of the owner or employer as to his right to contract with or to terminate a contract with particular persons of a class, and therefore the statute which does this is a special and not a general law, and, therefore, violative of the constitu-

A statute which provides that laborers employed by public corporations,<sup>2</sup> or by contractors who are performing public contracts,<sup>3</sup> must be union men, is unconstitutional. Statutes requiring goods made in penal institutions to be marked with a "convict label,"<sup>4</sup> or providing that goods can be marked with a "union label" only with the consent of such union,<sup>5</sup> are valid. An ordinance which requires all city printing to bear the union label is invalid.<sup>6</sup> Statutes providing that no stone can be used on any municipal work unless it is cut and dressed within the state are invalid.<sup>7</sup>

**§ 3741. Statutes regulating discharge of employe.** Statutes have been enacted which provide that an employer shall, at the request of a discharged employe, furnish him with a true statement in writing as to the reason for such discharge. Such statutes have been held to be unconstitutional, as an interference with the liberty of contract,<sup>1</sup> as well as freedom of speech. A similar statute applicable to both domestic and foreign corporations has, however, been upheld.<sup>2</sup> A statute which forbids a railroad company to discharge an employe upon information with reference to

tion." *State v. Julow*, 129 Mo. 163, 176, 50 Am. St. Rep. 443, 29 L. R. A. 257, 31 S. W. 781 [quoted in *Gillespie v. People*, 188 Ill. 176, 186, 80 Am. St. Rep. 176, 52 L. R. A. 283, 58 N. E. 1007].

"The legislature can not prevent persons who are sui juris from laboring, or from making such contracts as they may see fit to make relative to their own lawful labor; nor has it any power by penal laws to prevent any person, with or without cause, from refusing to employ another or to terminate a contract with him, subject only to the liability to respond in a civil action for an unwarranted refusal to do that which has been agreed upon." *Gillespie v. People*, 188 Ill. 176, 186, 80 Am. St. Rep. 176, 52 L. R. A. 283, 58 N. E. 1007.

<sup>2</sup> *Wright v. Hctor*, 95 Neb. 342, 52 L. R. A. (N.S.) 728, 145 N. W. 704.

<sup>3</sup> *Wright v. Hctor*, 95 Neb. 342, 52 L. R. A. (N.S.) 728, 145 N. W. 704.

<sup>4</sup> *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736, 42 L. R. A. 490, 51 N. E. 257.

<sup>5</sup> *State v. Bishop*, 128 Mo. 373, 49 Am. St. Rep. 569, 29 L. R. A. 200, 31 S. W. 9; *Perkins v. Heert*, 158 N. Y. 306, 70 Am. St. Rep. 483, 43 L. R. A. 858, 53 N. E. 18.

<sup>6</sup> *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495, 71 S. W. 815.

<sup>7</sup> *People v. Coler*, 166 N. Y. 144, 59 N. E. 776.

<sup>1</sup> *Wallace v. Georgia, Carolina & Northern Ry.*, 94 Ga. 732, 22 S. E. 579; *Atchison, Topeka & Santa Fe Ry. Co. v. Brown*, 80 Kan. 312, 23 L. R. A. (N.S.) 247, 102 Pac. 459; *St. Louis Southwestern Ry. Co. v. Griffin*, 106 Tex. 477, L. R. A. 1917B, 1108, 171 S. W. 703.

<sup>2</sup> *Cheek v. Prudential Insurance Co.*, — Mo. —, L. R. A. 1918A, 166, 192 S. W. 387.

the behavior of such employe, without giving him an opportunity to be heard in the presence of such party who furnished such information, is unconstitutional.<sup>3</sup> The legislature can not provide that an employer shall not refuse to employ persons who have taken part in a strike.<sup>4</sup>

**§ 3742. Statutes regulating employment of aliens.** A statute requiring a city to employ only citizens of the United States or persons who have made formal declaration of their intention to become citizens, has been held invalid.<sup>1</sup> A statute which forbids the employment of aliens on public works, is said not to deprive them of their liberty without due process of law or to deny to them the equal protection of the laws.<sup>2</sup> A statute which provides that an employer of five or more workers shall employ not less than eighty per cent. qualified electors or native-born citizens of the United States, is invalid;<sup>3</sup> but this is on the theory that such legislation denies to aliens the equal protection of the laws.<sup>4</sup>

**§ 3743. Statutes concerning liens.** Statutes providing that mechanic's liens shall have priority over mortgages prior in time, are generally held valid as to mortgages executed after the passage of such act.<sup>1</sup>

Sub-contractors' liens are of two kinds. Some statutes, the sub-rogation lien acts, give him a lien upon the realty on which the work is done, but limit his recovery to the amount due under the contract from the owner of the realty to the main contractor. Statutes giving liens of this class are valid,<sup>2</sup> and there is little

<sup>3</sup> In re Opinion of Justices, 220 Mass. 627, L. R. A. 1917B, 1119, 108 N. E. 807.

<sup>4</sup> St. Louis Southwestern Ry. Co. v. Griffin, 106 Tex. 477, L. R. A. 1917B, 1108, 171 S. W. 703.

<sup>1</sup> Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786.

<sup>2</sup> Heim v. McCall, 239 U. S. 175, 60 L. ed. 206 [affirming, 214 N. Y. 629]; Crane v. New York, 239 U. S. 195, 60 L. ed. 218 [affirming, People v. Crane, 214 N. Y. 154, L. R. A. 1916D, 550, 108 N. E. 427].

<sup>3</sup> Truax v. Raich, 239 U. S. 33, L. R. A. 1916D, 545, 60 L. ed. 131.

<sup>4</sup> Truax v. Raich, 239 U. S. 33, L. R. A. 1916D, 545, 60 L. ed. 131.

<sup>1</sup> Alabama. Wimberley v. Mayberry, 94 Ala. 240, 14 L. R. A. 305, 10 So. 157. Illinois. Smith v. Moore, 26 Ill. 392. Iowa. Stockwell v. Carpenter, 27 Ia. 119.

Kentucky. Montgomery v. Allen, 107 Ky. 298, 53 S. W. 813.

Missouri. Crandall v. Cooper, 62 Mo. 478.

Contra, Meyer v. Berlandi, 39 Minn. 438, 12 Am. St. Rep. 663, 1 L. R. A. 777, 40 N. W. 513. (Even where the lien was claimed only on the building erected after the mortgage was given.)

<sup>2</sup> Smalley v. Gearing, 121 Mich. 190, 79 N. W. 1114, 80 N. W. 797.

dispute on this question. The others, known as direct lien acts, give him a lien upon the realty for the amount due him from the main contractor, irrespective of the state of accounts under the contract between the owner of the realty and the main contractor. As to the constitutionality of such statutes there is a difference of opinion, some courts holding them valid,<sup>3</sup> while a minority hold them invalid.<sup>4</sup> A statute which provides that the sub-contractor can not waive his lien, is unconstitutional.<sup>5</sup>

**United States.** *Great Southern Fireproof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778 [affirming, 116 Fed. 793, 54 C. C. A. 165, which was a decree rendered after the reversal (on the ground that the record did not show diverse citizenship) in 177 U. S. 449, of *Jones v. Hotel Co.*, 86 Fed. 370, 30 C. C. A. 108, which in turn reversed 79 Fed. 477].

**California.** *Hollenbeck-Bush Planing Mill Co. v. Amweg*, 177 Cal. 159, 170 Pac. 148.

**Colorado.** *Chicago Lumber Co. v. Newcomb*, 19 Colo. App. 265, 74 Pac. 786.

**Connecticut.** *Paine v. Tillinghast*, 52 Conn. 532.

**Indiana.** *Smith v. Newbaur*, 144 Ind. 95, 33 L. R. A. 685, 42 N. E. 40 [affirmed on rehearing, 33 L. R. A. 687, 42 N. E. 1004]; *Barrett v. Millikan*, 156 Ind. 510, 83 Am. St. Rep. 220, 60 N. E. 310.

**Iowa.** *Aalfs Wallpaper & Paint Co. v. Bowker*, 179 Ia. 726, 162 N. W. 33.

**Kentucky.** *Hightower v. Bailey*, 108 Ky. 198, 94 Am. St. Rep. 350, 49 L. R. A. 255, 56 S. W. 147.

**Louisiana.** *McKeon v. Sumner Building & Supply Co.*, 51 La. Ann. 1961.

**Maryland.** *Treusch v. Shryock*, 51 Md. 162.

**Massachusetts.** *Bowen v. Phinney*, 162 Mass. 593.

**Michigan.** *Smalley v. Gearing*, 121 Mich. 190.

**Minnesota.** *Laird v. Moonan*, 32

*Minn.* 358, 20 N. W. 354; *Bardwell v. Mann*, 46 Minn. 285, 48 N. W. 1120.

**Missouri.** *Henry & Coatsworth Co. v. Evans*, 97 Mo. 47, 10 S. W. 868.

**Nebraska.** *Calpetzer v. Church*, 24 Neb. 113, 37 N. W. 931.

**New York.** *Blauvelt v. Woodworth*, 31 N. Y. 285; *Glacius v. Black*, 67 N. Y. 563.

**Oregon.** *Title Guarantee Co. v. Wrenn*, 35 Or. 62, 76 Am. St. Rep. 454, 56 Pac. 271.

**Rhode Island.** *Gurney v. Walsham*, 16 R. I. 698.

**South Dakota.** *Albright v. Smith*, 3 S. D. 631, 54 N. W. 816; s. c., 2 S. D. 577, 51 N. W. 590.

**Tennessee.** *Cole Mfg. Co. v. Falls*, 90 Tenn. 466.

**Virginia.** *Roanoke Land & Improvement Co. v. Karn*, 80 Va. 589.

**Wisconsin.** *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071.

The validity of such statute is especially clear if the property owner is given the opportunity of withholding payment from the principal contractor, until the expiration of the period for filing liens. *Aalfs Wallpaper & Paint Co. v. Bowker*, 179 Ia. 726, 162 N. W. 33.

<sup>4</sup> *Palmer v. Tingle*, 55 O. S. 423, 45 N. E. 313.

<sup>5</sup> *Rittenhouse & Embree Co. v. Warren Construction Co.*, 264 Ill. 619, 106 N. E. 466.

A statute requiring a bond to pay sub-contractors to be filed with the contract, and making the owner personally liable if no bond is filed, has been held invalid.<sup>6</sup> A statute requiring those who contract about erecting buildings to give bonds for performance of such contracts, which bonds shall enure to the benefit of all who furnish materials, is unconstitutional.<sup>7</sup> Even if such bond may be required, a statute which provides that a surety must be a corporation, is said to be unconstitutional.<sup>8</sup> A statute which provides that judgment on a mechanic's lien, against the property owner, shall be limited to the amount due from him to the contractor, and that judgment shall be rendered against the contractor and his sureties, is valid.<sup>9</sup> A statute providing that the purchaser of property encumbered by a statutory lien who sells such property so that such lien can not be enforced, shall be personally liable for the entire debt secured by such lien is invalid.<sup>10</sup> A statute providing that the purchaser of logs subject to loggers' liens is not a bona fide purchaser unless he has paid full value and has seen the purchase money applied to the payment of such liens is valid.<sup>11</sup>

A statute which provides for a lien for water and light furnished for use on such realty, is valid.<sup>12</sup>

The legislature may give an attorney a lien upon the cause of action or upon the amount recovered thereunder.<sup>13</sup>

**§ 3744. Statutes concerning public utilities—Rates.** The state has a wide power over public utilities.<sup>1</sup> It may fix the rates which

<sup>6</sup> *Shaughnessey v. American Surety Co.*, 138 Cal. 543, 69 Pac. 250, 71 Pac. 701; *Gibbs v. Tally*, 133 Cal. 373, 60 L. R. A. 815, 65 Pac. 970.

<sup>7</sup> *San Francisco Lumber Co. v. Bibb*, 139 Cal. 192, 72 Pac. 964; *Snell v. Bradbury*, 139 Cal. 379, 73 Pac. 150.

<sup>8</sup> *Contra, Rio Grande Lumber Co. v. Darke*, — Utah —, L. R. A. 1918A, 1193, 167 Pac. 241.

<sup>9</sup> *George Bolln Co. v. North Platte Valley Irrig. Co.*, 19 Wyom. 542, 39 L. R. A. (N.S.) 868, 121 Pac. 22.

<sup>10</sup> *Hazard, Gould & Co. v. Rosenberg*, 177 Cal. 295, 170 Pac. 612.

<sup>11</sup> *Rogers-Rugers Co. v. Murray*, 115 Wis. 267, 95 Am. St. Rep. 901, 59 L. R. A. 737, 91 N. W. 657.

<sup>12</sup> *McCoy v. Cook*, 13 Wash. 158, 42 Pac. 546.

<sup>13</sup> *State v. Kearney*, — N. J. L. —, L. R. A. 1918D, 361 [sub nomine, *Ford Motor Co. v. Kearny*, 103 Atl. 254].

<sup>14</sup> *Standidge v. Chicago Railways Co.*, 254 Ill. 524, 40 L. R. A. (N.S.) 529, 98 N. E. 963; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 115 Am. St. Rep. 495, 97 S. W. 150.

<sup>15</sup> *Sandpoint Water & Light Co. v. Sandpoint*, 31 Ida. 498, 173 Pac. 972; *Winfield v. Public Service Commission*, 187 Ind. 53, 118 N. E. 531; *Portland v. Public Service Commission*, 89 Or. 325, 173 Pac. 1178.

On this question generally, see *Test of a Regulation of Foreign or Inter-*

the public utility may charge,<sup>2</sup> including charges for common car-

state Commerce, by Louis M. Greeley, 1 *Harvard Law Review*, 159; The Police Power and Interstate Commerce, by William R. Howland, 4 *Harvard Law Review*, 221; Federal Restraints upon State Regulation of Railroad Rates of Fare and Freight, by William F. Dana, 9 *Harvard Law Review*, 324; The Origin of the Right to Engage in Interstate Commerce, by E. Parmalee Prentice, 17 *Harvard Law Review*, 20; The Power of Congress over Combinations Affecting Interstate Commerce, by Augustine L. Humes, 17 *Harvard Law Review*, 83; The Power of Congress to Regulate Railway Rates, by Victor Morawetz, 18 *Harvard Law Review*, 572; Railway Rate Regulation, by Adelbert Moot, 19 *Harvard Law Review*, 487; The Power of Congress to Prescribe Railroad Rates, by Frank W. Hackett, 20 *Harvard Law Review*, 127; Reasonableness of Maximum Rates as a Constitutional Limitation upon Rate Regulation, by Frank M. Cobb, 21 *Harvard Law Review*, 175; The Force and Effect of the Orders of the Interstate Commerce Commission, by H. T. Newcomb, 23 *Harvard Law Review*, 12; Federal Control of Interstate Commerce, by George W. Wickersham, 23 *Harvard Law Review*, 241; Powers of Regulation Vested in Congress, by Max Pam, 24 *Harvard Law Review*, 77; Source of Authority to Engage in Interstate Commerce, by Frederick H. Cooke, 24 *Harvard Law Review*, 635; The Minnesota Rate Cases, by Hannis Taylor, 27 *Harvard Law Review*, 14; Fair Value for Rate Purposes, by Robert H. Whitten, 27 *Harvard Law Review*, 419; The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases, by William C. Coleman, 28 *Harvard Law Review*, 34; Another Word about the Evolution of Federal Regulation of Intrastate Rates

and the Shreveport Rate Cases, by John S. Sheppard, Jr., 28 *Harvard Law Review*, 294; Separation of Interstate and Intrastate Accounts in Federal and State Regulation of Rates, by Bruce Wyman, 28 *Harvard Law Review*, 742; The Vanishing Rate-making Power of the States, by William C. Coleman, 14 *Columbia Law Review*, 122; The Federal Valuation Act, by Henry Hull, 17 *Columbia Law Review*, 585; The Supreme Court's Ambiguous Use of "Value" in Rate Cases, by Robert L. Hale, 18 *Columbia Law Review*, 208; Outstanding Events in Railway Regulation, by Edgar Watkins, 19 *Columbia Law Review*, 47; One Phase of Federal Power under the Commerce Clause of the Constitution, by John C. Donnelly, 2 *Michigan Law Review*, 670; Public Utility Rates: A Just and Scientific Basis for the Establishment of Public Utility Rates with Particular Attention to Land Values, by Max Thelen, 2 *California Law Review*, 3; Constitutional Objections to the Railway Control Act, by Blewett Lee, 28 *Yale Law Journal*, 158; Judicial Review as a Requirement of Due Process in Rate Regulations, by Thomas P. Hardman, 30 *Yale Law Journal*, 681; The "Physical Value" Fallacy in Rate Cases, by Robert L. Hale, 30 *Yale Law Journal*, 710; Insurance in its Relation to the Commerce Clause of the Federal Constitution, by Reginald H. Innes, 39 *American Law Register (N.S.)*, 717, and The Right of the Public to Regulate the Charges of Common Carriers and of all Others Discharging Public, or Quasi-public Duties, by Walter Clark, 31 *American Law Review*, 685.

<sup>2</sup> *United States v. Chicago, Burlington & Quincy Ry. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & Northwestern Ry.*, 94 U. S. 164, 24 L. ed. 97; *Wabash, St. Louis & Pacific Ry. v. Illi-*

riers,<sup>3</sup> or for grain elevators,<sup>4</sup> or electricity,<sup>5</sup> if reasonable, or for telephone service.<sup>6</sup> Such power may be conferred upon a commission.<sup>7</sup> A commission fixing railroad rates must, however, give a hearing to such railroad company before fixing such rates.<sup>8</sup> If such rates are unreasonable, as where they are less than the cost of such service,<sup>9</sup> such statutes are, in effect, a taking of private

nois, 118 U. S. 557, 30 L. ed. 244; Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U. S. 418, 33 L. ed. 970; Chicago & Grand Trunk Ry. v. Wellman, 143 U. S. 339, 36 L. ed. 176; Pennsylvania Ry. Co. v. Towers, 245 U. S. 6, 1 L. R. A. 1918C, 475, 62 L. ed. 117; Arkadelphia Milling Co. v. St. Louis Southwestern Ry., 249 U. S. 134, 63 L. ed. 517.

Idaho. Sandpoint Water & Light Co. v. Sandpoint, 31 Ida. 498, 173 Pac. 972.

Massachusetts. Commonwealth v. Interstate Consolidated Street Ry. Co., 187 Mass. 436, 11 L. R. A. (N.S.) 973, 73 N. E. 530.

Missouri. Home Telephone Co. v. Carthage, 235 Mo. 644, 48 L. R. A. (N. S.) 1055, 139 S. W. 547.

New York. Willis v. Rochester, 219 N. Y. 427, 114 N. E. 851.

North Dakota. State v. Northern Pacific Ry., 19 N. D. 45, 25 L. R. A. (N.S.) 1001, 120 N. W. 869.

Oregon. Portland v. Public Service Commission, 89 Or. 325, 173 Pac. 1178.

Pennsylvania. New York & Pennsylvania Co. v. New York Central Ry. Co., 267 Pa. St. 64, 110 Atl. 286.

<sup>3</sup>United States. Chicago, Burlington & Quincy Ry. v. Iowa, 94 U. S. 155, 24 L. ed. 94; Peik v. Chicago & Northwestern Ry., 94 U. S. 164, 24 L. ed. 97; Wabash, St. Louis & Pacific Ry. v. Illinois, 118 U. S. 557, 30 L. ed. 244; Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U. S. 418, 33 L. ed. 970; Chicago & Grand Trunk Ry. v. Wellman, 143 U. S. 339, 36 L. ed. 176; Pennsylvania Ry. Co. v. Towers, 245 U. S. 6, 1 L. R. A. 1918C, 475, 62 L. ed.

117; Arkadelphia Milling Co. v. St. Louis Southwestern Ry., 249 U. S. 134, 63 L. ed. 517.

Massachusetts. Commonwealth v. Interstate Consolidated Street Ry. Co., 187 Mass. 436, 11 L. R. A. (N.S.) 973, 73 N. E. 530.

Missouri. Home Telephone Co. v. Carthage, 235 Mo. 644, 48 L. R. A. (N. S.) 1055, 139 S. W. 547.

New York. Willis v. Rochester, 219 N. Y. 427, 114 N. E. 851.

North Dakota. State v. Northern Pacific Ry., 19 N. D. 45, 25 L. R. A. (N.S.) 1001, 120 N. W. 869.

Pennsylvania. New York & Pennsylvania Co. v. New York Central Ry. Co., 267 Pa. St. 64, 110 Atl. 286.

<sup>4</sup>Budd v. New York, 143 U. S. 517, 36 L. ed. 247; People v. Budd, 117 N. Y. 1, 15 Am. St. Rep. 460, 5 L. R. A. 559, 22 N. E. 670; State v. Brass, 2 N. D. 482, 52 N. W. 408.

<sup>5</sup>Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 9 A. L. R. 1420, 63 L. ed. 309.

<sup>6</sup>Cleveland Telephone Co. v. Cleveland, 98 O. S. 358, 121 N. E. 701.

<sup>7</sup>Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, 9 A. L. R. 1420, 63 L. ed. 309; New York & Pennsylvania Co. v. New York Central Ry. Co., 267 Pa. St. 64, 110 Atl. 286.

<sup>8</sup>Chicago, Milwaukee & St. Paul Ry. Co. v. State, 134 U. S. 418, 33 L. ed. 970.

<sup>9</sup>Northern Pacific Ry. v. North Dakota, 236 U. S. 585, 59 L. ed. 735; Norfolk & Western Ry. v. West Virginia, 236 U. S. 605, 59 L. ed. 745; Groesbeck

property without due process of law, and are invalid. The state or the United States may forbid free transportation.<sup>10</sup> A common carrier who wishes to use a public highway may be compelled to give bond;<sup>11</sup> and the fact that no surety company will issue such policy does not render the statute invalid.<sup>12</sup>

**§ 3745. Liability.** A statute which makes a common carrier<sup>1</sup> or a telegraph company<sup>2</sup> liable for its own negligence or that of its employes in spite of its contract to the contrary, is valid. A statute which makes the initial carrier liable for the negligence of connecting carriers in spite of its contract to the contrary has been held invalid;<sup>3</sup> but modern decisions, including that of the United States supreme court, hold that such statutes are valid.<sup>4</sup> A statute providing that in case of loss a common carrier shall be liable for the amount of damages which it causes, less insurance, and that the insurance company shall have no right of subrogation, is valid.<sup>5</sup> A statute which requires a common carrier to turn over to a storage company or to a public warehouse all property not called for, for twenty days, is unconstitutional.<sup>6</sup> A statute that makes a bill of lading conclusive evidence of the amount of grain shipped

v. Duluth, South Shore & Atlantic Ry., 250 U. S. 607, 63 L. ed. 1167; *Vandalia Ry. Co. v. Schnull*, — U. S. —, — L. ed. —; U. S. S. C. Advance Opinions, 1920-1921, 372; *Southern Iowa Electric Co. v. Chariton*, — U. S. —, — L. ed. —, 41 S. Ct. 400; U. S. S. C. Advance Opinions, 1920-1921, 514; *Commonwealth v. Covington & Cincinnati Bridge Co. (Ky.)*, 21 S. W. 1042; *Commonwealth v. Interstate Consolidated Street Ry. Co.*, 187 Mass. 436, 11 L. R. A. (N.S.) 973, 73 N. E. 530.

<sup>10</sup> *Louisville & Nashville Ry. Co. v. Mottley*, 219 U. S. 467, 34 L. R. A. (N.S.) 671, 55 L. ed. 297; *State v. Martyn*, 82 Neb. 225, 23 L. R. A. (N.S.) 217, 117 N. W. 719.

<sup>11</sup> *Memphis v. State*, — Tenn. —, L. R. A. 1916B, 1151, 179 S. W. 631; *Hadfield v. Lundin*, 98 Wash. 657, L. R. A. 1918B, 909, 168 Pac. 516.

<sup>12</sup> *Hadfield v. Lundin*, 98 Wash. 657, L. R. A. 1918B, 909, 168 Pac. 516.

<sup>1</sup> *Tullis v. Lake Erie & Western Ry.*

*Co.*, 175 U. S. 348, 44 L. ed. 192; *Minnesota Iron Co. v. Kline*, 199 U. S. 593, 50 L. ed. 322.

<sup>2</sup> *Kemp v. Western Union Telegraph Co.*, 28 Neb. 661, 26 Am. St. Rep. 363, 44 N. W. 1064; *Burgess v. Western Union Telegraph Co.*, 92 Tex. 125, 71 Am. St. Rep. 833, 46 S. W. 794.

<sup>3</sup> *McCann v. Eddy*, 133 Mo. 59, 35 L. R. A. 110, 27 S. W. 541.

<sup>4</sup> *Atlantic Coast Line Ry. Co. v. Riverside Mills*, 210 U. S. 186, 31 L. R. A. (N.S.) 7, 55 L. ed. 167; *Smeltzer v. St. Louis & Santa Fe Ry. Co.*, 158 Fed. 649; *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Mitchell*, 175 Ind. 196, 91 N. E. 735; *Louisville & Nashville Ry. Co. v. Scott*, 133 Ky. 724, 118 S. W. 992.

<sup>5</sup> *Leavitt v. Canadian Pacific Ry.*, 90 Me. 153, 38 L. R. A. 152, 37 Atl. 886.

<sup>6</sup> *State v. Great Northern Ry.*, 68 Minn. 381, 64 Am. St. Rep. 482, 38 L. R. A. 672, 71 N. W. 400.

is unconstitutional.<sup>7</sup> A statute which provides that the sworn statement of the shipper shall be conclusive as to the amount of goods delivered in case the carrier refuses to weigh such goods when delivered, has been held unconstitutional.<sup>8</sup>

**§ 3746. Other forms of control.** A statute which requires common carriers to maintain a given speed for trains on which livestock is transported, may be unconstitutional if the speed is excessive, in view of the conditions of transportation.<sup>1</sup> A street car company may be compelled to provide stools for the motormen.<sup>2</sup> A common carrier may be required to furnish telephone communication between their offices and the local telephone exchange.<sup>3</sup> Public service corporations may be compelled to make reports.<sup>4</sup> A railway may be compelled to change its grade for a proper purpose,<sup>5</sup> as for the purpose of avoiding grade crossings.<sup>6</sup> Public service corporations which furnish gas, electricity, and the like, may be compelled to furnish service on reasonable application,<sup>7</sup> and a penalty may be imposed for failure to furnish such service.<sup>8</sup> A railway company can not be compelled to install a machine for weighing cattle.<sup>9</sup> A statute which provides that no one shall act as conductor unless he has had two years' experience as a freight conductor or brakeman, is invalid.<sup>10</sup> A statute requiring thirty days' experience in operating automobiles on city streets before operating a "jitney bus," is valid.<sup>11</sup> A municipal corpora-

<sup>7</sup> Missouri, Kansas & Texas R. R. v. Simonson, 64 Kan. 802, 91 Am. St. Rep. 248, 57 L. R. A. 765, 68 Pac. 653..

<sup>8</sup> Shellabarger Elevator Co. v. Illinois Central Ry., 278 Ill. 333, L. R. A. 1917E, 1011, 116 N. E. 170.

<sup>1</sup> Davison v. Chicago & Northwestern Ry. Co., 100 Neb. 462, L. R. A. 1917C, 135, 160 N. W. 877; Downey v. Northern Pacific Ry. Co., 19 N. D. 621, 26 L. R. A. (N.S.) 1017, 125 N. W. 475.

<sup>2</sup> Silva v. Newport, 150 Ky. 781, 42 L. R. A. (N.S.) 1060, 150 S. W. 1024.

<sup>3</sup> State v. Missouri Pacific Ry. Co., 100 Neb. 700, L. R. A. 1918E, 346, 161 N. W. 270.

<sup>4</sup> State v. Farmerville Light & Power Co., 144 La. 241, 80 So. 268.

<sup>5</sup> Erie Ry. v. Public Utility Commissioners, 254 U. S. 394, — L. ed. —.

A railway company which has paid full damages can not be compelled to construct a crossing over its tracks. Chamberlain v. Missouri Pacific Ry. Co., 107 Kan. 341, 12 A. L. R. 224, 191 Pac. 261.

<sup>6</sup> Erie Ry. v. Public Utility Commissioners, 254 U. S. 394, — L. ed. —.

<sup>7</sup> Hansen v. Vallejo Light & Power Co., 182 Cal. 492, 188 Pac. 990.

<sup>8</sup> Hansen v. Vallejo Light & Power Co., 182 Cal. 492, 188 Pac. 999.

<sup>9</sup> Great Northern Ry. Co. v. Cahill, 253 U. S. 71, 10 A. L. R. 1335, 64 L. ed. 787.

<sup>10</sup> Smith v. Texas, 233 U. S. 630, L. R. A. 1915D, 677, 58 L. ed. 1129.

<sup>11</sup> Ex parte Cardinal, 170 Cal. 519, L. R. A. 1915F, 850, 150 Pac. 348.

tion can not compel an interurban railway to stop at any street crossing where persons may desire to enter or alight,<sup>12</sup> as this regulation does not relate to public health or safety, but merely to convenience. A statute which provides that the upper berth of a sleeping-car shall not be let down unless it is occupied, is unconstitutional.<sup>13</sup> Railroad companies may be forbidden to make indemnity contracts with their employes.<sup>14</sup> The legislature can not, however, reduce the compensation of agents of insurance companies under prior contracts of employment.<sup>15</sup>

**§ 3747. Statutes concerning sales—Brokers, tickets, etc.** Congress and the state legislatures have a considerable power over sales and the conduct of business in general,<sup>1</sup> although the limits of this power can not be drawn accurately. Statutes forbidding the sale of railroad tickets by any except duly authorized agents of the railroad are generally held valid,<sup>2</sup> and so are statutes or ordinances forbidding the sale of transfers issued by a street railway company.<sup>3</sup> However, the addition of a provision that such law should apply only if notice was given on the face of the ticket, which notice the railway company had the right to omit, was held

<sup>12</sup> *Excelsior v. Minneapolis & St. Paul Street Ry. Co.*, 108 Minn. 407, 24 L. R. A. (N.S.) 1035, 122 N. W. 486.

<sup>13</sup> *Chicago, Milwaukee & St. Paul Ry. Co. v. State*, 238 U. S. 491, L. R. A. 1916A, 1133, 59 L. ed. 1423; *State v. Redmon*, 134 Wis. 89, 14 L. R. A. (N.S.) 220, 114 N. W. 137.

<sup>14</sup> *McGuire v. Chicago, Burlington & Quincy Ry. Co.*, 131 Ia. 340, 33 L. R. A. (N.S.) 706, 108 N. W. 902.

<sup>15</sup> *Boaswell v. Security Mutual Life Insurance Co.*, 193 N. Y. 465, 19 L. R. A. (N.S.) 946, 86 N. E. 532.

<sup>1</sup> See, *The Trading with the Enemy Act*, by C. H. Hand, Jr., 19 *Columbia Law Review*, 112; *Government Control of Business*, by John B. Cheadle, 20 *Columbia Law Review*, 438, 550; *The Webb-Pomerene Law—Extraterritorial Scope of the Unfair Competition Clause*, by William Notz, 29 *Yale Law Journal*, 29.

<sup>2</sup> *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329, 24 L. R. A. 152, 36 N. E. 948; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *State v. Corbett*, 57 Minn. 345, 24 L. R. A. 498, 59 N. W. 317; *State v. Bernheim*, 10 Mont. 512, 40 Pac. 441; *State v. Thompson*, 47 Or. 492, 4 L. R. A. (N.S.) 480, 84 Pac. 476; *Commonwealth v. Keary*, 198 Pa. St. 500, 48 Atl. 472; *Samuelson v. State*, 116 Tenn. 470, 115 Am. St. Rep. 805, 95 S. W. 1012; *Jannin v. State*, 42 Tex. Cr. Rep. 631, 96 Am. St. Rep. 821, 53 L. R. A. 349, 51 S. W. 1126, 62 S. W. 419; *Ex parte O'Neill*, 41 Wash. 174, 3 L. R. A. (N.S.) 558, 83 Pac. 104.

*Contra*, *People v. Warden*, 157 N. Y. 116, 68 Am. St. Rep. 763, 43 L. R. A. 264, 51 N. E. 1006.

<sup>3</sup> *Ex parte Lorenzen*, 128 Cal. 431, 79 Am. St. Rep. 47, 50 L. R. A. 55, 61 Pac. 68.

to invalidate such statute, though valid otherwise.<sup>4</sup> Theaters may be forbidden to place tickets in the hands of brokers to be sold at an advance over the regular price, for the joint account of the theater and the broker;<sup>5</sup> but it is held that brokers can not be forbidden to sell theater tickets on their own account at an advance over the regular price.<sup>6</sup> A statute requiring the admission of a ticket holder to a race course, if sober and properly behaved, is held to be valid.<sup>7</sup>

**§ 3748. Department stores, trading stamps, etc.** Statutes forbidding department stores,<sup>1</sup> or forbidding a vendor of goods to give an order on a third person with the articles sold by him,<sup>2</sup> such as what are familiarly known as "trading stamps,"<sup>3</sup> or forbidding a vendor of goods to give premiums to purchasers at his store and making such act a crime,<sup>4</sup> have been held invalid, except where the stamp is in the nature of a lottery entitling the purchaser to something indeterminate at the time, to be selected after-

<sup>4</sup> *Jannin v. State*, 42 Tex. Cr. Rep. 631, 96 Am. St. Rep. 821, 53 L. R. A. 349, 51 S. W. 1126, 62 S. W. 419.

Such a statute has been held invalid as special legislation. *Horwich v. Laboratory Co.*, 205 Ill. 497, 68 N. E. 938.

<sup>5</sup> *People v. Thompson*, 283 Ill. 87, L. R. A. 1918D, 382, 119 N. E. 41.

<sup>6</sup> *Ex parte Quarg*, 149 Cal. 79, 117 Am. St. Rep. 115, 5 L. R. A. (N.S.) 183, 84 Pac. 766; *People v. Steele*, 231 Ill. 340, 121 Am. St. Rep. 321, 14 L. R. A. (N.S.) 361, 83 N. E. 236; *Chicago v. Powers*, 231 Ill. 560, 83 N. E. 240.

<sup>7</sup> *Western Turf Association v. Greenberg*, 204 U. S. 359, 51 L. ed. 520 [affirming, 148 Cal. 126, 82 Pac. 684]; *Greenberg v. Western Turf Association*, 140 Cal. 357, 73 Pac. 1 50.

<sup>1</sup> *Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 93, 48 L. R. A. 261, 55 N. E. 707.

So a statute imposing a license fee on department stores only is invalid. *State v. Ashbrook*, 154 Mo. 375, 77 Am. St. Rep. 765, 55 S. W. 627.

<sup>2</sup> *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818, 48 L. R. A. 775, 46 Atl. 234.

<sup>3</sup> *State v. Hawkins*, 95 Md. 133, 93 Am. St. Rep. 328, 51 Atl. 850; *State v. Sperry & Hutchinson Co.*, 94 Neb. 785, 49 L. R. A. (N.S.) 1123, 144 N. W. 795; *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818, 48 L. R. A. 775, 46 Atl. 234; *State v. Dodge*, 76 Vt. 197, 56 Atl. 983; *Young v. Commonwealth*, 101 Va. 853, 45 S. E. 327.

*Contra*, *Pitney v. Washington*, 240 U. S. 387, 60 L. ed. 703 [affirming, 80 Wash. 699, 141 Pac. 883]; *Tanner v. Little*, 240 U. S. 369, 60 L. ed. 691; *District of Columbia v. Kraft*, 35 D. C. App. 253, 30 L. R. A. (N.S.) 957; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918 [overruling, *Leonard v. Bassindale*, 46 Wash. 301, 89 Pac. 879]; *Sperry & Hutchinson Co. v. Weigle*, 166 Wis. 613, 166 N. W. 54.

<sup>4</sup> *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343.

*Contra*, *Commonwealth v. Mutual Union Brewing Co.*, 252 Pa. St. 168, 97 Atl. 206.

wards by lot.<sup>5</sup> Special license taxes may be imposed upon merchants who offer trading stamps.<sup>6</sup> A statute which imposes a penalty for issuing trading stamps to be redeemed by any person except the merchant who issues them, but imposing no penalty if the merchant who issues them is to redeem them, is invalid as class legislation.<sup>7</sup> A statute which provides that food packages which contain premiums or prizes shall be regarded as "misbranded," is valid.<sup>8</sup>

**§ 3749. Food.** Statutes requiring the ingredients of baking powder to be shown by the label,<sup>1</sup> or forbidding the manufacture or sale of baking powder containing alum,<sup>2</sup> or requiring disclosure of the ingredients of food for livestock,<sup>3</sup> are valid. Statutes which prohibit the sale of articles of food, such as vinegar,<sup>4</sup> or oleomargarine,<sup>5</sup> which contain artificial coloring matter, or which require oleomargarine to be colored pink,<sup>6</sup> have been held valid. The sale of oleomargarine may be prohibited.<sup>7</sup> A state may totally forbid the manufacture and sale of oleomargarine within its own limits,<sup>8</sup> but can not prevent its importation from other states.<sup>9</sup> While a

<sup>5</sup> State v. Hawkins, 95 Md. 133, 93 Am. St. Rep. 328, 51 Atl. 850.

<sup>6</sup> Rast v. Van Deman & Lewis Co., 240 U. S. 342, L. R. A. 1917A, 421, 60 L. ed. 679; State v. Wilson, 101 Kan. 789, L. R. A. 1918B, 374, 168 Pac. 679.

<sup>7</sup> People v. Sperry & Hutchinson Co., 197 Mich. 532, L. R. A. 1918A, 797, 164 N. W. 503.

<sup>8</sup> Arrigo v. Hyers, 98 Neb. 134, L. R. A. 1917A, 1116, 152 N. W. 319.

<sup>1</sup> State v. Sherod, 80 Minn. 446, 81 Am. St. Rep. 268, 50 L. R. A. 660, 83 N. W. 417.

<sup>2</sup> State v. Layton, 163 Mo. 474, 62 L. R. A. 163, 61 S. W. 171 [affirmed, Layton v. Missouri, 187 U. S. 356].

<sup>3</sup> Savage v. Jones, 225 U. S. 501, 56 L. ed. 1182.

<sup>4</sup> People v. Girard, 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823; People v. William Henning Co., 260 Ill. 554, 49 L. R. A. (N.S.) 1206, 103 N. E. 530.

Even if the color is obtained by a mixture of two kinds of vinegar.

People v. William Henning Co., 260 Ill. 554, 49 L. R. A. (N.S.) 1206, 103 N. E. 530.

<sup>5</sup> Plumely v. Massachusetts, 155 U. S. 462; Cook v. State, 110 Ala. 40, 20 So. 360; Butler v. Chambers, 36 Minn. 69, 1 Am. St. Rep. 638, 30 N. W. 308; State v. Bockstruck, 136 Mo. 335, 38 S. W. 317; State v. Capital City Dairy Co., 62 O. S. 350, 57 N. E. 62.

Contra, State v. Hanson, 118 Minn. 85, 40 L. R. A. (N.S.) 865, 136 N. W. 412.

<sup>6</sup> State v. Myers, 42 W. Va. 822, 57 Am. St. Rep. 887, 35 L. R. A. 844, 26 S. E. 530.

<sup>7</sup> Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253.

<sup>8</sup> Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253.

<sup>9</sup> Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49. (Involving the same statute as that in Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253.)

state may prevent oleomargarine colored yellow in imitation of butter from being imported,<sup>10</sup> it can not prevent its importation except when colored pink,<sup>11</sup> since this involves the power to exclude it entirely in practice. Reasonable tests for the sale of milk may be imposed,<sup>12</sup> and the sale of milk containing a preservative may be forbidden,<sup>13</sup> as may be the sale of milk from cows fed with slops from distilleries.<sup>14</sup> The sale of milk without a permit may be forbidden,<sup>15</sup> and the seizure of milk for inspection without a warrant may be authorized.<sup>16</sup> A dealer in milk may be required to give bond to pay for milk supplied to him.<sup>17</sup> On the other hand, a statute which requires dealers in milk to pay for their purchases at certain fixed intervals, is invalid as class legislation.<sup>18</sup>

**§ 3750. Drugs.** The legislature may provide that medical preparations can be sold only by licensed pharmacists,<sup>1</sup> even if such preparations are harmless.<sup>2</sup> The sale of patent medicines may be forbidden unless the ingredients are registered.<sup>3</sup> A druggist may be required to satisfy himself that poisons which are sold without a physician's prescription are to be used for a proper purpose.<sup>4</sup> A physician may be forbidden to supply drugs from his own stock to habitual users thereof.<sup>5</sup>

<sup>10</sup> *Plumley v. Massachusetts*, 155 U. S. 462.

<sup>11</sup> *Collins v. New Hampshire*, 171 U. S. 30, 43 L. ed. 60.

<sup>12</sup> *Nelson v. Minneapolis*, 112 Minn. 16, 29 L. R. A. (N.S.) 260, 127 N. W. 445; *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 492, 1 L. R. A. (N.S.) 936, 89 S. W. 617.

<sup>13</sup> *St. Louis v. Schuler*, 190 Mo. 524, 1 L. R. A. (N.S.) 928, 89 S. W. 621.

<sup>14</sup> *Sanders v. Commonwealth*, 117 Ky. 1, 1 L. R. A. (N.S.) 932, 77 S. W. 358.

<sup>15</sup> *Lodes v. Health Department*, 189 N. Y. 187, 13 L. R. A. (N.S.) 894, 82 N. E. 187.

<sup>16</sup> *St. Louis v. Liessing*, 190 Mo. 464, 1 L. R. A. (N.S.) 918, 89 S. W. 611.

<sup>17</sup> *People v. Beakes Dairy Co.*, 222 N. Y. 416, 3 A. L. R. 1260, 119 N. E. 115.

*Contra, State v. Porter*, 94 Conn. 639, 110 Atl. 59.

<sup>18</sup> *State v. Latham*, 115 Me. 176, L. R. A. 1917A, 480, 98 Atl. 578 (semi-monthly).

<sup>1</sup> *State Board of Pharmacy v. Matthews*, 197 N. Y. 353, 26 L. R. A. (N. S.) 1013, 90 N. E. 966.

<sup>2</sup> *State Board of Pharmacy v. Matthews*, 197 N. Y. 353, 26 L. R. A. (N. S.) 1013, 90 N. E. 966.

<sup>3</sup> *Fougera v. New York*, 224 N. Y. 269, 1 A. L. R. 1467, 120 N. E. 642.

<sup>4</sup> *Katzman v. Commonwealth*, 140 Ky. 124, 30 L. R. A. (N.S.) 519, 130 S. W. 990.

<sup>5</sup> *State v. Martinson*, — U. S. —, 65 L. ed. —; U. S. S. C. *Advance Opinions*, 504 [affirming, *State v. Martinson*, 144 Minn. 206, 174 N. W. 823].

**§ 3751. Prevention of fraud.** Statutes which provide that dealers in stocks, bonds, and the like, must first secure a license, are valid.<sup>1</sup>

Statutes providing that a sale of a stock of goods in bulk shall be presumed fraudulent unless accompanied with certain precautions, such as furnishing a list of creditors of the business, and requiring the vendee to see to the application of the purchase money to their debts are generally held valid,<sup>2</sup> although in some jurisdictions such statutes have been held to be invalid.<sup>3</sup> The legislature may require agents and others who do business on credit to give bond for the faithful performance of their obligations.<sup>4</sup>

<sup>1</sup> *Hall v. Geiger-Jones Co.*, 242 U. S. 539, L. R. A. 1917F, 514, 61 L. ed. 480; *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559, 61 L. ed. 493; *Merrick v. N. W. Halsley & Co.*, 242 U. S. 568, 61 L. ed. 498; *Mechanic's Building & Loan Association v. Coffman*, 110 Ark. 269, 162 S. W. 1090; *Ex parte Taylor*, 68 Fla. 61, 66 So. 292.

See, *The Ohio "Blue Sky" Cases*, by Clarence D. Laylin, 15 *Michigan Law Review*, 389; "Watered Stock"—Commissions—"Blue Sky Laws"—Stock without Par Value, by William W. Cook, 19 *Michigan Law Review*, 583, and *The Constitutionality of "Blue Sky" Laws*, by R. S. Spilman, 49 *American Law Review*, 389.

<sup>2</sup> *Connecticut. Walp v. Mooar*, 76 Conn. 515 [sub nomine, *Walp v. Lamkin*, 57 Atl. 277]; *Young v. Lemieux*, 79 Conn. 434, 20 L. R. A. (N.S.) 160, 65 Atl. 436.

*Idaho. Boise Association of Credit Men v. Ellis*, 26 Ida. 438, L. R. A. 1915E, 917, 144 Pac. 6.

*Kansas. Burnett v. Trimmell*, 103 Kan. 130, L. R. A. 1918E, 1058, 173 Pac. 6.

*Massachusetts. Squire v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312.

*New York. Klein v. Maravelas*, 219

N. Y. 383, L. R. A. 1917E, 549, 114 N. E. 809.

*Oklahoma. Noble v. Ft. Smith Wholesale Grocery Co.*, 34 Okla. 6C2, 46 L. R. A. (N.S.) 455, 127 Pac. 14.

*Tennessee. Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50.

*Texas. Owosso Carriage & Sleigh Co. v. McIntosh*, 107 Tex. 307, L. R. A. 1916B, 970, 179 S. W. 257.

*Washington. McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 94 Am. St. Rep. 889, 60 L. R. A. 947, 71 Pac. 37; *Kohn v. Fishback*, 36 Wash. 69, 104 Am. St. Rep. 941, 78 Pac. 199.

*West Virginia. Marlow v. Ringer*, — W. Va. —, L. R. A. 1917D, 619, 91 S. E. 386.

*Wisconsin. Gazett v. Iola Co-operative Mercantile Co.*, 164 Wis. 406, 160 N. W. 170.

<sup>3</sup> *McKinster v. Sager*, 163 Ind. 671, 106 Am. St. Rep. 268, 68 L. R. A. 273, 72 N. E. 854; *Miller v. Crawford*, 70 O. S. 207, 71 N. E. 631; *Block v. Swartz*, 27 Utah, 387, 76 Pac. 22.

For history of this doctrine in Ohio, see *Steele, Hopkins & Meredith Co. v. Miller*, 92 O. S. 115, L. R. A. 1916C, 1023, 110 N. E. 648.

<sup>4</sup> *Payne v. Kansas*, 248 U. S. 112, 63 L. ed. 153 [affirming, *State v. Moh-*

**§ 3752. Weights, measures, etc.** The legislature may make reasonable legislation with reference to weights and measures. It may prescribe the shape and size of containers in which produce is to be marketed;<sup>2</sup> or it may fix the weight of loaves of bread<sup>3</sup> or it may provide that a milk dealer shall not have in his possession, with intent to use it, a bottle of less capacity than is marked thereon.<sup>4</sup> On the other hand, statutes which provide that certain articles must be sold by weight and not by quantity,<sup>5</sup> or which provide that the weight must be marked on small packages of butter offered for sale,<sup>6</sup> are said to be unconstitutional.

**§ 3753. Intoxicating liquor and tobacco.** Even before the eighteenth amendment the states had power to prevent the manufacture and sale of intoxicating liquors.<sup>1</sup> They could prevent the sale of liquor which contained alcohol, even though it was non-intoxicating.<sup>2</sup> It could prohibit the manufacture of intoxicating liquor;<sup>3</sup> it could restrict the hours within which liquor could be sold,<sup>4</sup> and it could prevent the sale of cider although it was in

ler, 98 Kan. 465, 158 Pac. 408]; Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610; Musco v. United Surety Co., 196 N. Y. 459, 134 Am. St. Rep. 851, 90 N. E. 171; State v. Bowen, 86 Wash. 23, 149 Pac. 330.

Contra, State v. Porter, 94 Conn. 639, 110 Atl. 59; People v. Berrien Circuit Judge, 124 Mich. 664, 83 Am. St. Rep. 352, 50 L. R. A. 493, 83 N. W. 594; State v. Sheridan, 25 Wyo. 347, 1 A. L. R. 955, 170 Pac. 1.

<sup>1</sup>Chicago v. Schmidinger, 243 Ill. 167, 44 L. R. A. (N.S.) 632, 90 N. E. 369; Stegmann v. Weeks. — Mo. —, 5 A. L. R. 1060, 214 S. W. 137; Chicago v. Bowman Dairy Co., 234 Ill. 294, 17 L. R. A. (N.S.) 694, 84 N. E. 913; State v. Belle Springs Creamery Co., 83 Kan. 369, L. R. A. 1915D, 515, 111 Pac. 474; Allion v. Toledo, 99 O. S. 416, 6 A. L. R. 426, 124 N. E. 237.

<sup>2</sup>Stegmann v. Weeks. — Mo. —, 5 A. L. R. 1060, 214 S. W. 137.

<sup>3</sup>Chicago v. Schmidinger, 243 Ill. 167, 44 L. R. A. (N.S.) 632, 90 N. E. 369;

Allion v. Toledo, 99 O. S. 416, 6 A. L. R. 426, 124 N. E. 237.

<sup>4</sup>Chicago v. Bowman Dairy Co., 234 Ill. 294, 17 L. R. A. (N.S.) 694, 84 N. E. 913.

<sup>5</sup>In re Steube, 91 O. S. 135, L. R. A. 1916E, 377, 110 N. E. 250.

<sup>6</sup>Ex parte Dietrich, 149 Cal. 104, 5 L. R. A. (N.S.) 873, 84 Pac. 770.

<sup>1</sup>Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, L. R. A. 1917B, 1218, 61 L. ed. 326; Southern Express Co. v. Whittle, 194 Ala. 406, L. R. A. 1916C, 278, 69 So. 652; Delaney v. Plunkett, 146 Ga. 547, L. R. A. 1917D, 926, 91 S. E. 561; State v. Davis, 77 W. Va. 271, L. R. A. 1917C, 639, 87 S. E. 262.

<sup>2</sup>State v. Fargo Bottling Works Co., 19 N. D. 396, 26 L. R. A. (N.S.) 872, 124 N. W. 387; Commonwealth v. Henry, 110 Va. 879, 26 L. R. A. (N.S.) 883, 65 S. E. 570.

<sup>3</sup>Schmitt v. F. W. Cook Brewing Co., 187 Ind. 623, 120 N. E. 19.

<sup>4</sup>State v. Calloway, 11 Ida. 719, 4 L. R. A. (N.S.) 109, 84 Pac. 27.

fact, non-intoxicating.<sup>5</sup> It may restrict the amount of intoxicating liquor which any one may have in possession, although it is not kept for the purpose of sale.<sup>6</sup> It was said, however, that the abuse of the business of selling soft drinks did not justify the legislature in suppressing it.<sup>7</sup> One who has obtained a license to sell "near-beer," and has made use thereof to sell intoxicating liquors, may be refused another license.<sup>8</sup> The legislature may prevent the sale of snuff,<sup>9</sup> or cigarettes,<sup>10</sup> especially to minors.<sup>11</sup>

**§ 3754. Monopolies and unfair discriminations.** Congress and the state legislatures may, within their respective spheres of power, prevent trusts and combinations in restraint of trade.<sup>1</sup> Such legislation may be invalid as discriminatory,<sup>2</sup> or as not fixing any definite standards in advance,<sup>3</sup> or as making the reputation of being a trust, evidence to prove such fact.<sup>4</sup>

Statutes which forbid discrimination in prices in different parts of the state which are made to drive competitors out of business,<sup>5</sup>

<sup>5</sup> *State v. Frederickson*, 101 Me. 37, 6 L. R. A. (N.S.) 186, 63 Atl. 535.

<sup>6</sup> *Barbour v. State*, 146 Ga. 667, 2 A. L. R. 1095, 92 S. E. 70.

<sup>7</sup> *Contra, Commonwealth v. Smith*, — Ky. —, L. R. A. 1915D, 172, 173 S. W. 340.

<sup>8</sup> *Tolliver v. Blizzard*, 143 Ky. 773, 34 L. R. A. (N.S.) 890, 137 S. W. 509.

<sup>9</sup> *Cassidy v. Wiley*, 141 Ga. 331, 51 L. R. A. (N.S.) 128, 80 S. E. 1046.

<sup>10</sup> *State v. Olson*, 26 N. D. 304, L. R. A. 1918B, 975, 144 N. W. 661.

<sup>11</sup> *State v. Sbragia*, 138 Wis. 579, 23 L. R. A. (N.S.) 697, 119 N. W. 290.

<sup>1</sup> *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224.

<sup>2</sup> *State v. Jack*, 69 Kan. 387, 1 L. R. A. (N.S.) 167, 76 Pac. 911; *Stewart v. W. T. Raleigh Medical Co.*, — Okla. —, L. R. A. 1917A, 1276, 159 Pac. 1187.

See, *Constitutionality of the Sherman Anti-trust Act of 1890*, as Interpreted by the United States Supreme Court in the Case of the Trans-Missouri Traffic Association, by William D. Guthrie, 11 *Harvard Law Review*,

80; *The Power of Congress over Combinations Affecting Interstate Commerce*, by Augustine L. Humes, 17 *Harvard Law Review*, 83; *Constitutional Questions Involved in the Commodity Clause of the Hepburn Act*, by William Draper Lewis, 21 *Harvard Law Review*, 595; and, *The Commodities Clause and the Fifth Amendment*, by Learned Hand, 22 *Harvard Law Review*, 250.

<sup>3</sup> *Gay v. Brent*, 166 Ky. 833, 179 S. W. 1051; *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 82 Pac. 833.

<sup>4</sup> *International Harvester Co. v. Kentucky*, 234 U. S. 216, 58 L. ed. 1284.

<sup>5</sup> *Hammond v. State*, 78 O. S. 15, 125 Am. St. Rep. 684, 15 L. R. A. (N. S.) 906, 84 N. E. 416.

<sup>6</sup> *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 57 L. ed. 164 [affirming, *State v. Central Lumber Co.*, 24 S. D. 136, 42 L. R. A. (N.S.) 804, 123 N. W. 504; *State v. Drayton*, 82 Neb. 254, 130 Am. St. Rep. 671, 23 L. R. A. (N.S.) 1287, 117 N. W. 768.

and statutes which forbid purchasing at higher rates at different parts of the state for the purpose of breaking down competition,<sup>6</sup> have been held to be valid, and in some of these cases such statutes have been upheld upon the theory that they tend to prevent monopoly.<sup>7</sup> The legislature may provide that contracts between wholesalers and retailers shall not restrict the purchaser from handling the goods of other dealers.<sup>8</sup>

**§ 3755. Other restrictions on sales.** Statutes which forbid the purchase, and the like, of metal articles belonging to a railroad company and made for railroad purposes without the written consent of an officer of such company,<sup>1</sup> or which makes it a crime to possess an automobile from which the manufacturer's serial number has been removed,<sup>2</sup> are valid. Statutes forbidding the defacing of any mark on bottles, or selling bottles unless they have been purchased by the vendor, are held valid.<sup>3</sup> Statutes forbidding any sales of shares of corporate stock "on margin" are valid.<sup>4</sup> Statutes requiring notes given for patent rights so to state on their face are valid.<sup>5</sup> The legislature may forbid the sale of linseed oil which is below the standard of the United States Pharmacopoeia.<sup>6</sup> It may provide that gasoline shall be tested and that the barrels containing it shall be properly printed.<sup>7</sup> It may provide that lighting rods can not be sold without license and that license can be issued only to citizens of the state.<sup>8</sup> On the other hand, legislation which regulates the sale of cholera serum for hogs has been held to be unconstitutional.<sup>9</sup> Statutes which provide that articles can be sold only if a license therefor is obtained, and which give

<sup>6</sup> *State v. Fairmont Creamery Co.*, 153 Ia. 702, 42 L. R. A. (N.S.) 821, 133 N. W. 895.

<sup>7</sup> *State v. Central Lumber Co.*, 24 S. D. 136, 42 L. R. A. (N.S.) 804, 123 N. W. 504.

<sup>8</sup> *Commonwealth v. Strauss*, 191 Mass. 545, 11 L. R. A. (N.S.) 968, 78 N. E. 136.

<sup>1</sup> *State v. Weinstein*, 141 La. 1085, L. R. A. 1917F, 706, 76 So. 208.

<sup>2</sup> *People v. Johnson*, 288 Ill. 442, 4 A. L. R. 1535, 123 N. E. 543.

<sup>3</sup> *People v. Cannon*, 139 N. Y. 32, 645, 36 Am. St. Rep. 668, 34 N. E. 759, 1098.

<sup>4</sup> *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323; *Parker v. Otis*, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927.

<sup>5</sup> *State v. Cook*, 107 Tenn. 499, 62 L. R. A. 174, 64 S. W. 720.

<sup>6</sup> *American Linseed Oil Co. v. Wheaton*, 25 S. D. 60, 41 L. R. A. (N.S.) 149, 125 N. W. 127.

<sup>7</sup> *State v. Bartles Oil Company*, 132 Minn. 138, L. R. A. 1916D, 193, 155 N. W. 1035.

<sup>8</sup> *State v. Stevens*, 78 N. H. 268, L. R. A. 1917C, 528, 99 Atl. 723.

<sup>9</sup> *Hall v. State*, 100 Neb. 84, 158 N. W. 362.

unlimited discretion to the board which issues such license, to refuse them because of the applicant's dishonesty, or financial irresponsibility, are invalid.<sup>10</sup> An unreasonable license fee can not be imposed on transient traders who are selling bankrupt or damaged stocks.<sup>11</sup> A statute to the effect that packages shall not be sold containing a false statement that the contents were placed in the original package by the owner of the trademark which appears thereon, is valid.<sup>12</sup> The state can not provide that fruit which is packed for shipment shall be marked with the name of the locality where it was grown.<sup>13</sup>

**§ 3756. Statutes regulating rents.** In some jurisdictions, recent legislation has attempted to regulate rents which a landlord may charge, and to prevent the eviction of tenants who are willing to pay the rent thus fixed. In some jurisdictions such regulations have been sustained,<sup>1</sup> although the supreme court of the United States has reached this result on account of the emergency growing out of the recent war.<sup>2</sup> Under a statute which specifies all bona fide purchasers of realty in the District of Columbia, who purchase for their own occupancy, either before or after the passage of such statute,<sup>3</sup> the fact that upon the purchase the technical relation of landlord and tenant arises between the purchaser and the tenant in possession,<sup>4</sup> and the fact that the purchaser accepts

<sup>10</sup> *Ex parte Hawley*, 22 S. D. 23, 15 L. R. A. (N.S.) 138, 115 N. W. 93.

<sup>11</sup> *People v. Jenkins*, 202 N. Y. 53, 35 L. R. A. (N.S.) 1070, 94 N. E. 1065.

<sup>12</sup> *People v. Luhrs*, 195 N. Y. 377, 25 L. R. A. (N.S.) 473, 89 N. E. 171.

<sup>13</sup> *Ex parte Hayden*, 147 Cal. 649, 1 L. R. A. (N.S.) 184, 82 Pac. 315.

<sup>1</sup> *Block v. Hirsh*, — U. S. —, — L. ed. —, 41 Sup. Ct. 458 [reversing, *Block v. Hirsh*, 50 D. C. App. —, 267 Fed. 631; for opinion on first appeal, see *Block v. Hirsh*, 50 D. C. App. —, 11 A. L. R. 1238, 267 Fed. 614]; *Marcus Brown Holding Co. v. Feldman*, — U. S. —, 41 Sup. Ct. 465; *People v. La. Petra*, — N. Y. —, 130 N. E. 601.

Such statute has been held invalid if applicable only to counties having a population of over two hundred fifty thousand (*Milwaukee*). *State v. Rail-*

*way Commission of Wisconsin*, — Wis. —, 183 N. W. 687.

See, *Rent Regulation under the Police Power*, by Alan W. Boyd, 19 Michigan Law Review, 590; and, *The Edict of Diocletian Fixing Maximum Prices*, by Roland G. Kent, 60 University of Pennsylvania Law Review, 33, 1920-1921, 531.

<sup>2</sup> *Block v. Hirsh*, — U. S. —, — L. ed. — [reversing *Block v. Hirsh*, 50 D. C. App. —, 267 Fed. 631; for opinion on first appeal, see *Block v. Hirsh*, 50 D. C. App. —, 11 A. L. R. 1238, 267 Fed. 614]; *U. S. S. C. Advance Opinions*, 1920-1921, 531; *Marcus Brown Holding Co. v. Feldman*, — U. S. —, 41 Sup. Ct. 465.

<sup>3</sup> *Maxwell v. Brayshaw*, 258 Fed. 957; *Gilder v. Dickens*, 258 Fed. 962.

<sup>4</sup> *Maxwell v. Brayshaw*, 258 Fed. 957.

rent for a month during which the notice to the tenant to quit possession of the premises runs,<sup>5</sup> does not prevent the purchaser from recovering possession if he bought for his own occupancy. The fact that the purchaser and the tenant are both in the employment of the government as war workers,<sup>6</sup> or the fact that two of the purchasers are employed by the government and the defendant is caring for a number of persons in the employment of the government,<sup>7</sup> or the fact that the tenant is caring for war workers, if the plaintiff has purchased such property for a home and brings the action to recover possession after the expiration of the tenant's lease,<sup>8</sup> are all immaterial

**§ 3757. Statutes concerning insurance.** Insurance is a business of a character so public that the legislature may regulate insurance rates,<sup>1</sup> or prescribe the conditions under which insurance may be exchanged with corporations or persons outside the state.<sup>2</sup> The legislature can not regulate contracts of insurance which are made and to be performed outside of the state, even though they cover property within the state.<sup>3</sup> Statutes requiring a copy of the application to be attached to the insurance policy,<sup>4</sup> or requiring certain insurance companies to act promptly upon receipt of applications and making insurance effective, unless the application is rejected in the time specified,<sup>5</sup> or providing that in case of a total loss in fire insurance, the entire amount stipulated in the policy shall be paid,<sup>6</sup> or providing that the falsity of a representation

<sup>5</sup> *Maxwell v. Brayshaw*, 258 Fed. 957.

<sup>6</sup> *Gilder v. Dickens*, 258 Fed. 962;  
*Biggs v. Sparks*, 258 Fed. 964.

<sup>7</sup> *White v. Hickman*, 258 Fed. 963.

<sup>8</sup> *Williams v. Jacobs*, 258 Fed. 964.

<sup>1</sup> *German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, L. R. A. 1915C, 1189, 58 L. ed. 1011; *People v. Hartford Life Ins. Co.*, 252 Ill. 398, 37 L. R. A. (N.S.) 778, 96 N. E. 1049.

<sup>2</sup> *Lewelling v. Manufacturing Woodworkers' Underwriters*, 140 Ark. 124, 215 S. W. 258.

<sup>3</sup> *Hyatt v. Blackwell Lumber Co.*, 31 Ida. 452, 1 A. L. R. 1663, 173 Pac. 1083.

<sup>4</sup> *Considine v. Metropolitan Life Ins. Co.*, 165 Mass. 462, 43 N. E. 201.

<sup>5</sup> *Wanberg v. National Union Fire*

*Ins. Co.*, — N. D. —, 179 N. W. 666 (twenty-four hour limit).

<sup>6</sup> *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 172 L. ed. 552 [affirming, *Daggs v. Orient Ins. Co.*, 136 Mo. 382, 58 Am. St. Rep. 638, 35 L. R. A. 227, 38 S. W. 851]; *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 45 Am. St. Rep. 570, 26 L. R. A. 107, 27 S. W. 718; *Home Fire Ins. Co. v. Bean*, 42 Neb. 537, 47 Am. St. Rep. 711, 60 N. W. 907; *Ins. Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Dinneen v. Delaware Insurance Co.*, 98 Neb. 97, L. R. A. 1915E, 618, 152 N. W. 307; *Queen Ins. Co. v. Leslie*, 47 O. S. 409, 9 L. R. A. 45, 24 N. E. 1072; *Dugger v. Mechanics' & Traders' Ins. Co.*, 95 Tenn. 245, 28 L.

should not avoid a policy of insurance unless wilfully false and material,<sup>7</sup> or providing that suicide should be no defense to a policy of life insurance, unless intended when the policy was taken out,<sup>8</sup> or forbidding any defense to be made if based on a covenant in the policy printed in type less than a certain size,<sup>9</sup> or forbidding a covenant in an insurance policy limiting the time in which to sue on the policy,<sup>10</sup> or providing that no action should be brought on a policy of insurance for ninety days after the loss,<sup>11</sup> are all held valid. The legislature may provide that railroad companies who are liable for loss by fire shall be subrogated to insurance upon the property thus destroyed,<sup>12</sup> or that companies which issue casualty insurance shall be liable to the injured parties, before the insured has satisfied final judgment against him,<sup>13</sup> are valid. The legislature may provide for attorney's fees, if the insurance company refuses to pay the loss when due.<sup>14</sup> The proceeds of life insurance may be exempt from the claims of the creditors.<sup>15</sup>

**§ 3758. Statutes restricting right to engage in business.** On the one hand, liberty of contract includes the right of a citizen to deal with such persons as he pleases, and this right can not be

R. A. 796, 32 S. W. 5; *Commercial Union Assurance Co. v. Meyer*, 9 Tex. Civ. App. 7, 29 S. W. 93; *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45, 33 S. W. 902; *Reilly v. Franklin Ins. Co.*, 43 Wis. 449, 28 Am. Rep. 552.

<sup>7</sup> *John Hancock Mutual Life Ins. Co. v. Warren*, 181 U. S. 73 [affirming, 59 O. S. 45, 51 N. E. 546, 45 L. ed. 755]. See § 373.

<sup>8</sup> *Knights' Templars' & Masons' Life Indemnity Co. v. Jarman*, 104 Fed. 638, 44 C. C. A. 93 [affirming, *Jarman v. Indemnity Co.*, 95 Fed. 70; *Head Camp Woodmen of the World v. Sloss*, 49 Colo. 177, 31 L. R. A. (N.S.) 831, 112 Pac. 49; *Andrus v. Business Men's Accident Association*, — Mo. —, 223 S. W. 70.

<sup>9</sup> *Dupuy v. Delaware Ins. Co.*, 63 Fed. 680.

<sup>10</sup> *Massachusetts Benefit Life Association v. Hale*, 96 Ga. 802, 23 S. E. 849; *North American Ins. Co. v. Brim*, 111

Ind. 281, 12 N. E. 315; *Dolbier v. Agricultural Ins. Co.*, 67 Me. 180; *Karnes v. American Fire Ins. Co.*, 144 Mo. 413, 46 S. W. 166; and see to the same effect, *Small v. Ins. Co.*, 51 Fed. 789; *Johnson v. Dakota Fire & Marine Ins. Co.*, 1 N. D. 167, 45 N. W. 799.

<sup>11</sup> *Christie v. Life Indemnity & Investment Co.*, 82 Ia. 360, 48 N. W. 94.

<sup>12</sup> *Boston Ice Co. v. Boston & Maine Ry. Co.*, 77 N. H. 6, 45 L. R. A. (N.S.) 835, 86 Atl. 356

<sup>13</sup> *Lorando v. Gethro*, 228 Mass. 181, 117 N. E. 185.

<sup>14</sup> *Hartford Life Insurance Co. v. Blincoe*, — U. S. —, — L. ed. —, [affirming, *Hartford Life Insurance Co. v. Blincoe*, 279 Mo. 318, — A. L. R. —, 214 S. W. 207]; *U. S. S. C. Advance Opinions* (1920-21) 379; *Germania Fire Insurance Co. v. Bally*, — Ariz. —, 1 A. L. R. 488, 173 Pac. 1052.

<sup>15</sup> *Brown v. Steckler*, 40 N. D. 113, 1 A. L. R. 753, 168 N. W. 670.

taken away.<sup>1</sup> On the other hand, different kinds of businesses may be regulated as far as such regulations are reasonably adapted to protecting the public health, morals, and welfare.

The legislature may regulate the practice of medicine,<sup>2</sup> dentistry,<sup>3</sup> the treatment of the sick,<sup>4</sup> the sale of drugs at retail,<sup>5</sup> and the undertaking business;<sup>6</sup> and it may require persons who engage in such businesses to secure licenses. The state may forbid physicians to advertise that they have a special ability to cure chronic or incurable diseases,<sup>7</sup> or it may forbid physicians to solicit patients through paid solicitors.<sup>8</sup> Statutes restricting the business of insurance,<sup>9</sup> or the building and loan business,<sup>10</sup> to corporations, have been held valid, while similar statutes have been held invalid as to banking.<sup>11</sup> On the other hand, it is said that the state may prescribe the conditions on which persons may engage in the banking business.<sup>12</sup> Statutes forbidding persons to act as insurance brokers,<sup>13</sup> as for foreign insurers,<sup>14</sup> or real estate brokers,<sup>15</sup> or auctioneers,<sup>16</sup> or as lightning rod vendors,<sup>17</sup> or as

<sup>1</sup> *New Method Laundry Co. v. McCann*, 174 Cal. 26, 161 Pac. 990 (as by decree of court of equity).

<sup>2</sup> *Smith v. People*, 51 Colo. 270, 36 L. R. A. (N.S.) 158, 117 Pac. 612; *Meffert v. Medical Board*, 66 Kan. 710, 1 L. R. A. (N.S.) 811, 72 Pac. 247.

<sup>3</sup> *Green v. Blanchard*, 138 Ark. 137, 5 A. L. R. 84, 211 S. W. 375; *People v. Griswold*, 213 N. Y. 92, L. R. A. 1915D, 538, 106 N. E. 929.

<sup>4</sup> *State v. Smith*, 233 Mo. 242, 33 L. R. A. (N.S.) 179, 135 S. W. 465.

<sup>5</sup> *State v. Hovorka*, 100 Minn. 249, 8 L. R. A. (N.S.) 1272, 110 N. W. 870.

<sup>6</sup> *People v. Ringe*, 197 N. Y. 143, 27 L. R. A. (N.S.) 528, 90 N. E. 451.

The state can not, however, require a knowledge of embalming as a qualification for the undertaking business. *State v. Rice*, 115 Md. 317, 36 L. R. A. (N.S.) 344, 80 Atl. 1026; *Wyeth v. Board of Health*, 200 Mass. 474, 23 L. R. A. (N.S.) 147, 86 N. E. 925.

<sup>7</sup> *State Medical Board v. McCrary*, 95 Ark. 511, 30 L. R. A. (N.S.) 783, 130 S. W. 544.

<sup>8</sup> *Thompson v. Van Lear*, 77 Ark. 506,

5 L. R. A. (N.S.) 588, 92 S. W. 773.

<sup>9</sup> *Commonwealth v. Vrooman*, 164 Pa. St. 306, 44 Am. St. Rep. 603, 25 L. R. A. 250, 30 Atl. 217.

<sup>10</sup> *Brady v. Mattern*, 125 Ia. 158, 106 Am. St. Rep. 291, 100 N. W. 358.

<sup>11</sup> *State v. Scougal*, 3 S. D. 55, 44 Am. St. Rep. 756, 15 L. R. A. 477, 51 N. W. 858.

<sup>12</sup> *Noble State Bank v. Haskell*, 219 U. S. 104, 32 L. R. A. (N.S.) 1062, 55 L. ed. 112; *Schaafe v. Dolley*, 85 Kan. 598, 37 L. R. A. (N.S.) 877, 118 Pac. 80.

<sup>13</sup> *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297; *Commonwealth v. Roswell*, 173 Mass. 119, 53 N. E. 132.

<sup>14</sup> *People v. Gay*, 107 Mich. 422, 30 L. R. A. 464, 65 N. W. 292.

<sup>15</sup> *Riley v. Chambers*, 181 Cal. 589, 8 A. L. R. 418, 185 Pac. 855.

Such contract of employment may be required to be in writing. *Selvage v. Talbott*, 175 Ind. 648, 33 L. R. A. (N.S.) 973, 95 N. E. 114.

<sup>16</sup> *Wright v. May*, 127 Minn. 150, L. R. A. 1915B, 151, 149 N. W. 9.

<sup>17</sup> *State v. Stevens*, 78 N. H. 268, L. R. A. 1917C, 528, 99 Atl. 723.

itinerant vendors,<sup>18</sup> or as merchants who issue trading stamps purchased from others,<sup>19</sup> or to engage in the chattel mortgage or salary loan business,<sup>20</sup> or to sell milk,<sup>21</sup> or to sell nursery stock,<sup>22</sup> or to sell farm produce,<sup>23</sup> or to operate a jitney bus<sup>24</sup> without a license, have been held valid. An employment agency may be required to secure a license before engaging in business.<sup>25</sup> A statute which forbade employment agencies to take fees from employees was held to be valid by the state court,<sup>26</sup> but invalid in the United States supreme court.<sup>27</sup> Statutes or ordinances limiting the compensation which a private employment agency may charge have been held to be invalid.<sup>28</sup> A public corporation can not make employment agencies liable for misrepresentations if such provision does not apply to similar kinds of business.<sup>29</sup> Persons who are not admitted to practice law may be forbidden to solicit claims for collection.<sup>30</sup> The legislature may forbid the business of selling railroad tickets,<sup>31</sup> as brokers. It is said, however, that it can not forbid a broker who deals in theatrical tickets from selling them at a price in excess of the regular rate.<sup>32</sup> The legislature can not make it mandatory to weigh cotton at compresses.<sup>33</sup> It may re-

<sup>18</sup> *State v. Harrington*, 68 Vt. 622, 34 L. R. A. 100, 35 Atl. 515.

Contra, *People v. Wilson*, 249 Ill. 195, 35 L. R. A. (N.S.) 1074, 94 N. E. 141.

<sup>19</sup> *Sperry & Hutchinson Co. v. Tacoma*, 68 Wash. 254, L. R. A. 1915B, 241, 122 Pac. 1060.

<sup>20</sup> *Sallsbury v. Equitable Purchasing Co.*, 177 Ky. 348, L. R. A. 1918A, 1114, 197 S. W. 813; *Sanning v. Cincinnati*, 81 O. S. 142, 25 L. R. A. (N.S.) 686, 90 N. E. 125.

<sup>21</sup> *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 492, 1 L. R. A. (N.S.) 936, 89 S. W. 617; *People v. Beakes Dairy Co.*, 222 N. Y. 416, 3 A. L. R. 1260, 119 N. E. 115.

<sup>22</sup> *Ex parte Hawley*, 22 S. D. 23, 15 L. R. A. (N.S.) 138, 115 N. W. 93.

<sup>23</sup> *Payne v. State*, 248 U. S. 112, 63 L. ed. 39 [affirming, 98 Kan. 465].

<sup>24</sup> *Ex parte Cardinal*, 170 Cal. 519, L. R. A. 1915F, 850, 150 Pac. 348.

<sup>25</sup> *People v. Brazee*, 183 Mich. 259, L. R. A. 1916E, 1146, 149 N. W. 1053;

*People v. Warden of New York City Prison*, 183 N. Y. 223, 2 L. R. A. (N.S.) 859, 76 N. E. 11.

<sup>26</sup> *State v. Rossman*, 93 Wash. 530, L. R. A. 1917B, 1276, 161 Pac. 349.

<sup>27</sup> *Adams v. Tanner*, 244 U. S. 590, L. R. A. 1917F, 1163, 61 L. ed. 1336.

<sup>28</sup> *Ex parte Dickey*, 144 Cal. 234, 103 Am. St. Rep. 82, 66 L. R. A. 928, 77 Pac. 924; *Wilson v. Denver*, 65 Colo. 484, 178 Pac. 17.

<sup>29</sup> *Spokane v. Macho*, 51 Wash. 322, 21 L. R. A. (N.S.) 263, 98 Pac. 755.

<sup>30</sup> *McCloskey v. Tobin*, 252 U. S. 107, 64 L. ed. 481.

<sup>31</sup> *State v. Thompson*, 47 Or. 492, 4 L. R. A. (N.S.) 480, 84 Pac. 476; *Ex parte O'Neill*, 41 Wash. 174, 3 L. R. A. (N.S.) 558, 83 Pac. 104.

<sup>32</sup> *Ex parte Quarg*, 149 Cal. 79, 5 L. R. A. (N.S.) 183, 84 Pac. 766; *People v. Steele*, 231 Ill. 340, 14 L. R. A. (N.S.) 361, 83 N. E. 236.

<sup>33</sup> *Lockhart v. Anderson*, 62 Okla. 209, 162 Pac. 946.

quire thirty days' experience in operating automobiles upon city streets in order to secure a license to operate a jitney bus.<sup>34</sup>

On the other hand, statutes forbidding persons to act as horse-shoers,<sup>35</sup> or to engage in the business of laying concrete sidewalks,<sup>36</sup> or to teach dancing,<sup>37</sup> without a license, have been held invalid. The legislature may regulate boarding houses,<sup>38</sup> and bootblacking stands.<sup>39</sup> It may forbid soliciting business for hotels,<sup>40</sup> or physicians,<sup>41</sup> on trains or in depots.

**§ 3759. Statutes making breach of contract a crime.** Statutes making it a crime to break a contract to farm on shares or perform labor after supplies have been advanced thereunder,<sup>1</sup> or to sell personalty subject to a landlord's lien,<sup>2</sup> or to refuse to pay an account for board,<sup>3</sup> have been held valid by the state courts as not amounting to imprisonment for debt. The supreme court of the United States, however, has held that a statute which makes it a crime to secure advances under a contract for work and labor with intent to defraud the employer, and which makes refusal to perform the services or to repay the advances, *prima facie* evidence of fraudulent intent, is unconstitutional as providing for involuntary servitude.<sup>4</sup> An employer who attempts to take advantage

<sup>34</sup> *Ex parte Cardinal*, 170 Cal. 519, L. R. A. 1915F, 850, 150 Pac. 348.

<sup>35</sup> *Bessette v. People*, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215.

<sup>36</sup> *State v. Sheridan*, 25 Wyom. 347, 1 A. L. R. 955, 170 Pac. 1.

<sup>37</sup> *People v. Wilber*, 198 N. Y. 1, 27 L. R. A. (N.S.) 357, 90 N. E. 1140.

See however, *State v. Rosenfield*, 111 Minn. 301, 29 L. R. A. (N.S.) 331, 126 N. W. 1068.

<sup>38</sup> *Bonnett v. Vallier*, 136 Wis. 193, 17 L. R. A. (N.S.) 486, 116 N. W. 885.

<sup>39</sup> *Darius v. Apostolos*, 68 Colo. 323, 10 A. L. R. 986, 190 Pac. 510.

See also, *Barlin v. Knox County*, 136 Tenn. 238, 2 A. L. R. 112, 188 S. W. 795.

<sup>40</sup> *Williams v. State*, 85 Ark. 464, 122 Am. St. Rep. 47, 26 L. R. A. (N.S.) 482, 108 S. W. 838.

<sup>41</sup> *Williams v. State*, 85 Ark. 464, 122

Am. St. Rep. 47, 26 L. R. A. (N.S.) 482, 108 S. W. 838.

<sup>1</sup> *State v. Easterlin*, 61 S. Car. 71, 39 S. E. 250; *State v. Chapman*, 56 S. Car. 420, 76 Am. St. Rep. 557, 34 S. E. 961.

See *Imprisonment of Workmen for Breach of Contract*, by Fran. A. Umpherston, 14 *Juridical Review* 68.

<sup>2</sup> *State v. Hoskins*, 106 Tenn. 430, 91 S. W. 781.

<sup>3</sup> *Chauncey v. State*, 130 Ala. 71, 89 Am. St. Rep. 17, 30 So. 403 [citing, *Ex parte King*, 102 Ala. 182, 15 So. 524; and distinguishing *Carr v. State*, 106 Ala. 35, 54 Am. St. Rep. 17, 34 L. R. A. 634, 17 So. 350]; *State v. Kingsley*, 108 Mo. 135, 18 S. W. 994.

<sup>4</sup> *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191 [reversing, 161 Ala. 75, 49 So. 856]. (The question of freedom of contract was not considered.)

of a statute which requires the accused to perform work and labor to a surety who has been obliged to pay his fine, is himself guilty under the anti-peonage legislation of the United States.<sup>5</sup>

A statute which makes it a crime for a third person to induce an employe to break his contract of employment, has been held to be valid.<sup>6</sup> Arrest or imprisonment for fraud,<sup>7</sup> as for hiding property taken on execution,<sup>8</sup> or for contempt in refusing to comply with lawful orders of the court,<sup>9</sup> even if such order is for the payment of money,<sup>10</sup> is not in violation of the due process of law clause.

A statute which creates a court of industrial relations is valid as against the objection that it provides for involuntary servitude.<sup>11</sup>

**§ 3760. Other statutory restrictions.** Statutes which forbid the transaction of certain kinds of business on Sunday are valid;<sup>1</sup> but the legislature can not require business houses to close at six o'clock P. M.<sup>2</sup>

Statutes limiting the rate of interest which may be contracted for are valid,<sup>3</sup> and accordingly a statute limiting the rate at which a banker can discount paper has been upheld.<sup>4</sup> The legislature may also regulate charges and fees in connection with loans.<sup>5</sup> Statutes regulating the sale of patent-rights are valid,<sup>6</sup> and a state statute requiring a vendor of a patent right to file a copy of his letters patent with the clerk of the court before selling such rights has been upheld.<sup>7</sup> The state may regulate the use of natural gas,<sup>8</sup>

<sup>5</sup> United States v. Reynolds, 235 U. S. 133, 59 L. ed. 162.

<sup>6</sup> State v. Hurdle, 113 Miss. 736, 74 So. 681.

<sup>7</sup> Tatlow v. Bacon, 101 Kan. 26, 165 Pac. 835.

<sup>8</sup> Padley v. State, — Del. —, 102 Atl. 60.

<sup>9</sup> Ex parte Merrill, 245 Fed. 778; In re Merrill, 200 Mich. 244, 167 N. W. 30.

<sup>10</sup> Ex parte Merrill, 245 Fed. 778; In re Merrill, 200 Mich. 244, 167 N. W. 30.

<sup>11</sup> State v. Howat, — Kan. —, 198 Pac. 686.

<sup>1</sup> State v. Dolan, 13 Ida. 693, 14 L. R. A. (N.S.) 1259, 92 Pac. 995.

See The Constitutionality of Sunday Laws, by George Stuart Patterson, 32 American Law Register (N.S.) 437.

See ch. XXXIII.

<sup>2</sup> Saville v. Corless, 46 Utah 495, L. R. A. 1916A, 651, 151 Pac. 51.

<sup>3</sup> Althaus v. State, 99 Neb. 465, 156 N. W. 1038; Wessell v. Timberlake, 95 O. S. 21, 116 N. E. 43; State v. Cary, 126 Wis. 135, 11 L. R. A. (N.S.) 174, 105 N. W. 792.

See ch. XXXIV.

<sup>4</sup> Youngblood v. Birmingham Trust & Savings Co., 95 Ala. 521, 36 Am. St. Rep. 245, 20 L. R. A. 58, 12 So. 579.

<sup>5</sup> Althaus v. State, 99 Neb. 465, 156 N. W. 1038; State v. Cary, 126 Wis. 135, 11 L. R. A. (N.S.) 174, 105 N. W. 792.

<sup>6</sup> See § 687.

<sup>7</sup> Reeves v. Corning, 51 Fed. 774.

<sup>8</sup> Walls v. Midland Carbon Co., 254 U. S. 300, 65 L. ed. —.

the use of certain tracts of land for cemetery purposes,<sup>9</sup> and horse racing.<sup>10</sup> It may forbid the use of the United States flag for advertising purposes.<sup>11</sup> It may require a certificate to freedom from venereal diseases, as a condition precedent to marriage.<sup>12</sup> It may regulate the height of buildings,<sup>13</sup> and it may establish fire limits,<sup>14</sup> and provide for the destruction of buildings erected thereafter, within such limits, in violation of such regulations.<sup>15</sup> It may forbid the operation of certain kinds of business within a specified distance of a church.<sup>16</sup> It may forbid the discharge of sewage or other similar matter, into a running stream,<sup>17</sup> and it may forbid bathing in ponds from which a public water supply is taken.<sup>18</sup> Consumers of water may be required to install meters at their own expense.<sup>19</sup> The state may impose reasonable regulations upon the operation of bakeries,<sup>20</sup> or upon billiard tables and pool rooms.<sup>21</sup> A state can not forbid the importation, or aiding in the transportation, of a woman into the state for immoral purposes, since Congress has undertaken to legislate upon that subject.<sup>22</sup> The interstate commerce commission may make reasonable regulations for a uniform system of accounting and bookkeeping, although in the particular case it may deprive certain owners of preferred stock

<sup>9</sup> *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 27 L. R. A. (N.S.) 260, 93 Pac. 70.

<sup>10</sup> *State Racing Commission v. Lexington Agricultural Association*, 136 Ky. 173, 25 L. R. A. (N.S.) 905, 123 S. W. 681.

<sup>11</sup> *Halter v. State*, 74 Neb. 757, 7 L. R. A. (N.S.) 1079, 105 N. W. 298.

<sup>12</sup> *Petersen v. Widule*, 157 Wis. 641, 52 L. R. A. (N.S.) 778, 147 N. W. 966.

<sup>13</sup> *Welch v. Swasey*, 214 U. S. 91, 214 L. ed. 923.

For abuse of power by city, see *State v. Stahlman*, 81 W. Va. 335, L. R. A. 1918C, 77, 94 S. E. 497.

<sup>14</sup> *Maguire v. Reardon*, — U. S. —, — L. ed. — [affirming, *Maguire v. Reardon*, — Cal. App. —, 183 Pac. 303]; U. S. S. C. Advance Opinions, 1920-1921, 333.

<sup>15</sup> *Maguire v. Reardon*, — U. S. —, — L. ed. — [affirming, *Maguire v. Reardon*, — Cal. App. —, 183 Pac.

303]; U. S. S. C. Advance Opinions, 1920-1921, 333.

<sup>16</sup> *Walcher v. First Presbyterian Church*, 76 Okla. 9, 6 A. L. R. 1593, 184 Pac. 106.

<sup>17</sup> *People v. Hupp*, 53 Colo. 80, 41 L. R. A. (N.S.) 792, 123 Pac. 651; *Durham v. Eno Cotton Mills*, 141 N. Car. 615, 7 L. R. A. (N.S.) 321, 54 S. E. 453; *Shelby v. Cleveland Mill & Power Co.*, 155 N. Car. 196, 35 L. R. A. (N.S.) 488, 71 S. E. 218.

<sup>18</sup> *State v. Morse*, 84 Vt. 387, 34 L. R. A. (N.S.) 190, 80 Atl. 189.

<sup>19</sup> *Farkas v. Albany*, 141 Ga. 833, L. R. A. 1915A, 320, 82 S. E. 144.

<sup>20</sup> *Benz v. Kremer*, 142 Wis. 1, 26 L. R. A. (N.S.) 842, 125 N. W. 99.

<sup>21</sup> *Murphy v. People*, 225 U. S. 623, 41 L. R. A. (N.S.) 157, 56 L. ed. 1229; *Shreveport v. Schulsinger*, 113 La. 9, 36 So. 870.

<sup>22</sup> *Montana v. Harper*, 48 Mont. 456, 51 L. R. A. (N.S.) 157, 138 Pac. 495.

of a part of non-cumulative dividends which would have otherwise been paid to them.<sup>23</sup> Permits for the use of water can not be refused although not the purest obtainable, if the practical result is to prevent all water supply.<sup>24</sup> Statutes for public improvements which give to the property owner an opportunity to perform the work himself,<sup>25</sup> or to pay the assessments at once,<sup>26</sup> are valid. A statute which forbids the assignment of a claim outside of a state in order to collect it by garnishment, or other similar proceedings, is valid as far as it applies to actions within such state.<sup>27</sup> The legislature can not render invalid provisions to the effect that a certificate of an architect shall be necessarily a condition precedent to an action upon the contract;<sup>28</sup> nor can it forbid an employer and an employe to enter into a contract by which it is provided that tips which are received by the employe shall belong to the employer;<sup>29</sup> nor can the proprietor of a theater be compelled to maintain a guard against fire at a salary fixed by statute.<sup>30</sup> Statutes which provide for attorney fees as costs are usually held to be valid.<sup>31</sup>

**§ 3761. Effect on theory of contract and illegality of doctrines discussed in this chapter.** The principles discussed in this chapter are of the utmost importance as affecting the doctrine of illegality. A contract to perform an act forbidden by statute is illegal.<sup>1</sup> This implies, however, that the written law is a valid one; that it is within the powers of the legislative body which enacted it. Accordingly, if a statute exists which appears to make the subject-matter of the contract either void or illegal, the further question remains for consideration whether it is within the power of the

<sup>23</sup> *Kansas City Southern Ry. Co. v. United States*, 231 U. S. 423, 58 L. ed. 296, 52 L. R. A. (N.S.) 1.

<sup>24</sup> *Frost v. Los Angeles*, 181 Cal. 22, 6 A. L. R. 468, 183 Pac. 342.

<sup>25</sup> *Fristoe v. Crowley*, 142 La. 393, 76 So. 812.

<sup>26</sup> *Pfeiffer v. Bertig*, — Ark. —, 217 S. W. 791.

<sup>27</sup> *St. Louis & Santa Fe Ry. v. Crews*, 51 Okla. 144, 151 Pac. 879.

<sup>28</sup> *Adinolfi v. Hazlett*, 242 Pa. St. 25, 48 L. R. A. (N.S.) 855, 88 Atl. 869.

<sup>29</sup> *Ex parte Farb*, 178 Cal. 592, 3 A. L. R. 301, 174 Pac. 320.

<sup>30</sup> *O'Neil v. Providence Amusement Co.*, — R. I. —, 8 A. L. R. 1590, 108 Atl. 887.

<sup>31</sup> *Manhattan Life Ins. Co. v. Cohen*, 234 U. S. 123, 58 L. ed. 1245; *Alexander v. Chicago, Milwaukee & St. Paul Ry. Co.*, — Mo. —, 11 A. L. R. 867, 221 S. W. 712; *Riter-Conley Manufacturing Co. v. Wryn*, — Okla. —, 11 A. L. R. 859, 174 Pac. 280.

Contra, if applicable only to certain classes of claims. *Union Terminal Co. v. Turner Construction Co.*, 247 Fed. 727, 11 A. L. R. 880.

<sup>1</sup> See §§ 677 et seq.

legislature to withdraw from the sphere of contract that subject-matter concerning which it has attempted to forbid the parties to contract. The tendency of the courts, at one time, seemed to be to limit the doctrines of illegality to those which were recognized at the common law, and to prevent the extension of the doctrine of illegality by legislation. The present tendency, in view of the breadth which is given to the police power by modern courts, and in view of the scope of modern legislation, is to withdraw many of the transactions of modern life from the domain of contract in the narrower sense. In many of the most common transactions, such as transportation, employment, and insurance, the parties are free to enter into the transaction, or to refrain from entering into it, at pleasure; but if they see fit to enter into such transactions, their rights and liabilities are fixed by statute and can not be altered by the parties by mutual agreement. Transactions of this sort can scarcely be classed as quasi-contract, since the parties intend to enter into them; but they can scarcely be classed as contracts since the parties are not free to fix their rights and liabilities by mutual agreement.





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